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A Comparative Study of Extra Territorial Competition Laws and Analyzing the Limitations in its Application

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ABSTRACT

The international markets are currently witnessing a phase of globalization and vast expansion of trade as a result of liberalization, less barriers on trade and non-restrictive import and export practices. The duty of the competition law is to prevent any conduct of the industries in a market that could cause appreciable adverse effect on competition in market, be economically disadvantageous to the consumer. It is important to understand that liberalization and globalization also raises concern of anti-competitive activities. Anti-competitive activities may be adopted by India based companies or foreign based company who are trading in India. In order to curb Anti-competitive actions of foreign companies, the Act is equipped with the extra territorial applications of competition law through Section-32.

The provision deals with acts that occur outside the territory of India but has a significant adverse effect in India and the act allows for the commission to investigate such matters and pass orders as it finds fit. This research paper aims on doing a comparison of the extra territorial competition laws in the Indian scenario with that of the European Union and the United States. Additionally, the paper tries to look into the limitations that the commission faces in the applications of the extra-territorial laws.

***Keywords**: competition law, extra territorial application, international markets.*

I. INTRODUCTION

The globalization and advancement of information technology has created a new global market. Increase in the free trade policies of all developing countries has seen a lot of countries divulging into the global market. This is being facilitated by opening up of market for foreign companies. This created a new challenge for the competition authorities as there was a new global market to deal with. The Competition Act is well equipped to handle issues within their jurisdiction but what about the competition issues arisen outside of their jurisdiction with the

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impacts being on the domestic market.

The resolution of these kind of problems was done through the introduction of the extraterritorial application of competition law. The extra-territorial principle of the Competition Act, 2002("The Act" herein after) gives the commission the power to issue any order if they deem fit that any agreement entered into even outside their jurisdiction is likely to cause appreciable adverse effect on competition in the domestic market.

There are no set rules or regulations for maintaining the jurisdiction limits and the extent to which another country can apply its extra-territorial jurisdiction. This could cause certain issues with regard to the exploitation and excessive use of the extra-territorial principle. The countries with a leading market share in the global market may use the extra territorial principles to constrict other countries by prohibiting them to merge with other companies from gaining a substantial strength. Also, the other aspect of the issue exist that another country may try to limit the extra territorial application of a smaller country and try to dominate in their market by not cooperating during their investigation.

For the better cooperation of countries to cope with all such issues, on the multilateral level the Organization for Economic Cooperation and Development issued certain Recommendation[3] concerning International Co-operation on Competition Investigations and Proceedings. It recommended that the adherents to the recommendation shall cooperate to minimize direct or indirect obstacles in effective enforcement cooperation between cooperation authorities. It also recommends the adherents to request for consultations if individuals situated in one or more of the adherents who have been engaged on anti-competitive practices and mergers that could have appreciable adverse effect on the domestic market of such other adherents and also recommends to notify any ongoing investigation and that the other adherents are to endeavor to coordinate with the investigation into the anti-competitive practices and that they should also provide the other adherents with the relevant information that allows them to investigate and take steps to prevent any anti-competitive measures that are found.

In the bilateral level, there are countries that have bilateral agreements and agree on certain aspects to allow the exercise of extraterritorial application of laws. There are clauses in the agreement which allow for the easy application of laws without any hindrance faced by each of the competing countries. In the bilateral agreements the countries have important clauses like the notification requirement and the exchange of information, under which one of the parties

[3] Recommendation of the Council Concerning International Co-operation on Competition Investigations and Proceedings, https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408

have to inform the other party about any investigation or enquiry that they might be carrying on which could affect the interest of the other party and this party has to provide for the information that would be necessary to ease the investigation and eliminate any anti-competitive practices. Although these clauses are to be read in conjunction with the clause of confidentiality, which is most often drafted very narrowly so the actual amount of information exchanged is minimal.

II. IMPACT OF INTERNATIONAL MARKETS ON THE DOMESTIC MARKETS OF OTHER COUNTRIES

International trade can bring many benefits. By providing a bigger market, it allows producers to produce more cheaply, as producing a larger quantity usually lowers the costs. This aspect is especially important for smaller economies, as they will have to produce everything expensively, if they cannot trade internationally and have a bigger market. By increasing competition, international trade can force producers to become more efficient, insofar as they are not developing country firms that would get wiped out by vastly superior foreign firms. It might also produce innovation by exposing producers to new ideas. International trade is particularly important for developing countries. In order to increase their productive capabilities and thus develop their economies, they need acquire better technologies. For these countries it would be unthinkable not taking advantage of all the technologies they can import, whether in the form of machines or technology licensing or technical consultancy.

Benefits of international market on domestic markets:

- Comparative advantage

Due to presence of international markets, the countries can be specialized in goods in which they have a comparative advantage, and so even the other developing countries that have a higher cost price of those goods can afford it for a lower price.

- Increased exports and imports.

Due to the free trade and liberalization the export market will increase since there are lesser taxes on import export, which will lead to lower cost of imported good and increased economic welfare of the consumer.

- Economies of scale

If a country can specialize in certain goods it can benefit from economies of scale and lower average costs. This reasoning is especially true in industries with high fixed costs or industries that require high levels of investment. The benefits of economies of scale will ultimately lead to lower prices for consumers.

- Efficient competition

With the increase in international trade, the domestic firms in the market will also face competition from the international firms and so they will be forced to produce better goods for lower costs to match the standards of goods from the international market providing the consumers with better options.

- Economic growth

The increase in world trade is directly proportionate to the economic growth of countries taking part in the global market and since the globalization and liberalization the growth rate of India has jumped to 7.5% in 1991-2000 from 4.5% in 1951-80.[4]

These benefits as listed above would only work if this were a perfect competition. But it is not a perfect competition in today's market. Markets have changed, they used to be largely local or at most national in scope, except in key commodities that were traded internationally or a limited range of manufactured goods. These markets were served by numerous small-scale firms, resulting in the state that economists these days call perfect competition, in which no single seller can influence the price. Today, most markets are populated and often manipulated by large companies. Some of them are the only supplier (monopoly) or, more typically, one of the few suppliers (oligopoly) – not just at the national level but increasingly at the global level. Unlike the small companies, monopolistic or oligopolistic firms can influence market outcomes – they have what economists call market power.

The problem occurs when a firm has gained enough market power in an international or domestic market that it gains a majority of market share and is now able to monopolize the market carry out anti-competitive activities such a predatory pricing, cartelization, bid rigging etc. if such actions are carried out in the domestic markets it is sure to affect the interest of other players in the markets and the interest of the consumer. Also, since we now live in a globalized market in the international system, such activities in the international market can also cause damage to the domestic market.

So, to avoid any mishaps and destruction of interests of the players in domestic market and the domestic consumers, to make sure that the international market is used only for its benefits, every domestic competition regulatory authority has an extra territorial affairs principle in its legislation, which regulates and monitors the action of the players of the international market and if there are any actions that could cause appreciable adverse effect on the domestic markets

[4] Prof. Deepak Gupta; Economic Growth in the Post Liberalisation Era (International Journal of Engineering Technology Science and Research)

the said authority takes rightful measures to protect the interest of the domestic consumers.

III. Extra territorial laws in India

(A) Effects doctrine

Section 32 of the competition act, 2002 is based on what is commonly known as the "effects doctrine", which empowers regulators to extend jurisdiction beyond the "principle of territoriality". In most countries, the legal view taken is that the domestic competition law captures such acts even if the guilty enterprise is not located in the country, provided that the anti-competitive act has an effect in the country.

The effects doctrine is a product of a judicial intervention established in the case of US v. Aluminium Company of America[5], known as the "Alcoa case" where the U.S. Court of Appeals for the Second Circuit held "that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders" and thus laid down or set out a test of intended and actual effects on commerce within the US that had to be satisfied in order that US jurisdiction be asserted over the foreign company. The court held a Canadian corporation in violation of Sherman Act for agreeing with European aluminium producers of the world to allocate world markets and not supply to the American Markets[6]. The effects doctrine was given statutory recognition in the US in 1994 by the International Antitrust Enforcement Assistance Act[7] Similarly, the UK enacted the Protection of Trading Interests Act, 1980[8] which recognises this concept, though with minor theoretical differences.

In India, before the Competition Act there was no provision in MRTP Act which recognises the extraterritorial jurisdiction of the antitrust authority. However, in 1996, one case came before the MRTP commission which first time raised the issue of extraterritorial jurisdiction of the Commission. The Alkali Manufacturers Association of India[9] filed a complaint and also an application for grant of temporary injunction before the MRTP Commission alleging that American Natural Soda Ash Corporation (ANSAC), consisting of six producer of natural soda ash, had joined hands together to form an export cartel by virtue of membership agreement amongst them. According to the complainant, ANSAC was a cartel of American ash soda producers and was likely to affect maintenance of prices at reasonable and realistic levels in India and with a view to adversely affect the local production and availability of the soda ash

[5] 148 F.2d 416
[6] Edward M Graham and J. David Richardson; Global Competition Policy
[7] Antitrust Enforcement Guidelines For International Operations, http://www.justice.gov/atr/public/guidelines/internat.htm
[8] Protection of Trading Interests Act 1980, http://www.legislation.gov.uk/ukpga/1980/11/contents
[9] (1998) 3 Comp LJ 152 MRTPC

The MRTP Commission instituted an enquiry and passed an ad interim injunction which was subsequently confirmed by it, directing ANSAC not to indulge in the practice of cartelisation by exporting soda ash to India in the form of cartel directly or indirectly. Simultaneously, in a separate petition, the All India Float Glass Manufacturers' Association (AIFGMA) filed a somewhat similar complaint against three Indonesian companies, which resulted in a similar injunction against such imports.

(B) Provision of extra territorial jurisdiction in The Act.

The important provisions of competition act are Section 18 and Section 32 which deals with the concept of extra territoriality. The aim of curbing disturbances in the domestic markets due to the impacts of international markets is achieved through application of Section 32 which is enabled and facilitated by Section 18.

<u>Section 18 of the Act.</u>

Subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India:

Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

The basic goal of competition law is to advance economic efficiency by helping to create markets that are responsive to consumer preferences through the use of competition as one of its primary tools. The Competition Act aims to combat the ills of the nation's economic system, which directly harm the interests of the general public and consumers. One of the stated goals of the Act is to advance consumer welfare by eliminating market distortions brought on by business practices and agreements that work against consumers' interests and competition. By its very design, the competition law anticipates scenarios in which the Commission must play a role and exert control over how businesses behave in the marketplace in order to promote consumer welfare. According to the Preamble of the Act, Section 18 of the Act requires the CCI to "remove" anti-competitive acts and advance free trade, competition, and consumer interests. These duties of the commission are set out under Section 18 of the act.

<u>Section 32 of the Act.</u>

The Commission shall, notwithstanding that, —

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(a) an agreement referred to in section 3 has been entered into outside India; or

(b) any party to such agreement is outside India; or

(c) any enterprise abusing the dominant position is outside India; or

(d) a combination has taken place outside India; or

(e) any party to combination is outside India; or

(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire [in accordance with the provisions contained in Sections 19, 20, 26, 29 and 30 of the Act] into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India [and pass such orders as it may deem fit in accordance with the provisions of this Act.]

The provision of Section 32 that talks about the extra territoriality is a product of Section 18, in the aspect that to fulfil the duties of CCI listed under Section 18, Section 32 is a vehicle and through Section 32 any activity outside of India can also be intercepted and investigated against. Section 32 allows the CCI to inquire into any agreement or abuse of dominant position or combination if such agreement or dominant position or combination that has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of the Act.

Sections 19, 20, 26, 29, and 30 of the Act grant the CCI the power and set the procedures for investigating alleged anti-competitive agreements, abuse of dominant position, acquisitions, mergers, or amalgamations that may cause a negative effect on competition in India. Additionally, to ensure smooth cooperation and effective execution of its duties, Section 18 empowers the CCI to enter into memoranda or arrangements with foreign agencies, subject to approval from the Central Government.

Despite the CCI's strong authority under Section 32, there are no specific regulations or rules governing the manner and time frame for handling matters beyond India's territorial limits. When dealing with combinations occurring outside India, the CCI must raise objections or make decisions at the appropriate stage, as it may be challenging to reverse a combination once it has been completed in a foreign country. Therefore, the CCI needs to act proactively to address potential anti-competitive activities abroad before they become irreversible.

(C) Process of application and enforcement of extra territorial laws

Before the 2007 amendment of the Competition Act, the Competition Commission of India had the authority to investigate agreements, dominant positions, or combinations outside India's borders only if they caused or were likely to cause significant harm to competition in the relevant market within India. However, the amended Act granted the CCI broader powers. Now, after conducting inquiries under Sections 19, 20, 26, 29, and 30 of the Act, if the CCI finds no violation of the Act's provisions, it will allow such agreements or combinations by order. But if the CCI discovers any anti-competitive agreements, abuse of dominance, or combinations that have or may have a significant negative impact on India's competitive market, it will direct the parties involved to cease and not re-enter into such practices, regardless of where these actions took place.

In cases where the CCI exercises extraterritorial jurisdiction and imposes penalties under Section 27, 31, or other provisions of Chapter VI of the Act, and the penalized party fails to comply with the CCI's order, Section 39 of the Competition Act empowers the CCI to recover the penalty as specified in the regulations.

However, Sub-para 2 of Paragraph 39 mentions that if the CCI believes it would be expedient to recover the penalty imposed under the Act as per the provisions of the Income-tax Act, 1961,[10] it may make a reference to the relevant income-tax authority for the recovery of the penalty as if it were tax due under the Income Tax Act. The person on whom the penalty has been imposed and who is subject to such reference under Section 39(2) will be considered the defaulter under the Income Tax Act, 1961.

Now while enforcing its order under Section 32 of the Act Commission may face two situations:

1. <u>The party against whom the order has been passed is ready to comply with the order of the Commission,</u>

In cases where the Commission exercises its extraterritorial jurisdiction under Section 32 of the Competition Act and issues an order to cease and desist, or stop abusing its dominant position, which has or could have a significant negative impact on India's competitive market, the party against whom the order is issued has the option to voluntarily comply with the Commission's directives. If the party decides to willingly adhere to the Commission's orders, then there will be no unfortunate consequences.

In such a situation, the party must inform the Commission of its intention to comply with the orders. The Commission may also require the party to submit an affidavit confirming their commitment to comply with the orders, as mentioned in paragraph 36 of the General

[10] Mr. M. Govindarajan; Article on Competition Commission of India (manner of recovery of monetary penalty) regulations, 2011

Regulation. Furthermore, if the Commission imposes a monetary penalty on the party for violating the provisions of the Competition Act, and the party is willing to comply with the Commission's orders, then the penalty must be paid accordingly.

In those cases, the penalty will be paid in either of the three ways:[11]

1. To the commission directly
2. To the party on whose favor the order is made
3. In any other way the commission directs

2. The party against whom order has been passed is not ready to comply with the orders of the Commission.

The party that wins a legal case and obtains an order from the Commission can enforce that order if the other party fails to comply with it. To do so, they can apply to the Commission or a person appointed by the Commission for this purpose. The Commission will issue a process for the execution of the order, unless there is a valid reason not to.

The duly certified order of the Commission can then be transferred to the courts in the country where the party against whom the order is to be enforced resides, works for gain, or conducts business. There are two options for transferring the order: Section 39 or Section 44A of the Code of Civil Procedure. Section 44A deals with the enforcement of decrees or orders in countries with which India has bilateral agreements for recognition and enforcement of decrees. If there is no such agreement with a particular country, the order can be sent under Section 39 of the Code of Civil Procedure to the appropriate court of that country.

The competition commission does not have ample experience with the application and enforcement of anti-territorial competition laws. There has been one case regarding this which was the case of In Re: Cartelisation in the supply of Electric Power Steering Systems (EPS Systems)[12]. Although the commission applied its prudence in the case regarding anti territoriality, the case was filled on the leniency principle basis so the compensation was waived in accordance with the Competition Commission of India (Lesser Penalty) Regulations, 2009.

NSK was a party of the case and was the first to approach the Commission as a lesser penalty applicant in the matter and has been granted 100% (percent) reduction in penalty, the Commission decides to grant benefit of reduction in penalty of 100% (percent) in terms of

[11] Sumit Kumar; Exercise of Extraterritorial Jurisdiction by CCI Under Section 32 of Competition Act and Process for its Enforcement.
[12] Suo Motu Case No. 07 (01) of 2014

Regulation 4 (a) of the Lesser penalty.

In general, foreign court judgments and orders are respected by Indian courts, and vice versa. This means that the judgments of foreign courts are presumed to be honoured and respected by Indian courts, and the same presumption applies to Indian court judgments in foreign courts. Therefore, by using the provisions of Section 39 and the presumption under Section 14, the Commission can seek enforcement of its orders in foreign courts. This provides a way for the Commission to assert its authority beyond national borders and have its orders executed in other countries.

IV. Extra territorial Anti-competitive laws in other jurisdictions

(A) Analysis of the U.S. extra territorial Anti-Competitive laws

There are importantly three acts which regulates any activity regarding competition in the USA. Them being, The claytons act, The Sherman Antitrust act and The Federal Trade Commission Act.

The Sherman antitrust act outlaws all contracts and combinations and conspiracy that unreasonably restrains interstate and foreign trade This includes agreements among competitors to fix prices, rig bids, and allocate customers, which are punishable as criminal felonies. The Sherman Act also makes it a crime to monopolize any part of interstate commerce. An unlawful monopoly exists when one firm controls the market for a product or service, and it has obtained that market power, not because its product or service is superior to others, but by suppressing competition with anti-competitive conduct.

The U.S. antitrust laws, the Sherman Act applies to “commerce … with foreign nations” (Section 1) without qualifying provisions concerning its territorial scope as “within the United States” (Section 2) or “in any section of the country” (Section 3) as specified in the Clayton Act. In the past, U.S. courts interpreting the Sherman Act of 1890 and other antitrust laws commonly followed the traditional territorial principle with regard to its jurisdictional reach.

The Clayton Act is a civil statute (carrying no criminal penalties) that prohibits mergers or acquisitions that are likely to lessen competition. All persons considering a merger or acquisition above a certain size must notify both the Antitrust Division and the Federal Trade Commission. The Act also prohibits other business practices that may harm competition under certain circumstances.

The Federal Trade Commission Act prohibits unfair methods of competition in interstate commerce, but carries no criminal penalties. It also created the Federal Trade Commission to police violations of the Act.

The jurisprudence in the US dealing with commercial law transactions and interpretation of anti-trust law has contributed to the development of the extra territoriality of the competition law. The intention behind this was to ensure that no anti-competitive practices are occurring outside the jurisdiction of the US, but it is in clear violation of the upkeep of the market and economy as such. The Banana case[13] in 1909 initiated the need for extra-territorial jurisdiction in matters relating to the domestic market and economy and foreign entities affecting it. This was followed by the case of American Tobacco[14] where the need for effects doctrine was intensified as it was observed by the court that stated the Act that governed Anti-Trust is not clear that the extra-territorial jurisdiction could not apply. Later, with a more relaxed approach, the US Supreme Court decided the Sisal[15] case and applied the provisions of US laws of anti-competition to a defendant that was not a resident of the US. It was further stated that the agreement that was entered into was outside the US by non-residents but the court could exercise its jurisdiction over the performance and intention of parties. The Alcoa case[16] marked the beginning of the application of effects doctrine in a US case that involved the contravention of Section 4 of the Sherman Act and Section 15 under US constitution act. Different approaches and conditions started to apply extra territoriality of competition law according to facts and circumstances.

(B) Analysis of European union approach to extra territorial competition laws

European Antitrust policy is developed from two central rules set out in the Treaty on the Functioning of the European Union:[17]

Article 101 of the Treaty prohibits agreements between two or more independent market operators, which restrict competition. This provision covers both horizontal agreements (between actual or potential competitors operating at the same level of the supply chain) and vertical agreements (between firms operating at different levels, i.e. an agreement between a manufacturer and its distributor). Only limited exceptions are provided for in the general prohibition. The most flagrant example of illegal conduct infringing Article 101 is the creation of a cartel between competitors, which may involve price-fixing and/or market sharing.

Article 102 of the Treaty prohibits firms that hold a dominant position on a given market to

[13] American Banana Co. v United Fruit Co. [1945] 148 F 2d 416 (2nd Cir)
[14] United States v American Tobacco Co. [1969] US 106 221
[15] United States v Sisal Sales Corporation [1927] 274 US 268
[16] United States v Aluminium Co of America (Alcoa) 148 F 2d 416 (2d Cir 1945)
[17] Antitrust and Cartels Overview, https://competition-policy.ec.europa.eu/antitrust/antitrust-overview_en

abuse that position, for example by charging unfair prices, by limiting production, or by refusing to innovate to the prejudice of consumers.

The Commission is empowered by the Treaty to apply these rules and has a number of investigative powers to that end (e.g., inspections at business and non-business premises, written requests for information, etc.). The Commission may also impose fines on undertakings which violate the European Antitrust rules.

National Competition Authorities (NCAs) are empowered to apply Articles 101 and 102 of the Treaty fully, to ensure that competition is not distorted or restricted. National courts may also apply these provisions to protect the individual rights conferred on citizens by the Treaty. Building on these achievements, the Communication on Ten Years of Antitrust Enforcement identified further areas to create a common competition enforcement area in the EU.

As part of the overall enforcement of EU competition law, the Commission has also developed and implemented a policy on the application of EU competition law to actions for damages before national courts. It also cooperates with national courts to ensure that EU competition rules are applied coherently throughout the EU.

The extra-territorial jurisdiction under the EU is mainly governed by the Treaty of Rome and the Competition laws of the European Commission (EC). Though they do not offer much in the said area, it is still exercised to meet the anti-competitive challenges. EC offers two legal concepts for the same: the Implementation Doctrine, the Single Economic Unit Doctrine.

The Single Economic Unit Doctrine was first introduced in the Dyestuffs[18], The case in question involved price-fixing practices carried out by a group of aniline dye producers, who were based outside the EU but had subsidiaries operating within the EU's internal market. The European Commission took action against this alleged cartel, asserting that Article 101 of the EU Treaty applied directly to all restrictions, regardless of where they originated.

The Commission argued that even if a subsidiary had its own legal identity, its actions could still be attributed to its parent company. This was especially true if the subsidiary lacked real independence in making decisions in the market, as it could be seen as part of the same economic unit as the parent company.

While the concept of a single economic unit was frequently referenced in the decisions of the Court of Justice of the European Union (CJEU) and the General Court, it had limitations in establishing jurisdiction over foreign anticompetitive practices. It did not address how

[18] Case 48/69, ICI v. Commission (Dyestuffs) [1972] ECR 619.

competition rules should be applied to foreign companies that had no domestic subsidiaries but still affected competition within the EU's internal market. Therefore, there was a need for another legal theory to address these situations.

In the Implementation doctrine, it was held that the conduct under scrutiny might be of an extraterritorial origin, yet was territorial as its implementation took place within the boundaries of EU Member State the conduct under scrutiny might be of an extraterritorial origin, yet was territorial as its implementation took place within the boundaries of EU Member States.

The Advocate General opinion in Wood Pulp[19], counselled the CJEU to adopt effects doctrine. AG Darmon contended that the reading of Article 101(1) suggested the location, in which anticompetitive effects materialized, as a determinative criterion for the application of EU competition law

The Court pointed out that an infringement of Article 101 involved two elements: where an agreement which corresponded to a concerted practice was formed, and; where this agreement was implemented. If the place, in which an agreement was formed, was considered to be the only criterion for the application of EU competition rules, this would allow the perpetrators to restrict competition in the internal market with impunity. Therefore, the Court continued, the decisive criterion should be determined to be the place, in which this agreement was implemented.

V. LIMITATIONS TO APPLICATION OF EXTRA TERRITORIAL LAWS

(A) Conflicts over the Extraterritorial Application of Competition Law

One most important conflict that comes to light during the analysis of conflicts in the extra territorial application is the jurisdictional conflict case of GE-Honeywell merger[20]

The European Commission made a significant decision by rejecting General Electric's proposed takeover of Honeywell. This not only put an end to the largest industrial merger ever attempted but also highlighted the stark differences between the United States and the European Union regarding the interpretation and application of competition law.

The merger between the two American companies, worth $42 billion, had already been approved by regulatory authorities in the United States. However, to proceed, it needed the approval of the EU as well. Unfortunately for General Electric, the European Commission dampened their hopes when it refused to support the takeover. The reason cited was that the

19 Wood Pulp (Case IV/29725) Commission Decision 85/202/EEC [1985] OJ L85/1.
20 Eleanor M. Fox; GE/Honeywell: The U.S. Merger that Europe Stopped - A Story of the Politics of Convergence

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merger would have reduced competition in the European Union's single market.

What made the commission's decision even more controversial was that it was the first time they had rejected a merger between two U.S. companies that had previously received approval from the U.S. government. This added to the tensions between the US and the EU in matters of competition law. This incident serves as a clear example of how different regions can have varying perspectives on competition regulations, leading to complex situations when multinational companies are involved.

The principal standard in the United States for determining whether some practice or some agreement is competitive or anti-competitive is whether it can be shown to benefit consumers or harm consumers. The standard in terms of consumers is the broadest social welfare criterion possible. Quite differently, in Europe the effect on consumers is not given the same attention as in the United States. In the EU, on the other hand, competition law is based on the notion of "dominance" -- in other words, on the size of a firm and the scope of its activities.

The commission's Merger Task Force concluded that given GE's strength in aircraft engines and Honeywell's expertise in avionics, the new joint company could bundle these products and thus "dominate" the European aerospace industry.

Similarly, the proposed merger of Boeing and McDonnell Douglas[21] was approved by the US competition authorities but was later rejected by the EC (European Commission). This disagreement led to a standstill that could only be resolved after several months of intense political negotiations and the possibility of a trade war between the US and Europe. The reason for this impasse was that the EC wanted to protect the interests of Airbus, while the US was advocating for the best commercial interests of Boeing. Such conflicts have made it necessary for competition authorities to increase their cooperation to ensure a fair and open market.

To address these challenges and promote a harmonious business environment, the competition authorities of the US and EU have been working towards forming several cooperation agreements. These include bilateral and multilateral arrangements such as the "Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of their Competition Laws" in 1991, the "Agreement between the European Communities and the Government of the United States of America on the Application of Positive Comity Principles in the Enforcement of their Competition Laws" in 1998, and the "Agreement on Mutual Legal Assistance between the European Union and the United States of America" in 2003. By engaging in such agreements,

[21] Case IV/M.877, Boeing/ McDonnell Douglas v. Commission, 1997 O.J. (L 336) 42

these authorities aim to better handle situations where their interests may clash and to maintain fairness in the global market.

More complex jurisdictional issues may arise in cases where there is a conflict of mandatory competition laws If substantive competition law provisions differ, then the outcome of a competition law dispute would depend on where the proceedings are initiated. For example, in Wood Pulp[22], the US Webb-Pomerene Act did exempt the export cartel agreements from the prohibitions laid down in the US antitrust laws. As a result, it was essential for the Commission to establish that EU competition laws applied and regulated the private undertakings' behaviour. Similarly, it was crucial for the litigants in Laker Airways[23] and Hartford Fire Insurance[24] to establish jurisdiction in the US with a view to having US antitrust laws applied to the merits of their competition law dispute.

(B) Excessive extra-territorial application

Domestic laws generally apply only to conduct occurring in the country where they are enacted and lose their force at international borders. This concept is known as "the territorial principle" and applies to competition laws as well as to other legislation. In today's global economy, as corporate activities become more international, conduct taking place in one country may have grave effects on markets elsewhere. Therefore, effective regulation cannot always be achieved through strict application of the territorial principle. To some extent, countries have traditionally applied their competition laws extraterritorially in an attempt to mitigate effects on their own market. An exporting cartel may do damage to competition in an importing country.

The essential purpose of national competition laws is to protect the interests of consumers by ensuring that competition in the domestic markets is free and fair. Under the "effects doctrine" described above, competition laws can be applied extraterritorially only in cases where actions taken outside a country have a direct and substantial impact on competition in the domestic markets.

A different approach was taken in the Alcoa case[25], in which foreign companies outside the United States had concluded the agreements. The Court of Appeal for the Second Circuit held it settled law that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect

[22] Wood Pulp supra no 19.
[23] British Airways Board v Laker Airways [1984] 1 QB 142;
[24] Hartford Fire Insurance v California (1993) 509 US 764.
25 Alcoa case (148 F.2d. 416 (1944)),

imports and did affect them

This theory of the intended effect (the effects doctrine) elaborated in the Alcoa case was criticized by many as an excess of jurisdiction under public international law. For instance, R.Y. Jennings noted that "in this new guise it apparently comprehends the exercise of jurisdiction over agreements made abroad, by foreigners with foreigners provided only that the agreement was intended to have repercussions upon American imports or exports," while F.A. Mann argued that "the type of effect within the meaning of the Alcoa ruling has nothing in common with the effect which by virtue of established principles of international jurisdiction confers that right of regulation.

In response to excessive application of U.S. antitrust laws, especially with respect to courts' orders to produce documents such as subpoena duces tecum located abroad, a considerable number of states have issued diplomatic protests. Australia, France, the United Kingdom, the Netherlands, and New Zealand have even enacted blocking legislation. The protesting states maintain that taking evidence abroad, including an order to produce documents, is an exercise of extraterritorial enforcement of jurisdiction that, under international law, requires the consent of the state where the evidence is located.

(C) Limitation in enforcement of orders under S. 32.

In a world where the market is becoming more globalized, the CCI (Competition Commission of India) may face significant challenges when dealing with competition issues caused by actions of foreign firms. Trying to address such problems could risk straining diplomatic relations between countries. Additionally, when companies engage in activities like mergers and acquisitions, they may generate different effects in various countries, leading to conflicting views among the competition regulators with jurisdiction. Enforcing orders in such situations becomes difficult.

For instance, we saw this in examples like the Honeywell case or the McDonald Douglas incident, where one country approved a merger while another disallowed it. Resolving such deadlocks requires lengthy political negotiations, causing unfair consequences for the companies involved and impacting the global market.

To tackle these challenges, competition authorities around the world are recognizing the need for increased cooperation with each other. They are forming bilateral and multilateral cooperation agreements, like the one between the US and EU competition authorities, to promote a free and fair market. By working together, they aim to find better solutions and ensure healthy competition in the global market place.

The increasing globalization of business and the worldwide acceptance of the "effects doctrine" have resulted in the expansion of national competition laws to cover cross-border business activities. The principles of extraterritorial jurisdiction can be divided into two parts: subject matter jurisdiction and enforcement jurisdiction. Subject matter jurisdiction relies on territorial and nationality principles to address many violations of competition laws. On the other hand, enforcement jurisdiction requires the CCI (Competition Commission of India) to establish bilateral or multilateral agreements with other competition regulators to fully implement the provisions of the Act. By doing so, the CCI can effectively enforce competition laws concerning international business activities.

The main agenda of the Act is to prevent inequity in the Indian market and ensure free and ethical trade. Since the Act is relatively new, there is a relative paucity of jurisprudence on this subject, it would be interesting to monitor the stance of the regulator in future matters which happen outside India but have an effect on competition in India.

VI. CONCLUSION AND SUGGESTIONS

Before the existence of Competition Act, there existed the MRTP Act which looked into all the anti-competitive practices that existed in India but it did not have a provision which enable it to look into anti-competitive practices outside India. This was introduced in the Competition Act, 2002 which succeeded MRTP Act.

The Competition Act has been in force since 2002 and has been very actively participating in the investigations regarding market dis-functionaries. The main focus of the Act is on the combination regulation and anti-trust regulation enshrined under Section 3, 4 and 5 of the Act. But, the extra territoriality principle in the act has been hardly been put to the test as it was used only once and even in that instance was covered under the leniency provisions and no fines where allotted so the enforcement effect ability was also not tested.

Hence, the aim of the project’s aim was to look into a comparative analysis of Indian extra territoriality principles with that of US and EU and try to examine the limitation that could be faced in the application of the extra territoriality principle with the help of precedence form the other two jurisdictions.

From the analysis of the American anti-trust laws, we can find that it is developed not by legislations but by judicial activism and through different cases and judgement the principles have developed which has also brought to light certain limitations to such applications. In the American analysis we can also find that there have been certain instances of conflict and excessive application of extra-territorial laws, which provides an insight to their Indian counterpart as to what not to do.

The European anti-competitive laws have although exist through treaty of functioning of European union, have introduced two important doctrines as explained above the implementation doctrine and the single economic entity doctrine through certain case laws.

From the said analysis of different jurisdictions, the following limitations have come to light.

1. Enforcing competition regulations against a different jurisdiction could come at a cost of jeopardizing the diplomatic relations with the country.
2. There is a need to find a way to resolve Jurisdiction problems as to whose rules would apply in a matter where conflicting orders have been passed by two different jurisdictions.
3. There should be no exploitation or excessive use of Extra-territoriality principle as to harm other countries, which could lead to them issuing blocking statutes.

Based on the research findings, it is recommended that the Commission is currently in its early stages, so it should embrace the Principle of Comity, which has been acknowledged and adopted by numerous robust competition and antitrust authorities worldwide. The Study also proposes that the Government of India should engage in more bilateral agreements to ensure mutual enforcement of orders of the Commission. Additionally, it is advisable for the government to accede to the Hague Convention for recognizing and enforcing foreign civil and commercial judgments. This move could facilitate the enforcement and investigation processes more smoothly.

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