EXTRATERRITORIAL JURISDICTION AND EFFECTS DOCTRINE

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I. INTRODUCTION

In a world where businesses and individuals are increasingly operating in a global scenario, the issue of the extraterritorial application of national laws is assuming progressively greater importance to deal with new issues where markets are affected by these extraterritorial practices. Traditionally, the exercise of jurisdiction by a state was generally limited to persons, property and acts within its territory.

In this paper, the researcher is studying the evolution of the 'Effects Doctrine' in the United States of America (hereinafter 'US'), European Union (hereinafter 'EU') and India to understand the concept of effects doctrine and extra-territorial jurisdiction efficiently. As in the globalised world, it's easy to draft laws to regulate markets but when it comes to the practical implementation, the real problem arises. In addition, the researcher is also dealing with the powers and procedures followed by the Competition Commission of India (hereinafter 'CCI') to deal with such cases.

The scope of this paper is especially vast as almost every country uses this concept to prevent anti-competitive practices by other countries which affect their market directly. This paper has been limited by the researcher to a comparison of US, EU and India by understanding various other aspects which are used by the competition authorities such as CCI in India. The hypothesis of the paper is that even though we have come far enough to deal with anti-competitive practices, the only solution to such issues will be bilateral agreements with other countries.

II. OVERVIEW OF EXTRATERRITORIAL JURISDICTION

To keep apace with the perpetual evolutionary process of changing, communal competition authorities must adopt regulations to deal with such issues which directly have an impact on their markets. To prevent such practices nations are entering into bilateral agreements with other nations and groups such as OPEC (Organization of the Petroleum Exporting Countries) in this constantly developing world.[1] These agreements

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[1]Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (Hart 2007) 152.

make it easy for countries to resolve such issues and provide better protection to their markets without getting involved in cumbersome legal practices and political processes.[2]

This is a matter of public international law where there are limits imposed upon the state jurisdiction and subsequently upon the country's ability to implement its laws outside its jurisdiction over undertakings which are overseas. It can be said that there are two fundamental elements to a state's jurisdictional competence.[3]Firstly, a state frames laws with the help of its legislative, executive and judicial bodies to lay down general laws. This is also known as subject matter jurisdiction of the state.[4]Secondly, it becomes an issue of enforcement of these general rules, where sometimes even coercion is used by the authorities.[5] This is called enforcement jurisdiction of a state.[6]

Subject matter jurisdiction is considered as part of Public International Law as this concept provides power to state to regulate its citizens within its territory. Under laws such as taxation or corporate law, even corporate entities which are registered in a country will be considered as citizens. Due to trans-border transactions and events taking place at so many different levels, it has been tried by various scholars and judicial bodies to even include the acts which are originating outside but ending within the territory of that particular state under the definition of subject matter jurisdiction. Even certain connections are considered as acts being completed within the territory of a country.[7]

To include anti-competitive practices within the principles of territoriality and nationality, the definitions of the concepts have been widened in recent decades through various judicial decisions in the US and the United Kingdom (hereinafter 'UK'). Examples of these practices include taking over a competitor or charging predatory prices within the territory of the State concerned to apply its law, or because an agreement will have been made between a foreign undertaking and firm established within the State in question.[8]Such practices are considered as anti-competitive practices and these

[2] ibid 154.

[3]Elhauge (n 106) 155.

[4]Joseph Drexl, *The Future of Transnational Antitrust- From Comparative To Common Competition Law* (Kluwer Law International, 2003) 112.

[5] ibid.

[6]Drexl (n 109) 115.

[7]Tran Van Hoa, *Competition Policy And Global Competitiveness In Major Asian Economics* (Edward Elgar 2003) 245.

[8] ibid.

examples are show that they have a direct effect on the concerned country's economy.[9]

In these cases, it is easy to apply a subject matter jurisdiction over an individual who is outside the territory of the state, but the fundamental problem here is about enforcement of its laws in the territory of other states. To prevent such practices, states have incorporated regulations, which block other states to enforce their laws in their territory. India itself faces the problem of enforcing its judgments in the territory of other states, but as said earlier, there are a lot of jurisdictional issues involved in such cases.[10]

The issues of enforcement bring a lot of issues along with them. It has been seen in past that even though one state has a subject matter jurisdiction in relation to an individual in another state but it becomes contentious once the enforcement comes into the picture without the permission of that state. Here enforcement is not just about imposing penalties but also includes all other acts such as service of summons, investigation privileges etc.[11]

The fundamental problem for the competition authorities is a collection of information of the act which took place outside its own jurisdiction.[12] The problem here is that laws which were framed in the19th century to deal with issues of that time are not equipped to deal with issues in the present times where the whole globe is connected with transactions taking place at various levels and sometimes even in more than one jurisdiction. Hence, these all laws must be modified to deal with current issues.[13]

Bilateral agreements and other treaties have tried to resolve this problem up to certain extent, for example, India is signatory to the Hague Convention on the Taking of Evidence[14], and hence India is assisted in collecting evidence for any issue which occurs in the territory of the state signatory to the Hague Convention. Similarly, Private International Law becomes important when it comes to enforcement of foreign judgments in any territory. Sometimes, it comes under enforcement of foreign judgments especially in the matter of currency conversion, e.g. *Miliango case.*[15] However, cooperation on

[9] E Montgomery Graham and J David Richardson, *International Trade And Competitive Policy: CER, APEC And WTO* (KerrinVautier and Peter Llyod, New Zealand Economic Papers 1997) 103.

[10] ibid.

[11] G Bruce Doern and Stephen Wilks, *Comparative Competition Policy, National Institutions In A Global Market*(OUP 2001) 25.

[12] ibid.

[13]Lennart Goranson, *Competition Law Today, Concepts, Issues And The Law In Practice: The Efficient and The Effective Competition Authority*(Vinod Dhall, 2nd edn, OUP 2008) 601.

[14] ibid.

[15] *Miliangos v George Frank Ltd*[1976] AC 443 (HL).

evidence and the enforcement of judgments is often not provided by one State to another where the former takes exception to an attempt by the latter to affirm its law extraterritorially, and most legal systems contain restrictions on the disclosing by competition authorities of confidential information.[16]

III. DIFFERENCE BETWEEN US AND EU APPROACH

I) US APPROACH

Effects Doctrine in the US has developed through legal interpretation of antitrust law provided by the courts in cases dealing with commercial law jurisprudence. This was to put an end to activities which were taking place outside US but still were affecting its market and economy. The first instance of Effects Doctrine came into the picture in 1909 when American Banana Case[17]was brought to the court. In this case all the acts which were found to be violative of laws in US were committed outside its territory where the Costa Rican government was influenced to monopolise the banana trade. Unfortunately, in the absence of clear laws regarding enforcement of laws in a jurisdiction outside US's territory, the court rejected the matter saying they have no power to impose their laws over other country or a citizen of another country.[18]

Later on, in the case of American Tobacco[19], the issue of anti-competitive practices came before the court. This time court said that the interpretation of Anti-Trust Act is so vague that every other matter of extraterritoriality can be rejected from even admitting into the court. Here the matter was about monopolising the tobacco industry. Hence, in this case as well the matter was not dealt with effects doctrine and subsequently was rejected.[20]

Later on with time, US Supreme court became more flexible about territoriality principle. In the Sisal case[21], US Supreme court interpreted the rules more flexibly and hence they exercised the jurisdiction in this case where the defendant was outside US. The explanation behind it was that even though the agreements were entered into outside US by foreigners, they have the power to exercise jurisdiction over performance and intention of the parties which was within US. Subsequently, the Alcoa case[22], came to

[16] Elhauge (n 106) 178.

[17] *American Banana Co v United Fruit Co* 148 F 2d 416 (2nd Cir 1945).

[18] *American Banana Case* 148 F 2d 416 (2nd Cir 1945).

[19] *United States v American Tobacco Co* [1969] US 106 221.

[20] *American Tobacco Case* 221 US 106 (1911).

[21] *United States v Sisal Sales Corporation* 274 US 268 (1927).

[22] *United States v Aluminum Co of America* 213 US 347 (1909).

the US Supreme Court, where the action was taken by US against Aluminium Company of America (hereinafter 'ALCOA') because defendants had entered into an agreement to conspire so that trade can be monopolized. This was considered as unlawful under the Sherman Anti-Trust Act, Sec. 4 and 15U.S.C.A.[23]. This was the first case where the Effects Doctrine was used to give a decree. This gave a new start to the courts to apply this doctrine in matters affecting US markets directly from the territory outside its jurisdiction.[24]

With time, all these judicial precedents started laying down several different conditions to apply effects doctrine. The case which brought all this together was the Timberlane case[25]. In this case, the court came up with the list of the tests which can be used when there is any kind of dilemma about the application of Effects Doctrine. This was to assert that the practice was anti-competitive and was affecting the market of the concerned nation. Court expressly said in the case that they have the power to exercise jurisdiction over matters which takes place outside its jurisdiction but to prevent any kind of flaw on their part, these three tests are as follows:[26]

- The first requirement was about having some effect whether direct or indirect over American Trade and Business (or for this matter over any other nation which follows these rules to exercise their jurisdiction)
- There cannot be any other matter regarding anti-competitive practices being dealt by the court. There must be an injury felt by the US potentially large which can be brought under the category of cognizable one. In addition, there must be an infringement of antitrust laws.
- There must be sufficient reason for the US court to exercise their jurisdiction outside their territory; hence the anti-competitive practice must be large enough to even affect the international comity and fairness.

II) APPROACH ADOPTED BY THE EU

The position in EU is a bit complex with regard to the applicability of extraterritorial jurisdiction principles. In EU, the Treaty of Rome and the competition law of European Commission (hereinafter 'EC') does not say much about the extraterritorial jurisdiction. Still, EC has adopted it to maintain the pace with Developing World and to deal with

[23] United States Code, s 4.

[24] Andrew Mitchell,'Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO' 24(3) World Competition (2001) 343-365.

[25] *Timberlane Lumber Co v Bank of America* NT & SA 549 F 2d 597 (9th Cir 1976).

[26] ibid.

such issues of anti-competitive practices.[27]EC uses three legal concepts to deal with issues of extraterritoriality namely the Implementation Doctrine, the Economic Entity Doctrine, and the Effects Doctrine. This was developed by implementing Articles 81[28] and 82[29] of EC in the matters of extraterritoriality through judicial decisions.[30]

However, in the EU the effects doctrine is still not recognized by the European Court of Justice (hereinafter ECJ), hence there is always a doubt whether this doctrine enjoys the same status as other doctrines. But, at the same time, courts have established in several cases over a period of time that this non-recognition will not bar the courts to exercise their subject-matter jurisdiction over an undertaking which is outside the EU territory.[31] It has been said by the courts that Effects Doctrine will be applicable in cases to deal with anti-competitive practices to provide safety to EU consumers. They also said that the effect of such anti-competitive practice on the economy must be reasonably foreseeable, immediate and substantial.[32]

It can be said that despite being in non-recognition of the doctrine, the Commission and Courts have presumed the power over extraterritorial matters with them.[33] In the Wood Pulp Case[34], the matter was about American, Canadian and Finnish wood pulp producers coming together and forming a price cartel outside the jurisdiction of EC and subsequently charging EC members with predatory prices. The reason for exercising jurisdiction over the defendants was that they were doing business in EU through their agents, branches, and subsidiaries situated in EU. They charged inflated prices from the customers which lead to the loss of 60% of wood pulp market.[35]

Later on, when the case went on to the appellate court, Advocate-General Darmon said that Effects Doctrine should be recognized by EC law.

He specifically said that effects doctrine is the most reliable rule which laid down the criteria of substantial, foreseeable and direct effect.[36]This doctrine was again discussed

[27] Elhauge (n 106) 192.

[28] European Community Law, art 81.

[29] European Community Law, art 82.

[30] Massimo Motta, *Competition Policy: Theory and Practice* (Cambridge University Press 2004) 338.

[31] ibid.

[32] Motta (n 135) 336.

[33] The 6thReport on Competition Policy, 1977.

[34] *A Ahlstrom Osakeytio v Commission Mkt Rep* (CCH) 491 (27 September 1988).

[35] *Wood Pulp Case* 491 (27th September 1988).

[36] ibid.

in the Gencor case[37] where the issue was about the merger of two South African companies. In this case, the court discussed merger regulations and international law to apply the principles of extraterritorial jurisdiction.[38]*Gencor case*[39]reiterated the three components namely immediate, foreseeable and substantial effect while deciding the case.

So it has been observed by the researcher that both US and EU developed their mechanism to implement this doctrine through cases and interpretation of anti-trust laws. India has its CCI in its nascent stage as we need a lot of change and better implementation of Competition Law.

IV. PROCEDURE AND POWERS OF CCI (INDIAN APPROACH)

I) COMPETITION COMMISSION OF INDIA (CCI):

CCI in India assumes its powers of extraterritorial jurisdiction under section 32[40] of the Competition Act, 2002. Unlike section 14[41] of its forerunner Act, i.e., the Monopoly and Restrictive Trade Practices (hereinafter 'MRTP') Act, 1969, it mandates some extraordinary power to the Commission to investigate into and also to pass such orders as it deems fit if it finds any anti-competitive agreement or misuse of dominant position or combination such as merger which constitutes any violation of the provisions of the Competition Act or the party to such anti-competitive practice are outside the territory of India.[42]

Neither the European competition law nor US competition law gives its competition authorities such tremendous power in such an unequivocal manner. Section 32, in very clear words, gives these two powers to the Competition Commission even if the anti-competitive practice has been taken place outside the territory of India or the party to such agreement is outside India. Before 2007 amendment Act[43], the Commission had power to only conduct an inquiry in such cases but the 2007 amendment to the Competition Act has made the Commission more dynamic in all respects. It broadened

[37] *Gencor v Commission* [1999] ECR II-753.

[38] ibid.

[39] ibid.

[40] The Competition Act 2002, s 32.

[41] Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 (1995) De Paul Law Review 1097-1109.

[42] ibid.

[43] The Competition (Amendment) Act 2007.

the scope of its powers which lead to more stringent against anti-competitive practices.[44]

If the provisions of Indian Competition law with the EU competition law or US competition law are compared then it is clear that the Indian Competition Commission is very strong than the competition authorities of EU or US. The reason behind this may be that we have learned from their mistakes and made the necessary amendments. The other reason can be that Article 81 and 82 of European Community Law or the concerned provision of US competition law does not specifically authorise the commission to exercise such jurisdiction. Such exercise of extraterritorial jurisdiction in US or EU is a judicially created power of these competition authorities and is based on three doctrines such as Implementation Doctrine, Economic Entity Doctrine and Effects Doctrine.[45]

Before the Competition Act, 2002 there was no provision in MRTP Act which discerns the extraterritorial jurisdiction of the competition authority. However, in 1996, one case came before the MRTP commission which first time brought up the issue of extraterritorial jurisdiction of the Commission. The Alkali Manufactures Association of India case (hereinafter AMAI)[46], whose members, which included the major Indian soda ash producers, filed a complaint saying that American Natural Soda Ash Corporation (ANSAC) had violated several provisions of India's MRTP Act, 1969.[47]

Analysis of various factors in this case was done by applying effects doctrine and judicial precedents of US and EU courts.[48] But at that time, the doctrine in India[49] was at a nascent stage and hence the Commission could not take action against foreign cartels or the pricing of exports to India[50], nor could it prevent imports.[51]Hence, a need for the specific provision in the statute itself was felt, and later on the new Act came up with such provisions.[52]

II) PROCEDURE FOR CCI

After 2007 amendment of the Act, the Commission has both inquiry power as well as

[44] ibid.

[45] Motta (n 135) 116.

[46] *Alkali Manufacturers v American Natural Soda Ash* (1998) 3 CompLJ 152 MRTPC.

[47] *The Alkali Manufactures Association of India (AMAI) Case* (1998) 3 CompLJ 152 MRTPC.

[48] ibid.

[49] The Monopoly and Restrictive Trade Practice Act 1969, s 14.

[50] ibid (n 152).

[51] *The Alkali Manufactures Association of India (AMAI) Case* (1998) 3 Comp LJ 152 MRTPC.

[52] ibid.

the power to pass an order against such anti-competitive practices. The phrasing of section 36[53] before amendment leads to the assumption that the legislatures were not of the view that the Commission should follow procedure laid down in Code of Civil Procedure, 1908[54] as clause 1 of section 36 in very clear words exempts the Commission from the procedure laid down in Code of Civil Procedure.[55]

Paragraph 12 of the general regulation[56] 2 of 2009 provides the mode of filing of information or reference.[57] The commission shall within sixty days form and record its opinion of the existence of prima facie case of the contravention of the provisions of the Competition Act.[58]

The commission may, if it thinks necessary call the primary conference for the formation of opinion on the existence of prima facie case. The direction of investigation to the Director General shall be deemed to be the commencement of the inquiry under section 26[59] of the Competition Act. The report of the Director shall contain his findings on each of the allegations made in the information or reference as the case may be together with all theevidences or documents or statements or analyses collected during the investigation.[60]

Section 19[61] of the Act gives the Commission power to inquire into certain agreements or misuse of dominant position of the enterprise. Section 26 of the Act read with paragraph 21 of the Competition Commission (General) Regulations, 2009[62] gives the procedure for the inquiry in such matters.[63]

Except in the case where the inquiry is to be conducted against government or public officers, neither the General regulation, 2009 nor the Code of Civil Procedure, 1908

[53] The Competition Act 2002, s 36.

[54] The Civil Procedure Code 1908.

[55] P J Lloyd and Kerrin M Vautier, *Promoting Competition in Global Markets- A Multi-National Approach* (Edward Elgar 1999) 1015.

[56] The Competition Commission of India (General) Regulations 2009 (No 2 of 2009).

[57] Motta (n 135) 336.

[58] Andrew T Guzman, 'Is International Antitrust Possible' (1998) 73 NYU LRev 1501-1505.

[59] The Competition Act 2002, s 26.

[60] Lloyd (n 160) 500.

[61] The Competition Act 2002, s 19.

[62] Lloyd (n 160) 245.

[63] William E Kovacic, 'Extraterritoriality, Institutions, and Convergence in International Competition Policy' (2001) 77 Chicago Kent LR260.

make it mandatory to give a notice to the defendant.[64] So it is upon the wish of the commission or the party to give notice to the alleged violator of the Act. However Order V of Code of Civil Procedure and paragraph 22 of General Regulations, 2009 of Competition Commission gives the mode of service of summons, notices and other documents.[65]

Though the regulation does not give any procedure for the examination of the parties or witness but for this purpose, sub-section 2 of section 36 of the Competition Act[66] gives the Commission same power as the Civil Court under Code of Civil Procedure.[67] The substance of such examination shall be reduced to writing by the members and shall form part of the record.[68] If the party or his pleader or such authorise person is unable to do so[69] or does not answer any material question which the Commission thinks necessary to answer[70], the commission may pronounce its order[71] against such party if the commission thinks fit.[72]

III) POWERS OF CCI

The amended Competition Act has empowered the Commission not only to inquire into such anti-competitive practices but also to pass such orders as the commission deems fit. Now if after an inquiry under sections 19, 20, 26, 29 and 30 of the Act, the commission finds there is no contravention of the provisions of the Act, then it shall approve by order such agreement or combination.[73]

If Commission finds there exist any anti-competitive agreement or abuse of dominance or combination which causes or likely to cause appreciable adverse effect on the Indian competitive market, it shall direct the person or enterprise or group of person or enterprise to discontinue and not to re-enter such agreement or abuse of dominant

[64] Lloyd (n 160) 246.

[65] Lloyd (n 160) 146.

[66] Brendan Sweeney, 'Globalisation of Competition Law and Policy' (2004) 15 Mel J Int L48.

[67] ibid.

[68] The Code of Civil Procedure 1908, sch 1.

[69]Maria Johansson, General Counsel, US Federal Trade Commission, 'Extraterritorial Jurisdiction in Competition and Anti-trust Matters'(2003) 97 American Society of International Law 319.

[70] Lloyd (n 160) 145.

[71] Johansson (n 174) 309.

[72]Fod Barnes*et al*, 'Evidence Remedies: Lessons from the Decision of the Cat in Tesco Plc v. Competition Commission' 08(04) Comp L J 329 (2009).

[73] Johansson (n 69) 309.

position irrespective of the fact that the concerned act has been taken place outside.[74]

Sections 27[75]and 31[76] of the Competition Act give certain remedial measures which can be taken by the Commission after the completion of the inquiry procedure. Section 27 talks about the orders by Commission after an inquiry into agreements or abuse of dominant position whereas section 31 says about the orders of the Commission on certain combinations.[77]

While the Commission exercising its extraterritorial jurisdiction under section 32 of the Act imposes any penalty undersections 27, 31 or others provisions of Chapter VI of the Act, and the party upon whom penalty has been imposed does not comply with such order of the Commission then section 39[78] of the Competition Act gives the commission power to proceed to recover such penalty in such manner as may be specified by the regulations.[79]

While enforcing its order under section 32 of the Act Commission may face two situations, first, the party against whom the order has been passed is ready to comply with the order of the Commission, and second, the party against whom the order has been passed is not ready to comply with the orders of the Commission.[80]

Where the Commission imposes any monetary penalty against such party for the contravention of the provisions of the Competition Act and the party is ready to comply with the orders of the Commission then the penalty shall be paid. The party who has to make payment shall give the notice either through the commission or independently to the party in favour of whom orders have been passed.[81]

V. CONCLUSION

India is at its nascent stage in terms of having rules and regulations for its own Effects Doctrine. Section 32 of the Competition Act, 2002 has been a major step taken by the Indian Government where Competition Commission is empowered with special powers

[74]Richard Whish, *Competition Law*(5edn, OUP 2003) 745.

[75] The Competition Act 2002, s 23.

[76] The Competition Act 2002, s 31.

[77] Johansson (n 174) 315.

[78] The Competition Act 2002, s 39.

[79] Johansson (n174) 306.

[80] T Ramappa, *Competition Law In India, Policy, Issues And Developments* (3edn, OUP 2006) 56.

[81] ibid.

to conduct an inquiry into anti-competitive practices which have an adverse effect on India, irrespective of the fact that it has taken place outside the territory of India. Still, the problem is about enforcement of its decisions in other territories. To take the benefits of these new rules and regulations, India will have to enter into bilateral agreements so that the anti-competitive practices can be prevented and the orders of the courts in India can be enforced easily.

The researcher, on the basis of his research and because of the fact that the Commission is in infancy right now, suggests that it should adopt the comity principle which has been recognized and adopted by many of the strongest competitive and antitrust authorities of the world. The researcher also suggests that the Government of India should make more bilateral agreements for the reciprocal enforcement of the judgments.