REDRESSING INTERNATIONAL ANTITRUST AGREEMENTS – AN ANALYSIS OF EXTRATERRITORIAL ENFORCEMENT

Research Paper for the Competition Commission of India

January, 2012

SUBMITTED TO DR. SANJAY KUMAR PANDEY, JOINT DIRECTOR (LAW) AT THE COMPETITION COMMISSION OF INDIA

Adhitya Srinivasan

IV Year B.A. LL.B. (Hons.) Student,

National Law Institute University, Bhopal.
DISCLAIMER

This paper has been prepared by the author as an intern under the Internship Program of the Competition Commission of India (CCI) for academic purposes only. The views expressed are personal and do not reflect the views of the Commission in any way. This report is the intellectual property of the Commission and no part thereof may be used in any manner whatsoever without the prior express permission of the Commission in writing.

Adhitya Srinivasan
New Delhi.
January 24, 2012.
ACKNOWLEDGMENT

I am extremely grateful to Dr. Sanjay Kumar Pandey without the guidance of whom, this paper would not have been possible. The direction taken and the perspectives shared in this paper are a direct outcome of the discussions that took place between Dr. Pandey and myself.

I am grateful to the Competition Commission of India for having provided me this opportunity to undertake a research study into the operation of the antitrust law in India.

I am grateful to the staff at the Competition Commission of India library who were happy to allow me to use the fabulous resources available at the library.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION</td>
<td>5</td>
</tr>
<tr>
<td>II.</td>
<td>INTERNATIONAL ANTITRUST AND EXTRATERRITORIAL ENFORCEMENT</td>
<td>7</td>
</tr>
<tr>
<td>III.</td>
<td>ISSUES RELATING TO EXTRATERRITORIAL ENFORCEMENT</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>A. UTILITARIAN ANALYSIS</td>
<td>9</td>
</tr>
<tr>
<td></td>
<td>B. CONFLICTING NATIONAL INTERESTS</td>
<td>11</td>
</tr>
<tr>
<td></td>
<td>C. CONFLICTING JURISDICTIONS</td>
<td>12</td>
</tr>
<tr>
<td></td>
<td>1. TARGETTING DOCTRINE</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>2. CONSPIRACY DOCTRINE</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>3. NATIONALITY/DOMICILE TEST</td>
<td>14</td>
</tr>
<tr>
<td></td>
<td>4. IMPLEMENTATION TEST</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>5. EFFECTS DOCTRINE</td>
<td>15</td>
</tr>
<tr>
<td></td>
<td>D. BLOCKING STATUTES</td>
<td>17</td>
</tr>
<tr>
<td></td>
<td>E. ENFORCEABILITY OF FOREIGN ANTITRUST DECISIONS</td>
<td>19</td>
</tr>
<tr>
<td>IV.</td>
<td>FRAMEWORKS FOR REDRESSING INTERNATIONAL ANTITRUST</td>
<td>20</td>
</tr>
<tr>
<td></td>
<td>A. HARMONIZATION OF DOMESTIC ANTITRUST LAWS</td>
<td>21</td>
</tr>
<tr>
<td></td>
<td>B. MUTUAL COOPERATION BETWEEN ANTITRUST AUTHORITIES</td>
<td>24</td>
</tr>
<tr>
<td></td>
<td>C. INTERNATIONAL COOPERATION AGREEMENTS</td>
<td>27</td>
</tr>
<tr>
<td></td>
<td>D. REDRESSING ANTITRUST AT AN INTERNATIONAL FORUM</td>
<td>28</td>
</tr>
<tr>
<td>V.</td>
<td>CONCLUSIONS AND RECOMMENDATIONS</td>
<td>30</td>
</tr>
<tr>
<td></td>
<td>DIRECTIONS FOR RESEARCH</td>
<td>31</td>
</tr>
<tr>
<td></td>
<td>RECOMMENDATIONS</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>STAGE ONE</td>
<td>32</td>
</tr>
<tr>
<td></td>
<td>STAGE TWO</td>
<td>33</td>
</tr>
<tr>
<td>VI.</td>
<td>REFERENCES</td>
<td>35</td>
</tr>
<tr>
<td>VII.</td>
<td>INDEX OF CASES</td>
<td>38</td>
</tr>
</tbody>
</table>
I. Introduction

Globalization has unquestionably redefined the way we think about law and economics. The global market, with its assimilating instincts, has found a means of surpassing geographic borders. The growth of cross-border business activity, evidenced by innumerable international transactions, was founded on substantial freedom of contract. But substantial freedom of contract has a strange way of making its presence known. On the one hand, it promises to offer undeniable economic advantages viz. better market access, better prices, better consumer care, etc. On the other hand, it facilitates the production of such undesirable conduct as cartels, predatory pricing, etc.

The challenge then was to regulate contractual freedom in a manner that would not disallow the flow of economic advantages but which would obstruct the detrimental consequences of anti-competitive conduct. India responded to this challenge by first enacting the Monopolies and Restrictive Trade Practices Act, 1969 (MRTPA). With a view to improve domestic legislation and to better equip it to deal with modern commerce, the Competition Act, 2002 ("the Act") was enacted. Both statutes were fairly successful in detecting and redressing antitrust that originated and took place in India. Similarly, both statutes endeavoured to redress antitrust that originated outside India.

However, the Hon'ble Supreme Court of India held in Haridas Exports v All India Float Glass Manufacturers' Association (which subsumed the AKAI v ANSAC) that the jurisdiction of the MRTPC does not extend to the formation of a foreign cartel unless a member of the cartel carries out business in India.

To cure this defect and to redress any anti-competitive conduct which produced an adverse appreciable effect on competition (AAEC) in India, the Competition Commission of India (CCI) was armed with extraterritorial jurisdiction by section 32 of the Act. Extraterritorial legislation is authorized by the Constitution under Article 1.

---

1 The Constitution of India (1950) under Article 39(b) and (c) lays down as a Directive Principle of State Policy that the State shall endeavour to ensure that the ownership and control of resources of the community are distributed according to the common good and that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

2 (2002) 6 SCC 600. In the AMAI v ANSAC case before the MRTPC, AMAI complained that ANSAC was a foreign cartel which had dumped soda ash into India at very low prices and that the same would destroy domestic competition in soda ash. The MRTPC held that section 14 of the MRTPA covered such cases and issued orders accordingly.
Section 32 consists of several parts of several descriptions. Firstly, section 32 addresses agreements, combinations and abuse of dominant position outside India. This is referred to as the subject matter of the provision. Secondly, section 32 confers powers of inquiry upon the Commission. Thirdly, as per the 2007 amendment, the Commission has also been conferred power to pass orders as it may deem fit. These three aspects constitute the language of section 32.

Additionally, there are several intriguing aspects. What is the theoretical basis for redressing international antitrust by way of extraterritorial enforcement of domestic law? It is argued that in a time where the operations of enterprises span across several jurisdictions, there is a burning need to check anti-competitive conduct that adversely affects competition in other jurisdictions. Similarly, it is contested that legal frameworks redressing international antitrust serves to limit international trade and that this could have a detrimental effect on some economies. What are the various instances of infringement that attract the exercise of jurisdiction under section 32? Can these instances of infringement be predicted and classified in a manner that will assist antitrust authorities in future investigations?

These questions are important and need to be answered. For example, it is vital to know the various circumstances which constitute infringement because section 32 comes into effect only through such infringement. However, owing to the limited time available and the limited access to resources, it will not be possible to cover all aspects of section 32. Instead, focus is placed on the enforcement aspects of Section 32. In the absence of any enforcement, section 32 becomes a dead, unproductive and useless provision.

The question that is sought to be answered is this: Can the Competition Act, 2002 effectively locate and redress international antitrust? There is abundant literature on choosing the best framework for enforcing the extraterritorial jurisdiction of the Act. But this paper takes a step backward. The answer to the earlier question cannot be accurate or effective unless we answer another question: What are the various issues/problems

---

3 Article 245(2) reads: “No law made by Parliament shall be deemed to be invalid on the ground that it would have extraterritorial operation.”
relating to extraterritorial enforcement of the Competition Act? No framework for enforcement can be effective unless it adequately addresses, if not, solves the problems existing prior to adopting such framework.

This paper will examine the enforcement aspects of extraterritorial jurisdiction of the Act. Towards this end, the paper will first briefly introduce the concept of extraterritorial jurisdiction and study how the same has been incorporated in the Act. Following this, the various issues relating to extraterritorial enforcement will be itemized and carefully scrutinized. Pursuant to this, various frameworks which allow for extraterritorial enforcement of domestic law will be considered to determine whether the issues raised are adequately addressed. Accordingly, the paper will discuss which framework(s) must be adopted to best fulfil the object of the legislation. Finally, the paper concludes.

II. International Antitrust and Extraterritorial Jurisdiction

Antitrust policy, international or otherwise, is essentially premised on an attempt to strike a balance. In the process of enforcing antitrust law, antitrust authorities undertake a balancing exercise inasmuch as the efficiency gains arising from economies of scale that are created by larger firms need to be balanced against the output reduction associated with allowing larger firms to exercise market power. Applying this standard to domestic antitrust cases is simple and unlikely to trigger any resistance. The problem arises when a state is confronted by an international antitrust matter. A state would continue to pursue an antitrust policy that would deliver maximum benefit to its constituents. Often a situation is created where the antitrust law of one country favours the expansion of efficiency gains whereas the antitrust law of the other country forbids any indiscriminate output reduction.

For several years, the United States was the only country which had adopted any antitrust legislation. Similarly, for a very long time, most antitrust cases were domestic matters which were capable of being redressed in accordance to domestic law. In the rare event

---

5 Ibid.
of an antitrust case that involved a foreign country, reliance was placed on Section 402 of the Restatement (Third) of Foreign Relations Law for the application of US antitrust law (domestic). In the absence of little or no competing antitrust legislation, there were few jurisdictional challenges to the extraterritorial application of US antitrust law.

Extraterritorial jurisdiction refers to the exercise of jurisdiction by an authority, judicial or administrative, to matters which exist beyond the territorial limits within which the authority is located. Such jurisdiction must obviously be conferred and cannot be assumed. Such jurisdiction (not being territorial jurisdiction) which is conferred to courts or other authorities is known as subject matter jurisdiction. Extraterritorial jurisdiction is created by establishing some relationship between the subject matter and the concerned territory. This may be in the form of a connection test, implication test, effect test, etc. For instance, Section 402 of the Third Restatement (supra) is founded on the effects test.

It is clear from the language of the Section 32 of the Act that any agreement, abuse of dominant position or combination, regardless of the jurisdiction of its origin, can be redressed by the Commission if the consequence of such agreement, abuse of dominant position or combination is an “appreciable adverse effect on competition” (AAEC) in the relevant market in India. In other words, the Competition Act, 2002 has unmistakably adopted the “effects doctrine”. The object and mandate of section 32 is to protect

6 Lanucara, Lucio. "The Globalization of Antitrust Enforcement: Governance Issues and Legal Responses." Indiana Journal of Global Legal Studies 9.2 (2002): 435-38. As per section 402, a state would have jurisdiction over “conduct outside its territory that has or is intended to have substantial effect within its territory”.

7 Section 32 of the Competition Act, 2002 reads:

“Acts taking place outside India but having an effect on competition in India
The Commission shall, notwithstanding that,—
(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.”
competition in India from antitrust or anti-competitive conduct that originates from a foreign jurisdiction.

The previous paragraph clearly establishes that section 32 of the Act confers extraterritorial jurisdiction to the Commission. But how is extraterritorial jurisdiction exercised? What are the various issues that are involved with the extraterritorial enforcement of the Act? Is the domestic remedy for redressing international antitrust the best way forward? The following section seeks to throw light on these issues by directly discussing the various issues relating to extraterritorial enforcement.

III. Issues Relating to Extraterritorial Enforcement

From this point forward, our focus shifts exclusively to the enforcement aspect of section 32 and the diverse issues related thereto. This is not to say that the mandate of the Act is being questioned or in any way disputed. The mandate cannot be doubted. However, it would be prudent to examine some of the potential challenges, both theoretical and practical, that may be encountered in exercising extraterritorial jurisdiction under the Act. For the purpose of the present study, our analysis is confined to the following areas viz. utility, conflict of interests, conflict of jurisdiction, blocking statutes and enforceability of foreign antitrust decisions. The aim is to correctly identify the issues and explain how they influence extraterritorial enforcement.

A. Utilitarian Analysis

At the very outset, it would be wise to peruse the language of section 32 once again. The Act provides that “The Commission shall […] have power to inquire […] into […] and pass such orders as it may deem fit […]”. Contrast the current language of the Act with these words: “The Commission shall inquire into and pass such orders as it may deem fit”. In the former case, the Commission is granted power by the Act but is also granted discretion with regards to when such power must be exercised. In the latter, hypothetical case, the statute mandatorily requires the Commission to conduct inquiry and pass orders. This difference is crucial to our analysis because it discloses that the Commission is not bound to exercise its powers even in the face of compelling reason to the contrary.
Competition law is widely thought to assist and facilitate the maximization of welfare. Welfare is an umbrella concept and includes inter alia ‘consumer welfare’ and ‘total welfare’. Accordingly, antitrust policy is expected to function in a manner that will maximize overall benefits and minimize overall costs. But this kind of welfare reasoning is itself criticized on grounds of limiting economic freedom and potentially sacrificing economic welfare for other kinds of welfare.

On the point of exercising extraterritorial jurisdiction, it has been argued that even if a country has a strong interest in prohibiting foreign anti-competitive conduct, it does not necessarily follow that the country’s interests are best advanced by a maximal application of its antitrust laws. This gives rise to two conclusions. First, whereas protecting against the effects of international antitrust may protect domestic competition, it may lead to other adverse consequences such as shortage of supply, inflation, etc. Second, even where prohibiting international antitrust is otherwise desirable, applying domestic antitrust law to redress foreign conduct may prove to be unfruitful. Either way, an important question relating to whether and when extraterritorial jurisdiction must be exercised arises.

Consider the *soda ash cartel*. The foreign cartel was no doubt indulging in anti-competitive conduct, but it offered soda ash to the Indian market at cheaper prices than domestic competitors. In other words, there was a tangible consumer benefit that resulted from the foreign cartel. This example merely serves to illustrate that there are strong reasons that need to be considered before exercising extraterritorial jurisdiction. As a corollary, extraterritorial enforcement may result in business and consumer disadvantages that far outweigh the benefits arising from extraterritorial enforcement.

---

9 Ibid. It is argued for instance that competition can only be guaranteed by placing limitations and restrictions on the functioning and business decisions of an enterprise. This, in turn, is said to restrict economic and business freedom.
The other angle which needs to be considered is whether extraterritorial enforcement of domestic law is the best way of redressing foreign anti-competitive conduct. Authors tend to point to the US experience where excessive invoking of domestic antitrust law resulted in counter-retaliation by other states in the form of blocking statutes (discussed later in this paper) and needless mistrust (which may prove counter-productive to future efforts at cooperation). Even where there is a strong case to redress international antitrust, there may be better options than extraterritorial enforcement such as mutual cooperation, bilateral/multilateral treaties, etc. These frameworks (discussed in detail at a later stage in this paper) are potentially more effective because they facilitate cheaper investigation and exchange of information.

B. Conflicting National Interests

Nations will enact law specific to their unique requirements and legal systems. A law which influences trade such as the competition law of a country will reflect the country’s ideology on trade. International trade involves more countries than one. Often a situation arises where the legal frameworks between nations are not harmonized. The result is that the laws of different countries reflect differing ideologies. In the context of this paper, the result is that the antitrust legislation of different countries seeks to protect different and conflicting interests.

Extraterritorial enforcement of domestic antitrust legislation to redress international antitrust is one of the ways in which these differing ideologies come to conflict. Exercising extraterritorial jurisdiction has the effect of denying market access to foreign firms. Next, consider the case of a foreign producer which will merge with a third party and where the proposed merger will have a net negative effect on the consumer country. Here, it would be prudent for the consumer country to exercise its extraterritorial jurisdiction. However, the proposed merger may deliver several

---


12 Antitrust legislation and policy may reflect and enforce prevailing economic ideology such as protectionism, free trade, import or export restrictions, etc.

13 *Supra* Note 4 at page 996. Sugden argues that this is possible where the foreign firm has a large domestic market on which the foreign firm is greatly dependent.
benefits such as higher revenues to the foreign producer country which would logically resist extraterritorial enforcement of the consumer country’s antitrust law.

There is a fear that antitrust legislation would protect domestic consumers from foreign manufacturers but not foreign consumers from domestic manufacturers. The ultimate consequence of this kind of legislation is mutually distrusting beggar-thy-neighbour competition policies. A second problem that arises due to laws which protect conflicting national interests is limitation on business activity. Even where the laws of all countries are known while business decisions are taken, it is possible that the unintended or unforeseen outcomes of a business decision violates a particular country’s antitrust law and triggers extraterritorial enforcement by that country whereas the same decision and consequences are welcomed by the laws of another country. This kind of a conflict has the undesirable effect of retarding business decision-making and activity.

From the perspective of this paper, the discussion on conflicting national interests seeks to raise two important questions: Whether extraterritorial enforcement can be resorted to in view of numerous domestic legislations, protecting independent and often conflicting interests? And if extraterritorial enforcement of domestic law is not feasible, what framework will best respond to the various issues that challenged the working of extraterritorial enforcement? This second question is considered in detail in Section IV of this paper.

C. Conflicting Jurisdictions
A natural outcome of conflicting national interests is conflicts with regards to jurisdiction arising out of international antitrust matters. To illustrate, consider the case of de Havilland where the European Community Commission (“EC Commission”) banned the acquisition of the Canadian company by a French/Italian consortium. Here two authorities viz. the Canadian antitrust authority and the EC

14 Supra Note 10 at page 357. Noonan makes the argument that whereas government interest analysis usefully suggests that states should not apply their law where the state has no interest in doing so, it is unable to unambiguously identify state interests merely from an analysis of the substantive law in question.
Commission had scrutinized the acquisition deal. Whereas the Canadian authority had granted permission, the EU Commission had refused permission. Consider also the 1997 merger proposal between McDonnell – Douglas and Boeing that led to a serious conflict between US and EU antitrust authorities, almost resulting in a full scale trade war which was avoided because the parties agreed to modify their agreement according to EU demands. Another conflict arose when the European Court of Justice (ECJ) affirmed the decision of the EU Commission to ban the merger of two South African companies, Lonrho and Gencor, involved in mining and processing of platinum. The South African antitrust authority however allowed the merger.

The above cases serve to demonstrate jurisdictional conflicts. Such conflicts arise at two levels: Firstly, when several antitrust authorities claim to have jurisdiction over a particular matter and secondly, when the jurisdiction claimed by different antitrust authorities proposes to enforce conflicting laws. A further question arises as to which authority’s decision must be followed in the event of a conflict. In other words, if one authority allows a merger and another authority refuses permission on grounds that it would violate antitrust laws, what is the basis of determining which decision will prevail? In the de Havilland case, for instance, the antitrust authority which expressed the narrower view prevailed. In the McDonnell-Douglas and Boeing case, the merger ultimately factored in the requirements of the antitrust authority which took a narrower view (European Commission) so as to avoid a trade war between US and EU. These examples show that there is no definitive answer to the above question.

The next question relates to how different antitrust authorities claim to exercise jurisdiction over the same set of facts. Jurisdictions have evolved numerous tests and requirements for this purpose. Some of these include inter alia the effects doctrine, targeting doctrine, nationality/domicile test, implementation test, conspiracy doctrine.

---

3. Paper prepared for presentation at the EEA meeting in Santiago de Compostela.
16 Ibid.
17 Ibid.
18 Ibid.
Some of these are briefly discussed below with a view to show how the problem of conflicting jurisdictions originates:

(1) **Targeting Doctrine:** This doctrine is a variant of the effects doctrine. It requires not only that there is anti-competitive conduct that results in an adverse effect on competition in a market but also that the such conduct must be targeted at that specific market and not generally at all markets.\(^{19}\) The Washington DC Circuit held in the *Vitamins cartel case*\(^{20}\) that a worldwide price-fixing agreement failed to reach the degree of specificity required by eight states but did meet the standards required by Illinois and California.\(^{21}\)

(2) **Conspiracy Doctrine:** According to this doctrine, jurisdiction can be exercised over all members of a conspiracy to engage in anti-competitive conduct if the following four conditions are satisfied viz. a) the defendant and one or more persons conspired to do something, b) that they could reasonably expect to lead to consequences in a particular forum, c) one co-conspirator commits overt acts in furtherance of the conspiracy and d) the acts are of a type which, if committed by a non-resident, would subject the non-resident to personal jurisdiction (by way of the targeting doctrine) under the long-arm statute of the forum state.\(^{22}\) Thus this doctrine is also based on the defendant’s acts (i.e. anti-competitive conduct) and not on the domicile of the parties.\(^{23}\)

(3) **Nationality/Domicile Test:** According to this test, jurisdiction is exercised on an antitrust matter on the basis of the nationality or domicile of one or all of the concerned parties. In other words, an antitrust authority claims to have jurisdiction over any business activity that is governed by antitrust law if one of

---


\(^{20}\) US Dist LEXIS 25073 (D DC 2001).

\(^{21}\) *Supra* Note 19.

\(^{22}\) *Ibid* while quoting from *Cawley v Bloch* 544 F Supp 133, 135 (D Md 1982).

\(^{23}\) *Ibid.*
the parties is domiciled in the jurisdiction of that authority. Applying this test will depend on how the antitrust law or policy of a country has been worded.

(4) **Implementation Test:** The implementation test is best understood by making reference to the judgment that first applied the test to international antitrust matters i.e. the *Woodpulp case* (85/202/EEC (1985) OJ L85/1) In this case, forty one producers and two trade associations were accused ofconcerting with each other with regards to the pricing of products and of ultimately implementing an illegal pricing agreement. The European Court of Justice (ECJ), relying on Article 85 of the Rome Treaty, applied the “implementation test” and held that the territorial scope of Article 85 included not only the place where the agreement was formed but also the place where the anti-competitive agreement was implemented. It must be remembered that the “implementation test” is different from the effects doctrine in that the effects doctrine allows a situation where the effects of conduct implemented outside a particular jurisdiction but felt within that jurisdiction can be redressed whereas the implementation test would not allow it to be redressed.

(5) **Effects Doctrine:** The effects doctrine in competition law refers to anti-competitive conduct which results in an adverse effect on competition. In the context of international antitrust, this means that foreign anti-competitive conduct which causes an adverse effect on the competition in a domestic market can be redressed according to the laws of the domestic jurisdiction. It is prudent to note that the effect doctrine is itself adopted subject to a number of considerations and variations. For instance, India u/s. 32 of the Act has adopted a widely worded effect doctrine subject to the consideration that anti-competitive conduct must result in an appreciable adverse effect on competition in the relevant market in India.

---

25 Ibid.
Initially, in the United States, the effects doctrine would apply to cases only where it could be proved that the effect was intended.\(^\text{26}\) Later, in *Timberlane Lumber Co v Bank of America NT and SA*,\(^\text{27}\) applicability of the effects doctrine was made subject to “international comity”.\(^\text{28}\) The 1993 decision of the U.S. Supreme Court in *Hartford Fire*\(^\text{29}\) changed the position by stating that comity should not even be considered unless different potentially applicable laws gave rise to incompatible requirements.\(^\text{30}\) However the 2004 decision of *Empagran*\(^\text{31}\) re-emphasized the importance of comity considerations.\(^\text{32}\) The statutory position in the United States is given by the Foreign Trade Antitrust Improvements Act (“FTAIA”).\(^\text{33}\) According to the FTAIA, the Sherman Act does not apply to anti-competitive conduct in export commerce unless such conduct has a direct, substantial and reasonably foreseeable effect on trade and commerce in the United States.\(^\text{34}\)

The purpose of the above discussion was to show how different antitrust authorities could possibly exercise extraterritorial jurisdiction over the same matter as a means of further illustrating how jurisdictional conflicts come to surface in the field of international antitrust. As mentioned earlier, the jurisdictional conflicts are compounded by the fact that different antitrust authorities seek to enforce ideologically divergent laws.

One method of solving the problem of several conflicting jurisdictions was to resort to Currie’s governmental interest analysis.\(^\text{35}\) There were three possible situations that could arise upon the application of governmental interest analysis: True conflicts,\(^\text{36}\)

---

\(^{26}\) *Supra* Note 19. See also *US v Aluminum Co of America* 148 F 2d 416 (2d Cir 1945).

\(^{27}\) 549 F 2d 597, 614 (9th Cir 1976).

\(^{28}\) *Supra* Note 19.


\(^{30}\) *Supra* Note 19.

\(^{31}\) *Empagran S.A. v F. Hoffman LaRoche, Ltd.*, 315 F.3d 338 (D.C. Cir. 2003).

\(^{32}\) *Supra* Note 19.


\(^{35}\) As per governmental interest analysis, courts were expected to study the substantive laws of all relevant states in order to determine which states had a good claim to apply their law to the dispute. If the court’s analysis revealed that the substantive policies of a state would be advanced by the application of its law to the antitrust dispute, the state is said to have an interest in having its law applied.

\(^{36}\) A true conflict is one in which more than one state has a good claim in having its law applied.
false conflicts\textsuperscript{37} and an unprovided for case.\textsuperscript{38} Despite winning wide acceptance in US, the flaws of interest analysis were obvious. For instance, interest analysis failed to adequately explain how laws will apply where a true conflict exists and what solution could be provided for a true conflict situation in which the application of the laws of one country would result in a further detriment of interests of the other nation.

\textbf{D. Blocking Statutes}

A blocking statute is another barrier mechanism which is applied to restrict the extraterritorial enforcement of the antitrust law of other jurisdictions. The provisions of such statutes take effect where it is found that the extraterritorial applicability of the antitrust law of another country is against the principles of international comity. Such a situation is most likely to arise when the antitrust law and policy of two countries is different and where one of the country seeks to enforce its antitrust policy against anti-competitive conduct in the other country. Needless to say, this kind of extraterritorial enforcement amounts to breach of the domestic law and by extension, of territorial sovereignty and is a cause of concern for the country in which enforcement is sought to be made. To prevent such enforcement, blocking statutes came into existence.

The history of blocking statutes in antitrust law is best understood by examining the response of some nations to the profusion of extraterritorial enforcement of US antitrust law. This was on account of the relatively liberal standards on which US Courts granted subject matter jurisdiction over anti-competitive conduct that originated in foreign jurisdictions.\textsuperscript{39} Initially, US efforts at extraterritorial enforcement of antitrust law were countered by diplomatic protests. But this soon turned out to be ineffective and nations felt the need to resort to stronger measures.\textsuperscript{40}

\textsuperscript{37} A false conflict is one in which the interest analysis reveals that only one state has a good claim in having its law applied.

\textsuperscript{38} An unprovided for case exists where interest analysis reveals that none of the state has an interest in applying its law.


\textsuperscript{40} \textit{Id} at 578 – 79.
The United Kingdom has constantly held that tests under US antitrust law such as foreclosure of foreign market or refusal to accept US technical standards which constitute a sufficient “effect” under the effect doctrine for extraterritorial enforcement show that US antitrust law is being used as a trade policy to open markets perceived to be closed.\textsuperscript{41} With reference to antitrust law, the UK has enacted the Protection of Trading Interests Act, 1980. According to this statute, the Secretary of State is empowered to prohibit compliance with foreign measures for regulating or controlling international trade and the supply of any commercial documents or information in response to the requirements of a foreign court.\textsuperscript{42}

The Foreign Extraterritorial Measure Act in Canada allows a resident to recover from a person who has received money under a foreign antitrust judgment that has been ordered not to be enforced by Attorney General of Canada.\textsuperscript{43} Similarly, under Australia’s Foreign Antitrust Judgments (Restrictions of Enforcement) Act, 1979, where the Attorney-General is satisfied that a foreign court has delivered an antitrust judgment that is inconsistent with international comity, or which adversely affects trade or commerce, or injures national interest, the Attorney-General may declare that judgment shall not be recognized or enforced in Australia.\textsuperscript{44} As per a corresponding French statute, even asking for commercial documents would constitute a violation of French law.\textsuperscript{45} Moreover, a number of statutes provided for non-recognition of foreign multiple damage judgments.\textsuperscript{46}

The preceding paragraphs emphasize the effect of retaliatory legislation or blocking statutes on attempts at extraterritorial enforcement of domestic antitrust law. Such statutes virtually render extraterritorial jurisdiction meaningless because any order passed while exercising extraterritorial jurisdiction cannot be enforced. Besides blocking statutes have two discouraging effects: Firstly, it will deter plaintiffs from

\textsuperscript{42} \textit{Id} at 189.
\textsuperscript{44} See section 3(2)(b) of the Foreign Antitrust Judgments (Restriction of Enforcement) Act, 1979.
\textsuperscript{45} \textit{Supra} Note 41.
\textsuperscript{46} See Protection of Trading Interests Act, 1980 (UK) and Foreign Antitrust Judgments Act, 1979 (Australia).
pursuing antitrust violations and secondly, it could cause reluctance among courts in recognizing subject matter jurisdiction.47

E. Enforceability of Foreign Antitrust Decisions

The next roadblock to extraterritorial enforcement of antitrust law is the problems associated with enforcing foreign judgments. This must not be confused with the earlier discussion on blocking statutes or jurisdictional conflicts. The present discussion focuses on the issues relating to recognition and sanction in domestic authorities of decisions delivered by foreign antitrust authorities.

In enforcing foreign antitrust decisions, international comity is a major consideration. Comity refers to the broad concept of respect among co-equal sovereign nations and helps determine the recognition one nation allows within its territory to the legislative, executive or judicial acts of another nation.48 This means that antitrust authorities are required to consider the significant interests of other nations that could be affected by enforcement of its laws.49 This gives rise to two possible interpretations. One interpretation is obvious: Antitrust authorities must factor in foreign national interests when delivering decisions. The other interpretation is that where such foreign interests have not been duly regarded and respected while arriving at a decision, there is no obligation on the part of the foreign nation to recognize and enforce such decision.

Antitrust authorities are required to consider all relevant factors. These factors include inter alia relative degree of violation of antitrust law between different nations, nationality of persons involved in conflict, existence of reasonable expectations that would be furthered or defeated by enforcement, degree of conflict with foreign law or articulated foreign economic policies, the extent to which enforcement activities of another country with respect to the same person (including remedies resulting from

47 Supra Note 45 at 605.
those activities) may be affected, the degree of effectiveness of antitrust enforcement between different countries.\textsuperscript{50}

It would be well to note here that there are a number of other factors relating to how enforceability of foreign antitrust decisions renders extraterritorial jurisdiction ineffective. These include absence of reciprocal international agreements for recognition of foreign judgments between nations, whether the order of an antitrust authority of one country qualifies to be enforced as a judgment or decree in another country, technical infirmities in antitrust decisions, etc. However, it was not possible to make an honest analysis into these areas in the given time.

As mentioned earlier, the discussion under this section was prepared to illustrate the various issues and problems which relate to extraterritorial enforcement. In this paper five issues were examined viz. utilitarian considerations, conflicting national interests, conflict of jurisdictions, blocking statutes and enforceability of foreign antitrust decisions. This list is illustrative and by no means exhaustive. A number of other factors play an important role in determining the efficacy of extraterritorial enforcement of antitrust law. However, an examination of the five factors above provides a sufficient background to draw a far-reaching conclusion.

In Conclusion, Section 32 in itself may be largely unsuccessful in redressing international antitrust. This raises a question that was stated earlier and which is repeated now: What legal framework must be adopted to effectively redress international antitrust?

\textbf{IV. Frameworks for Redressing International Antitrust}

Up to this point, this paper has discussed the various aspects involved in extraterritorial enforcement of domestic antitrust law and further considered some of the problems relating to extraterritorial enforcement which potentially render domestic redressal measures ineffective. This however does not take away from the fact that the prevalence of international antitrust (like international cartels) is very real and needs to be countered effectively as a means of ensuring the healthy growth of competitive markets.

\textsuperscript{50} \textit{Ibid.} The Guidelines address the issue from a US perspective. This paper attempts to state these considerations from a general perspective.
Accordingly, from this point forward, the paper will make attempts to study alternative legal frameworks which facilitate the redressal of international antitrust and will endeavour to determine which framework(s) is/are best suited to India. The following frameworks will be considered: Harmonization of domestic laws, Mutual Cooperation between antitrust authorities and International Antitrust Agreements.

A. Harmonization of Domestic Antitrust Laws

The call for harmonization of domestic antitrust laws appears to be substantially influenced by the deficiencies that arise by way of extraterritorial enforcement. At some level, there appears to be an understanding that enforcement becomes difficult if not altogether impossible if there are a number of laws, divergent in ideology and protecting different and often conflicting interests. Indeed, harmonization is hoped to improve efficiency manifold, particularly in the areas of antitrust investigations, enforcement actions involving international activities and reducing enforcement conflicts between jurisdictions.\(^{51}\)

The Competition Act, 2002 or any other antitrust law for that matter must not be understood as standalone legislation. Antitrust law forms an integral part of the larger discipline of trade law and policy. It was for this very reason that the World Trade Organization (WTO) considered adopting multilateral rules to tackle anti-competitive conduct in its Singapore Ministerial in 1996.\(^{52}\) The important point here is that harmonization of domestic antitrust law in effect means that nations not only adopt the same standards and principles of competition law but by extension, the same standards and principles of trade.\(^{53}\)

This paper focuses on redressing international antitrust. The focus is thus on extraterritorial enforcement of domestic antitrust law. The logic is that harmonization of domestic law would assure the same standards for extraterritorial enforcement of


\(^{52}\) Ibid.

\(^{53}\) Substantially similar standards of trade could have important ramifications, both domestic and international. It could for example have the effect of higher commodity prices.
law and would moreover reduce jurisdictional conflicts. This would mean for instance that the relevant nations (whose laws are harmonized) would adopt the same parameters for determining a breach of competition in foreign markets (effects doctrine). By adopting similar standards, the aspiration is also that such nations would discourage if not completely forbid anti-competitive conduct which adversely affects competition in foreign markets, among companies that are incorporated in their respective jurisdictions. Additionally, harmonization of domestic law was expected to provide greater clarity in matters of jurisdiction because each nation would have a better idea as to when to exercise its jurisdiction and when to allow the other nation to exercise its jurisdiction.

But there are a number of issues relating to harmonization itself. The most important question that needs to be asked is whether harmonization of domestic antitrust law solves the problems related to extraterritorial enforcement and better facilitates the redressal of international antitrust? This paper hopes to answer this question in the following paragraphs.

First, there is the argument that though harmonization will assure that similar standards are adopted and applied, it cannot guarantee that there will be a complete consensus between nations where there is scope for discretion in the application of competition principles. This is a problem which arises owing to the diversity in tastes, preferences, understanding and mentality of people belonging to different jurisdictions. To restate the argument, differences in antitrust enforcement are a result of different ideas about what will work best to achieve common norms. Thus harmonization may put countries on similar antitrust regimes with respect to redressing foreign anti-competitive conduct and may also reduce jurisdictional conflicts but application of similar antitrust policies, influenced by specific preferences and attitudes will still render different results.

54 Supra Note 52 at 367. The authors explain that in Europe where markets were historically divided on national lines and where consumer preferences are considerably different, it was difficult to persuade enforcement authorities that products that do not seem plausibly to be close substitutes may in fact be so.
Second, it is believed that harmonization is a political and economic instrument. As has constantly been stressed throughout the discussion on harmonization, antitrust is intricately linked to trade policy. Thus harmonization of domestic antitrust law could trigger substantial harmonization of trade law or at least bring the trade policies of two countries (who choose to harmonize their antitrust laws) on the same page. The fallout of the possibility of double harmonization is that nations are reluctant to engage in the process of antitrust harmonization, fearing that their trade policies become conditional or subverted to those of another nation. Moreover, as discussed in the previous argument, since there is no guarantee that harmonization of antitrust laws will effectively redress foreign anti-competitive conduct, there is little incentive to engage in harmonization.

Thirdly, there is a problem of costs. Harmonization of domestic antitrust laws is often defended on the basis that it will help reduce the costs involved with multiple antitrust regimes. However this defence is at least somewhat fallacious because it does not take into account the costs involved in the process of harmonization and this in itself is erroneous. Proponents of harmonization have not shown how harmonization of antitrust laws will result in a system that is more efficient than a system of multiple antitrust laws. Moreover, harmonization may be beneficial to one stakeholder (say the producer) but may be detrimental to another stakeholder (say the consumer). A comparative analysis of costs of harmonization versus continuing with the current regime is beyond the scope of this paper. For now, it is sufficient to state that in the absence of any comparative costs analysis, any proposition in favour of harmonization must be doubted.

B. Mutual Cooperation between Antitrust Authorities

56 Ibid. The authors argue that one of the reasons why the United States has historically resisted attempts at harmonizing international antitrust enforcement is grounded in political considerations. They argue that since the US has an interest in obtaining credible long-term commitments from other nations in favour of the kind of economic liberalization preferred by the US, the US prefers bilateral antitrust harmonization efforts rather than similar global efforts. This argument is premised on the proposition that adherence to the economic policies of the US is costly and that such adherence is itself a reflection of long-term commitment.
57 For one paper which attempts a cost-benefit analysis, see McGinnis, John O. “The Political Economy of International Antitrust Harmonization”. William and Mary Law Review. 2003. 549.
Multiple antitrust regimes indisputably pose several enforcement hurdles. Some of these hurdles were seen in Section III of this paper. Repeatedly, this paper has tried to emphasize the fact that problems in antitrust enforcement are most likely to surface in the area of extraterritorial enforcement i.e. when nations seek to redress anti-competitive conduct which takes place outside their territories. One method of solving these problems is by resorting to harmonization of domestic antitrust legislation. However, harmonization, as argued in the previous segment, may have problems of its own. Another method of solving enforcement issues is through cooperation between antitrust authorities. This may involve communication, coordination of efforts and sharing of information.

The fundamental question that arises while discussing the efficacy of cooperation between antitrust authorities is whether such efforts at cooperation will deliver any positive result in view of the vast differences that subsist in the substantive law, procedure and national interests of two or more jurisdictions? The answer to this question more or less tends to be in the affirmative. However, it must be noted that the answer to the question has been informed by the experience of cooperation among antitrust authorities over the years. The Competition Act, 2002 has provided a framework for cooperation between the CCI and other antitrust authorities.58 Thus the CCI is empowered to enter into a memorandum or arrangement for cooperation in antitrust enforcement with other anti-competitive authorities around the world.

Initial efforts at redressing international antitrust were steeped in confrontational extraterritorial enforcement. This is best exemplified by the functioning of the US antitrust authorities which led to nations such as Britain, France, Australia and Canada resorting first to diplomatic protests and later to blocking statutes. This reaction has been discussed earlier in this paper. Things began to change after the

---

58 Section 18 of the Act, titled ‘Duties of the Commission’ provides that:
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.
occurrence of the uranium cartel. Confrontational enforcement led to disadvantages in important aspects of foreign relations. The Organization for Economic Cooperation and Development (OECD) adopted a recommendation on cooperation between member countries on restrictive business practices affecting international trade in 1967. This recommendation has been amended several times since.

Meanwhile, Germany and the United States evolved a cooperative relationship to redress antitrust from their previous efforts at World War II decartelization.

Two questions that logically arise are what kind of cooperation do antitrust authorities engage in and how does cooperation between antitrust authorities help in international antitrust enforcement? Here it must be remembered that antitrust cooperation is premised on the principle of comity i.e. giving regard to the important and strategic interests of other nations.

A general answer to the first question relating to kinds of cooperation would include activities in the nature of sharing non-confidential information, joint enforcement, joint investigation, etc. More specifically, investigatory cooperation includes notification of counterpart authorities about a proposed investigation, explaining the legal theories on which the investigation is founded and sharing research and other subpoenaed evidence. Similarly, remedial cooperation between antitrust authorities involves the factoring of important interests of the authorities while formulating a

---

59 Foreign uranium producers had established a cartel to counter a US ban on uranium imports. The US ban was calculated to protect domestic producers from foreign competitors. The US court which was hearing the arguments of the plaintiff American firm served discovery orders upon foreign defendants. This resulted in retaliatory sentiments by the foreign court which saw the United States as trying to undermine important national and strategic interests. This also led to some nations adopting blocking statutes. See re Westinghouse Elec. Corp. Uranium Contract Litig. [1978] A.C. 547. Also see re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).
61 Ibid.
62 Ibid.
remedy, joint negotiation and sharing information about injury and about the impact of the proposed remedy in each jurisdiction.64

The answer to the second question relating to how cooperation between antitrust authorities is useful in redressing international antitrust is grounded in principles of trust and fairness. The most basic ingredient in international antitrust cooperation is the principle of non-discrimination between nations and antitrust authorities.65 The second ingredient is the principle of negative comity.67 According to the negative comity principle, although a nation has the right to apply its antitrust law to a certain set of facts and redress antitrust in its own jurisdiction, it chooses not to because it is of the opinion that significant interests of other nations may be affected by exercising such jurisdiction.68 The third ingredient is the principle of positive comity. According to the positive comity principle,69 there is a deliberate act of cooperation and reciprocal assistance between domestic antitrust authorities in several jurisdictions.70 The positive comity principle may be distinguished from the negative comity principle on the ground that negative comity merely involves a decision not to act in certain cases whereas positive comity contemplates a purposeful act.

Mutual cooperation between antitrust authorities is scarcely replaceable in redressing international antitrust. The very foundation of cooperation serves to alleviate some of the concerns that were raised in an earlier section in the paper. For instance, mutual cooperation strikes at the root of problems such as jurisdictional conflicts and national interest conflicts. It further prevents the problems of blocking statutes and

---

64 Ibid. The author holds that remedial cooperation is important where one authority has deferred to another authority despite having itself suffered a distinct injury and where the party indulging in anti-competitive conduct is an economically important actor in one jurisdiction but not in the other jurisdiction.

65 The non-discriminating principle requires nations not to discriminate among nations or between domestically produced goods and imported goods or domestic services and foreign services. This principle would include both direct and indirect discrimination.

66 Montini, Massimiliano, Fondazione Mattei, and University of Siena. "Globalization and International Antitrust Cooperation." Proc. of Trade and Competition in the WTO and Beyond, Venice. 1999

67 The negative comity principle may be understood as a doctrine of politeness and good manners between nations according to which one nation defers its rights in favour of another nation where the latter nation may be prejudiced by the exercise of the former nation’s rights.

68 Supra Note 67.

69 Cooperation agreements between antitrust authorities generally allow for a framework where the relevant authorities can voluntarily elect a system of positive acts of cooperation on the happening of certain contingencies.

70 Supra Note 67.
enforceability in foreign jurisdictions. One concern that arises is the uncertainty relating to antitrust enforcement in areas which are not subject to mutual cooperation. Will traditional extraterritorial enforcement operate? And will this not vitiate existing gains from comity and cooperation? These are interesting areas of research in international antitrust redressal and must be explored. Another concern that arises is whether mutual cooperation between antitrust authorities will prevent the Commission from exercising its discretion with regards to inquiring into and redressing foreign anti-competitive conduct?

C. International Cooperation Agreements

The brief discussion that follows on international cooperation agreements for international antitrust redressal may appear to be superfluous and at least partially repetitive of the arguments discussed under “mutual cooperation between antitrust authorities”. Nevertheless, the distinction between mutual cooperation and international cooperation agreements is maintained for the purpose of this paper because cooperation between antitrust authorities can be initiated by the CCI with the prior approval of the Central Government\(^1\) whereas an international cooperation agreement between one or more jurisdictions is in the nature of a treaty and can only be entered into by the Government and thus constitutes a distinct measure of antitrust redressal.

An international cooperation agreement on redressing antitrust is an agreement which incorporates a provision for positive comity between the parties to the agreement.\(^2\) A cooperation agreement is thus designed to include various features that will promote mutual cooperation between antitrust authorities. Under a cooperation agreement, where one party is satisfied that anti-competitive conduct in the territory of the other party is causing an adverse effect on the competition in its country, it may notify the other party and request the competition authorities in that country to initiate

\(^1\) See section 18 of the Competition Act, 2002.
enforcement action against anti-competitive conduct.\textsuperscript{73} In this way, positive comity is a mechanism which pre-emptively avoids jurisdictional clashes by putting the onus of investigating into anti-competitive conduct on the party where the alleged conduct takes place.\textsuperscript{74}

The US concluded bilateral agreements for redressing international antitrust with Germany in 1976,\textsuperscript{75} Australia in 1982,\textsuperscript{76} Canada in 1984 and later in 1995\textsuperscript{77} (which replaced the 1984 Agreement) and the European Union in 1991.\textsuperscript{78} The US-Canada antitrust agreement in 1995 was followed by an Enhanced Positive Comity Agreement in 2004.\textsuperscript{79} Similarly, the EU antitrust agreement was followed by a EU/US Positive Comity Agreement in 1998.\textsuperscript{80}

**D. Redressing Antitrust at an International Forum**

At the very outset, this paper identified the current economic activity as extending across several jurisdictions. There was a view (which has since lost currency) that cross-border competition issues are best addressed at the international level. This led to several discussions on antitrust redressal at various international forums such as the United Nations Conference on Trade and Development (UNCTAD), the Organization for Economic Cooperation and Development (OECD) which had issued a non-binding recommendation in 1967, the International Competition Network (ICN) and the World Trade Organization (WTO).\textsuperscript{81} This also led to the commissioning of a working group at the WTO to study the relationship between

\textsuperscript{73} For example, see Article V of the EU/US Competition Cooperation Agreement, 1991. For the full text of the Agreement, see http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:21995A0427(01):EN:NOT.


\textsuperscript{78} Supra Note 76.


trade and competition and to make recommendations on how the WTO should tackle international antitrust issues.\textsuperscript{82}

The Working Group on the Interaction between Trade and Competition Policy was initiated at the Singapore Ministerial of the WTO in 1996.\textsuperscript{83} Later at the Doha Ministerial in 2001, member states had agreed to place greater focus on competition issues.\textsuperscript{84} The future course for discussion was charted in paragraph 25 of the Doha Ministerial Declaration. According to the Declaration, the Working Group would focus on clarification of core principles including transparency, non-discrimination, procedural fairness, hardcore cartels, modalities for voluntary cooperation, etc.\textsuperscript{85} However, no consensus could be reached between member nations and after the Cancun Ministerial ended in a deadlock in 2003, the General Council of the WTO dropped competition policy from the Doha agenda.\textsuperscript{86}

The WTO experience brings out a few important points. Firstly, competition policy must be discussed as far as possible as a separate issue. The breakdown of talks in Cancun shows that where competition policy is seen as part of a larger agenda on trade, it will often be confined to the sidelines. This is however not to doubt that there are strong linkages between trade and competition policy. Secondly, it shows that different nations perceive competition issues differently and that this difference is in no small part influenced by the different levels of development of countries across the world. The developing countries were concerned that an international competition regime could subvert their development agendas. Thirdly, as a logical extension of the second point, it is necessary to arrive at a consensus with regards to

\textsuperscript{82} Ibid.


\textsuperscript{84} Ibid.

\textsuperscript{85} Ibid. Paragraph 25 of the Doha Declaration reads: "In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them" 

\textsuperscript{86} Ibid.
basic issues of international trade before seeking to discuss an international regime to counter antitrust.

These frameworks are common but do not represent the entire catena of mechanisms by which international antitrust can be redressed. Which framework is suitable to India? This writer is of the opinion that from the perspective of an antitrust regime that has proactively commenced operations not too long ago, it would be preferable not to force any one choice upon the antitrust authority. No framework is foolproof. Nor was any framework designed to be foolproof. The attempt throughout this paper has only been to identify the difficulties associated with extraterritorial enforcement and briefly discuss frameworks that would better achieve the object of the Competition Act, 2002. It is suggested that India should be careful while adopting a framework to tackle international antitrust so as not to subvert its trade advantages.

V. Conclusion and Recommendations

The following paragraphs will briefly summarize the main aspects that were discussed in the paper before suggesting directions in research and making recommendations on the basis of the findings of the paper. The Competition Act, 2002 provides for extraterritorial enforcement under section 32 of the Act. According to this section, the CCI is empowered to investigate and issue orders to forbid any anti-competitive conduct that results in an appreciable adverse effect on competition in India. This is a restatement of the effects doctrine.

Following this, the paper inquired into the various issues relating to extraterritorial enforcement of domestic antitrust laws. This inquiry was not unintended or without reason. A number of frameworks have been adopted by other jurisdictions to better redress international antitrust. It is opined that before adopting a framework, the CCI must first be informed about the problems associated with enforcement of domestic law and then determine whether the newer frameworks adequately address these problems. Four frameworks viz. harmonization of domestic laws, mutual cooperation between antitrust authorities, international cooperation agreements and redressing antitrust at an international forum were discussed.
Directions for Research

During the course of research, a number of important areas were identified but could not be discussed at length owing to limited time or for reason of being outside the scope of the present study. This writer seeks to contribute by itemizing these research areas with the hope that these areas will be inquired into.

1. What are the various points of infringement of antitrust laws that may trigger extraterritorial jurisdiction? Some points of infringement are known to us by way of case law but an understanding of possible infringement points will better inform antitrust authorities in redressing anti-competitive conduct.

2. What are the economic effects of international antitrust and by extension of extraterritorial enforcement? This paper briefly discussed utilitarian considerations. An economic analysis of international antitrust will strengthen the international antitrust regime or alternatively, better prepare the antitrust authorities on when to exercise discretion in antitrust redressal.

3. What are the various other problems/issues associated with extraterritorial enforcement of domestic antitrust law? This paper considered only five issues owing to paucity of time. A deeper study in this direction will better convince antitrust authorities in favour of abandoning the domestic redressal regime. Alternatively, it may give good reasons to the authorities to do the opposite.

4. What are the linkages between trade and antitrust law with specific reference to adopting mutual cooperation or cooperation agreement regimes? A focussed study in this area will either make prevalent concerns disappear or give good reasons to antitrust authorities to resist such regimes.

5. What are the costs of harmonizing the domestic antitrust laws of one or more jurisdiction? Does harmonization better preserve executive discretion of the antitrust authority when compared to international cooperation agreements? Research into these aspects will be undeniably difficult because it requires a fairly accurate estimate of all possible costs.

Recommendations
This paper was not intended to be standalone research. It was for this very reason that throughout the course of the paper, this writer has raised a number of issues which were important but which were not possible to be addressed in this paper. It was also for this reason that the previous paragraphs have been dedicated to “directions for research”. Each of those issues must be inquired into and must help build the body of literature on the subject. From the point of view of recommendations, it needs to be stressed that the following suggestions need to be enriched by inquiry into ancillary aspects such as international trade considerations, basis for international antitrust regimes, effect of cooperation on trade advantages, etc. Having said this, this writer proceeds to discuss some suggestions to redress international antitrust.

These recommendations are divided into two stages. Stage one recommendations deal with what can be done in the present. Stage two recommendations deal with courses of action that can be pursued in the future i.e. after sufficient development of antitrust law in India. This paper is focussed on redressing international antitrust and hence, the following proposals suggest better methods of tackling international antitrust. However, it is critical to note that this paper does not make suggestions that are best suited to India from a trade or economic perspective.

Stage One

1. **Harmonization:** Despite the concerns surrounding harmonization of domestic antitrust law, harmonization may be adopted as means of redressing international antitrust. With regards to extraterritorial enforcement, this means that nations will have to adopt the same tests and the same standards.

   a. This recommendation is made conditional on a study being made into the costs of harmonization as well as a study into the possible negative effects on trade policies that result from harmonization.

   b. It is also necessary to share information with other jurisdictions with regards to economic effects, particularly in the nature of what constitutes adverse effect on competition, relevant market, etc.
c. It is essential that India must not be bound by any agreement that mandates harmonization so as to give India sufficient possibility to withdraw itself from the harmonization process.

2. **Mutual Cooperation:** The CCI must consider entering into agreements, formal or informal, with other antitrust authorities for the purpose of redressing international antitrust. Cooperation between antitrust authorities in matters relating to foreign anti-competitive conduct will prove beneficial in international antitrust redressal.

a. Until further experience and development of antitrust law in India, it is advisable to engage in informal cooperation between antitrust authorities. This will have two benefits: (1) The CCI can witness the effect of cooperation between antitrust authorities, (2) There is no reciprocal expectation on the CCI which is of a binding character

b. There needs to be active interaction between antitrust authorities on points of standards, preferences, application of law, instances of infringement, etc. Cooperation becomes meaningless unless antitrust authorities know what to expect out of each other.

c. It is also necessary that antitrust authorities will discuss important factors such as currency differences, differences in local demand and supply and examine these factors on international antitrust.

**Stage Two**

3. **International Cooperation Agreements:** The CCI may consider recommending to the Central Government to enter into cooperation agreements with other nations for redressing international antitrust. Cooperation agreements can be either ‘non-binding law’ (OECD Recommendation, 1967) or ‘mandatory law’ (European Community Treaty). It is suggested that until the CCI is enriched by greater experience of tackling antitrust and until the effects on antitrust law on trade are better understood, it would be better to enter into non-binding agreements. A non-binding agreement would allow India to aspire to a standard rather than have a standard imposed upon it.
4. **International Antitrust Redressal Forum:** As discussed earlier, a number of forums have considered the possibility of redressing international antitrust at a global level. The WTO which had commissioned a Working Group to explore this possibility eventually had to shut down the working group. An international forum to redress international antitrust may be fairer given that all nations are required to submit to the same rules. Even so, the rules may affect the trade policies of some nations more than they affect the trade policies of other nations. It is therefore imperative that before seeking such a forum or before participating in such forum, India must not only fully understand the effects of antitrust law on trade but also try and resolve other outstanding international trade issues as far as possible.
VI. References


INDEX OF CASES

1. Haridas Exports v All India Float Glass Manufacturers’ Association (2002) 6 SCC 600


3. Cawley v Bloch 544 F Supp 133 (D Md 1982).

4. US v Aluminum Co of America 148 F 2d 416 (2d Cir 1945).

5. Timberlane Lumber Co v Bank of America NT and SA 549 F 2d 597, 614 (9th Cir 1976).


10. re Uranium Antitrust Litigation, 617 F.2d 1248 (7th Cir. 1980).