A research paper on

“Competition issues in Foreign Trade: with special reference to India”

Submitted to

Competition Commission of India

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Disclaimer

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Pooja Srivastava
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Abstract:

This paper focuses on these points:

- Indian foreign trade: composition
- Trade policy in India: Historical perspective
- Highlights of the Indian foreign trade policy: 2009-14
- Assessment of Indian foreign trade policy in the backdrop of the competition act
- Non-tariff barriers and competition policy e.g. anti dumping and qualitative restrictions
- Extra territorial jurisdiction
- Trade liberalization and competition policy
- Areas to improve or concentrate
1. Introduction

An individual gains from specialisation in a particular task by being able to exchange the returns for much greater variety of goods and services than if that one had attempted to be self sufficient; equally countries can gain by producing those goods and service in which they have a comparative advantage as propounded by David Ricardo. Previous to him Adam smith gave his theory of “Absolute Advantage”. Later on many trade theories were given like Haberler gave his “Theory of opportunity cost” and Heckscher- Ohlin propounded a modern theory.

All the nations have come to see the benefits of cross border trade in the form of potential profits and new products. However trade brings with it the competition that naturally occurs when two economies exchange goods and services for money. Each side of exchange hopes to maximize their own benefit. All the trade theories have said that one nation competes with others in order to have greater share of benefits.

Trade can either be internal like within India and international that all of us actually mean by trade. If a country has international trade relation then it must have trade strategy that refers to the system of government interference in foreign trade. The nature of government interference or trade policy have very broad implications- it has impact not only on the volume of and composition of imports and exports, but also on pattern of investment and direction of development competitive conditions entrepreneurial business attitudes, consumption patterns etc.

There are two types of trade strategies namely-:
• **Outward looking strategy**- in which trade and industrial policies do neither discriminate between production for the domestic market and exports, nor between purchase of domestic goods and foreign trade.

• **Inward oriented strategy**- which discriminates against foreign goods by protecting domestic industries from foreign competition.

In practice it is difficult to distinguish between both strategies. If we talk about the trade strategy of India then we find that India opted for Inward oriented policy till 1960’s. Outright ban on import of many products, quantitative restrictions, tariffs wall, which was one of the highest in the world and administrative restrictions like import licensing, foreign exchange regulation etc. were important instruments used to pursue this strategy. Later on India shifted from policy of Import restriction to policy of Export promotion and globalization.

**1.1 Cross border competition issues**-

Regarding internal anti competitive practices each country have strong competition law but due to increasing trend of integration in global economy countries are more prone to anti competitive practices operating on global scale. Some of the anti competitive of practices that affect countries are-

- Market power in global or export markets
- Barriers to import competition
- Foreign investment
Cross border market power

International cartels and market sharing agreements between firms in two or more countries are generally recognized as being akin to horizontal price-fixing and other collusive agreements within a single country. In both cases, competition is limited, prices are raised, output is restricted, and markets are allocated for the private benefit of firms. To the extent that their effects in jurisdiction are similar to those of national cartels, the enforcement of existing competition law should go far in providing a remedy. For example, in the 1940s and 1950s, the United States anti-trust authorities prosecuted a large number of cartel cases involving international markets for primary products and manufactured goods. These cases involved price fixing and the direct allocation of national markets among firms that would otherwise be in competition, reinforced by prohibitions against importing and exporting by the participating firms. In the 1990s, there has been a new wave of prosecution of international price-fixing cartels among producers of such products as lysine, citric acid and fax paper.

The largest international cartel was Electrical equipment cartel that was formed in 1930 that comprised of 40 industries, in which 17 were in Switzerland, 4 in France, 3 in Sweden. Another big cartel was that Radio equipment cartel of 1927. In 1969 two large motor vehicle monopolies the America owned Chryslar Corporation and Japanese company Mizubishi heavy industries made cartel.

Export cartels can be divided into two groups. ‘Pure’ export cartels that exclusively deal the foreign markets. ‘Mixed’ export cartels restrain competition in the exporting country’s home market as well as in foreign markets. Pure export cartels can’t come under the jurisdiction of most countries’ Competition laws for two reasons-1) these cartels are considered to be beyond the jurisdiction of domestic
competition laws, and 2) they are explicitly exempted from the application of the laws.
Actually export cartels work for countries interest that’s why they are exempted. Mixed export cartels are generally subject to essentially the same requirements or outright prohibitions as cartels that affect the domestic market alone, although some countries provide special exemptions for such cartels.

Cross border predatory pricing can also lead to market distortions. Due to some similarities cross border predatory pricing is very often dealt with dumping and thus comes under the jurisdiction of trade laws (anti dumping legislation). Indian exports, in engineering and textile sectors have been targeted by Canada, US, and EU. But in recent years developing countries are also using this strategy for protection of their domestic industries.

**BARRIERS TO IMPORT COMPETITION**
Import cartels, vertical market constraints creating import barriers, private standard setting activities, etc. may fall under this.¹ Import cartels formed by domestic importer, buyers and similar arrangements (e.g. boycotts of or collective refusals to deal with, foreign competitors), may be a threat to maintaining competition in market. Local firms gang up against foreign competitors by preventing market access. For example local firms lobby their governments to disallow foreign manufacturers from marketing their goods or to initiate unfair anti dumping action. In case of India it may be noted that a Swiss watch manufacturers association prevented the “India watch manufacturer”, Titan, from exhibiting their products at the “Basel jewelry and watch fair in Switzerland”, using the pretext of the prevailing Quantitative restrictions in India which did not

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¹ Towards a functional competition policy for India-
allow them to export to India. Similarly, Indian traders were not allowed to participate in “Dutch flower auctions”.

Foreign direct investment may increase competition in local markets. Cross border acquisition may lead to a lessening of effective competition, if the acquirer has been a major exporter to the country. In many of the developing countries, it can be seen that most of the FDI come through acquisition rather than a fresh investment.

Intellectual property rights the IP holders typically engage in licensing arrangements with the firms in different countries. In many cases it has been observed that cartels were built around patent cross-licensing schemes and thereby foreclosed competition.

In this research paper I have dealt with the first one that is Cross border market power.

## 2. Indian foreign trade

Over the last 60 years, India’s foreign trade has undergone a complete change in term of composition and direction. Imports galloped because of increasing requirements of capital goods, defense equipment, petroleum products, and raw materials. Exports remained relatively sluggish owing to lack of exportable surplus, competition in the international market, inflation at home, and increasing protectionist policies of the developed countries.

During 1950-60, the value of world exports becomes double. In the next 10 years it increased nearly 2 ½ times. During 1970s, the value of the world exports increased by about 5 ½ times. Worldwide inflation, particularly the successive hikes in oil prices, significantly contributed to sharp increase in the value of exports. During
1980-90, the value of world exports increased by 80%. Between 1990-2000, it increased by over 90%. During 2011-12, India's overall exports grew 21%. Exports of India's are broadly classified into following four categories.

The top 4 items in India’s manufactured exports are engineering goods, gems and jewellery, chemicals and related products and textiles. Engineering goods exports have seen almost steady rise in share from 1999-2000 to the first half of the 2010-11 and high growth rates of 84% and 43.6 % in 2010-11 and in the first half of the 2011-12. The major market for engineering exports during 2010-11 was USA, UAE, Saudi Arabia, China, Sri-lanka, Germany, UK, and Germany. All these markets showed tremendous export growth with China topping at 409%.\(^2\) With the highest growth rate among manufacturers at 58.4 % in the first half of 2011-12, gems and jewellery, the second major export item retained its share around 16-17 % since 2000-01. The share of chemicals and related products and textiles has fallen marginally over the years.

India is trying to diversify its exports. Although India has made major strides in diversifying its exports but a lot needs to be done not only to diversify the export basket but also have a perceptible share in the top items of the world trade.

\(^2\) For further details see the “indiabudget.nic.in/es2011-12/echap-07.pdf”
In case of imports, there are no major compositional changes other than the sudden rise in the share of gold and silver imports from 9.3% in 2000-01 to 13.3% in the first half of the 2011-12 and fall in the share of the pearls. Precious and semi-precious stones from 9.6% in 2000-01 to 6.0% in the first half of the 2011-12. The share of POL imports which fell from 31.3% in 2000-01 to 28.6% in 2010-11 rose again to 31.4% in the first half of the 2011-12 due to high prices of crude oil. ³

If we look at the trade deficit of India we found that the Indian trade deficit is widening due to huge imports of oil and gold. Import of oil is seen to be relatively inelastic to changes in international prices. Some reasons of rising trade deficit are

- Imports are rising at faster rate than exports
- Increase in consumption requirements
- Need for key industrial raw materials
- Poor competitiveness of India’s exports both at the cost as well as price front

A snapshot of present condition of principal export and import commodities can be seen through this table:-⁴

<table>
<thead>
<tr>
<th>Commodity/Group</th>
<th>Growth rates</th>
<th>Share in 2010-11</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2008-09</td>
<td>2009-10R</td>
</tr>
<tr>
<td>Export of principal commodities</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Engineering goods</td>
<td>26.5</td>
<td>-19.1</td>
</tr>
<tr>
<td>Petroleum products</td>
<td>-2.9</td>
<td>2.3</td>
</tr>
<tr>
<td>Gems and jewelry</td>
<td>42.1</td>
<td>3.7</td>
</tr>
<tr>
<td>Chemicals &amp; products</td>
<td>7.1</td>
<td>0.9</td>
</tr>
</tbody>
</table>

³ For further details see the “indiabudget.nic.in/es2011-12/echap-07.pdf
⁴ Assocham “India’s imbalance of trade”
<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>2011</th>
<th>2010</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Agricultural &amp; allied products</td>
<td>-4.9</td>
<td>1.1</td>
<td>39.3</td>
<td>9.7</td>
</tr>
<tr>
<td>Textile &amp; textile production</td>
<td>3.0</td>
<td>-0.8</td>
<td>17.4</td>
<td>9.2</td>
</tr>
<tr>
<td>Ores and minerals</td>
<td>-14.5</td>
<td>11.1</td>
<td>23.1</td>
<td>4.2</td>
</tr>
<tr>
<td>Handicrafts</td>
<td>1.5</td>
<td>-5.5</td>
<td>12.7</td>
<td>1.5</td>
</tr>
<tr>
<td>Leather &amp; manufactures</td>
<td>-40.5</td>
<td>-25.3</td>
<td>3.7</td>
<td>0.1</td>
</tr>
<tr>
<td>Others</td>
<td>68.8</td>
<td>32.7</td>
<td>0.5</td>
<td>3.5</td>
</tr>
<tr>
<td>Total export</td>
<td>12.2</td>
<td>-2.2</td>
<td>42.3</td>
<td>100.0</td>
</tr>
</tbody>
</table>

**Imports of principal commodities**

<table>
<thead>
<tr>
<th></th>
<th>2012</th>
<th>2011</th>
<th>2010</th>
<th>2009</th>
</tr>
</thead>
<tbody>
<tr>
<td>Capital goods</td>
<td>2.5</td>
<td>-8.3</td>
<td>8.7</td>
<td>20.3</td>
</tr>
<tr>
<td>Mainly export items</td>
<td>53.7</td>
<td>-2.1</td>
<td>58.7</td>
<td>14.1</td>
</tr>
<tr>
<td>Other bulk items</td>
<td>40.9</td>
<td>-27.3</td>
<td>22.4</td>
<td>10.1</td>
</tr>
<tr>
<td>Bulk consumption goods</td>
<td>8.2</td>
<td>81.1</td>
<td>-3.2</td>
<td>2.5</td>
</tr>
<tr>
<td>Petroleum &amp; petroleum products</td>
<td>17.6</td>
<td>-7.0</td>
<td>21.7</td>
<td>30.1</td>
</tr>
<tr>
<td>Others</td>
<td>17.7</td>
<td>17.1</td>
<td>22.6</td>
<td>22.9</td>
</tr>
<tr>
<td>Total imports</td>
<td>18.8</td>
<td>-3.5</td>
<td>22.3</td>
<td>100.0</td>
</tr>
</tbody>
</table>

Source: RBI, Note-R- Revised, P-Provisional

Exports during April, 2012 were valued at US$ 24455.38 million. Imports during April, 2012 were valued at US$ 37941.70 million. The trade deficit for April, 2012 was estimated at US$ 13486.32 million which was higher than the deficit of US$ 12850.38 million during April, 2011.
3. **Trade policy of India: Historical perspective**

In 1962 Government appointed a Import and Export Policy Committee headed by Mr. Mudaliar, to review Government’s trade policy. The recommendations of the committee were accepted by the government. Mr.V.P.Singh, the then Commerce Minister, announced the Export Import policy on the 12th of April, 1985. It was here that for the first time the Government announced the policy on a three year basis.

India’s foreign trade policy during the last five decades may be broadly split into import substitution policy, export drive policy and export acceleration policy. The import substitution was followed in the first two decades. With fears of external dominance, the Indian planners adopted a somewhat introvert external trade strategy which relied on encouraging domestic production for the domestic market with the help of high tariffs and high degree of protection. Far from viewing foreign trade as an engine of growth, Indian planners sought to minimize import demand by adopting an import substitution policy and gave secondary place to exports primarily as a source to generate the foreign exchange earnings to meet that part of the import bill not covered by external assistance. There were controls over both imports and exports. However, this policy of import substituting industrialization and system of controls failed to produce rapid growth and self-reliance.

With the realization of the drawbacks of the excessively inward-looking strategy on one hand and the need for modernization and technology up gradation on the
other many policy measures have been taken. The strategy towards a greater integration of the Indian economy with the rest of the world has been pursued since then. In 1985-88 policy main changes were abolition of automatic licensing, inclusion of 201 items of industrial machinery under capital goods import under OGL, decentralization of 53 import items and granting facility for import of capital goods against REP license from Rs1 lakhs to Rs. 2 lakhs.

The second three-year policy (1988-91) carried forward the process of trade liberalization to make exports more competitive. The policy was designed to stimulate industrial growth by providing easy access to essential imported capital goods, raw materials and components to industry. The liberal imports of capital goods and technology were viewed as a means to enable exporters to undertake technological upgradation in order to compete more effectively in the international market.

In 1990s, two major measures taken in trade policies were (a) liberalization of imports entailing successive expansion in the OGL list and (b) linking expansion in exports to import liberalization. CCS scheme was suspended; REP license was substituted by EXIM scrips.

EXIM Policy, 1992-97 made a conscious effort to dismantle various protectionist and regulatory policies and accelerate India’s transition towards a globally oriented economy. The export-import policy was further liberalized by the government on March 31, 1993. This new trade policy was characterized by a short negative list of imports and exports, lowering of the level and dispersion of nominal tariffs, withdrawal of quantitative restrictions on imports and phasing out of the system of import licensing. The implication is that continued reduction in import tariffs will help in inducing greater efficiency and competitiveness in the economy.
The export and import policy, 1997-2002 sought to consolidate the gains of the previous policy and further carry forward the process of liberalization by deregulating and simplifying procedures and removing quantitative restrictions in a phased manner. It set an ambitious target of attaining an export level of US$ 90-100 billion by the year 2002 and achieving 1 per cent share in world trade.

In radical move the government of India announced on August 31, 2004 a new foreign trade policy for the period 2004-09, replacing the hitherto nomenclature of EXIM policy by foreign Trade policy. Many promotional measures e.g. vishesh krishi upaj yojana, the Duty Entitlement passbook scheme etc. have been initiated. The main features of FTP, 2004-09, are as follows:

1) FTP (2004-09) envisaged a doubling of India's share in world exports from 0.75 per cent to 1.5 per cent by 2009.

2) Five thrust sectors (Agriculture, Handicrafts, Handlooms, Gems and Jewelry, and Leather and Footwear sector). these are the Sectors with significant export prospects coupled with potential for employment generation in semi-urban and rural areas were identified as thrust sectors.

Presently India’s FTP is under the influence of “Spaghetti bowl effect” which refers to the development of overlapping bilateral and regional trade agreements.

India’s trade policy is multifaceted. Regional policy of India can be divided into two parts 1) towards developed countries mainly US and EU. 2) Towards southern blocs e.g. Mercado Comun Del Sur (MERCUSUR) and southern African custom union.

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5 ASSOCHAM “Imbalance of trade”
3.1 FTP (2009-14)

The short term policy objectives of FTP (2009-14) is to arrest and declining trend of exports and to provide additional support to those sectors which have been hit badly by recession in developed countries. The medium term objective is to achieve an Annual Export growth of around 25% by 2014 and to double India’s exports of goods and services by 2014. The long term objective is to double India’s share in Global Trade by 2020. The foreign trade policy 2009-14 has set a target of $500 billion exports in the terminal year. Some of the strategies mentioned in this policy perspective are:

1) Stable Policy environment 2) Fiscal incentives 3) Diversification of export markets 4) Procedural rationalization 5) Institutional changes

Promotional measures or some incentive schemes 6

- Vishesh Krishi and Gram Udyog Yojana (VKGUY)
- Focus Market Scheme (FMS)
- Focus Product Scheme (FPS)
- Market Linked Focus Product Scheme (MLFPS)
- Served From India Scheme (SFIS)

VKGUY focuses on promoting exports of Agricultural Produce and their value added products; Minor Forest Produce and their value added variants; Gram

6 From www.nirc-icai.org/.../12.12.09_presentation_on_ftp-icai.ppt
Udyog Products; Forest Based Products; and Other Products, as notified from time to time.

The objective of FMS scheme is to offset high freight cost and other externalities to select international markets with a view to diversify the markets and to enhance India’s export competitiveness in these countries.

FPS aims to incentivize export of such products which have high export intensity / employment potential, so as to offset infrastructure inefficiencies and other associated costs involved in marketing of these products.

MLFPS promotes exports of products of high export intensity but which have a low penetration in countries.

SFIS aims to accelerate growth in export of Services to create a powerful and unique “Served from India” Brand;

Recently, in the annual supplement of FTP 2009-14 the government has unveiled a seven-point strategy, including extension of import-tax waiver and interest subsidy, to boost India's merchandise exports that have been hit by sluggish demand from Europe and US.

It enlarged the scope of tax benefits on imported inputs to include goods sourced locally, aimed at incentivizing domestic manufacturing while encouraging import substitution. It also extended the interest subsidy scheme on labour intensive exports by a year to March 2013; declared seven countries as focus markets; offered special sops for export units in the North-East; and made e-commerce and courier exports out of Delhi and Mumbai eligible for the export benefits.

Thus in conclusion we can say that India is trying to be more liberal in its foreign trade policy.
3.2 Protectionism in India

Protectionism, an economic policy that restrains trade between states through instruments such as tariffs on imported goods, restrictive quotas, and other government regulations that are designed to allow "fair competition" between imports of goods and services produced domestically.

The main policies for achieving protectionist goals include:

1) **Tariffs** - tariffs are imposed on imported goods that vary with type of goods. Import tariffs will increase the cost to importers, and increase the price of imports.
2) **Import quota** - these are levied for reducing the quantity and increasing the market prices of imported goods.
3) **Administrative barriers** - e.g. regarding food safety, environmental standards, electrical safety, etc.
4) **Antidumping legislation**
5) **Direct subsidies** - government subsidies in the form of lump sum payment or cheap loans given to local firms that cannot compete against imports.
6) **Export subsidies** - these are given by govt. for increasing exports.
7) **Exchange rate manipulation** - A government may intervene in the foreign exchange market to lower the value of its currency by selling its currency in the foreign exchange market. Doing so will raise the cost of imports and lower the cost of exports, leading to an improvement in its trade balance.

Protectionism in countries such as India and the United States is largely based on the notion that increased importing reduces the demand for low-wage and low-skilled labor. Moreover, it is inferred that new domestic industries will not grow.

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7 Anti-competitive practices in India prepared by Joel Vilmenay.
until they are protected from foreign companies and product to earn profits. In the 1950’s the Indian government enforced extensive import restrictions and high tariffs. India opted for protectionism due to increasing global competition. Till 1990s as mentioned earlier India was a closed economy with high restrictions. But later on average non-agricultural tariffs have fallen below 15 percent, quantitative restrictions on imports have been eliminated, and foreign investments norms have been relaxed for a number of sectors.

But the protection of domestic industries had other adverse effects too. The sheltered domestic market acted as deterrent to efficiency improvement. And also unnecessary protection resulted in high costs, inefficiencies, scarcities and negligence of consumers. Protected industries start acting as monopolist and it causes harm to consumers. Although tariff barriers are relaxed excessively but protectionism took the form of non tariff barriers. Due to emergence of anti competitive practices there arose the need of Competition policy.

India’s protectionist strategy led to the Monopolistic and Restrictive Trade Practices Act of 1969, which sought to save jobs, guard profits and increase government revenue.

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4. Competition policy:

UK white paper (2001) observed that vigorous Competition is necessary for innovation, strong and effective markets, and consumer interest and productivity growth in the economy. The term ‘competition policy’ has different meanings in different countries, in different contexts. Broadly, it includes those policies that are relevant to competition in the market e.g. trade policy, regulatory policy and policies government adopts to address the anti-competitive practices of enterprises, whether private or public. In the narrow sense, the term is used to cover laws or policies governing the anti-competitive behavior of enterprises.

4.1 Competition law in India: After India become party to WTO agreement the highly restrictive Indian economy took step to integrate it with global economy. By the introduction of globalization and liberalization; India has to enact its first anti-competitive legislation in 1969 known as Monopolies and restrictive trade practices (MRTP) Law.

Finding the domain of MRTP Act insufficient for fostering competition in the market and eradicating anti-competitive practices in the national and international trade, the Government of India in October 1999 appointed a high level committee on Competition Policy and Law (the Raghavan Committee) to advise on the competition law compatible with international developments. Acting on the report of the committee, the Government passed the new Competition Act, 2002.

9 “Effective competition advocacy: a prerequisite for building competition culture” an article by Sandeep Kapoor
The basic purpose of the Competition Act is to create an environment conducive to competition. The various salient features of the Act that are of our interest:

- **Anti-Competitive Agreements** - No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or likely to cause an appreciable adverse effect on competition within India. Section 3(3) defines all the anticompetitive practices.

- **Prohibition of abuse of dominant position** –
  In respect of abuse of dominant position, Section 4(2) enlists all the circumstances.

- **Mergers and acquisitions** - Section 6 of the act defines regulation of combination.

- **Extra territorial jurisdiction** - Section 32 mentions it.

### 4.2 Cross border issues in competition act, 2002

The section 3(5)(ii) states that “nothing in this section[on anti competitive agreements] shall restrict… the right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.” Section 32 states that, notwithstanding any restrictive agreement, any party to such agreement, any enterprise abusing a dominant position, or any combination or party to combination outside India, the competition commission have the power to inquire into it, if it has an anti competitive effect within the relevant market in

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10 “New competition regime in India” by Debashree dutta
India. Sub-section 33(2) allows competition commission grant a temporary injunction restraining any party from importing goods, if it can be established that such imports would contravene the act’s substantive provisions. The provision of section 18 states that the CCI may enter into any arrangement with the prior approval of central government, with any agency of any foreign country in order to discharge its duty.

All these provisions shows that Indian competition authority has right-
1. To pass an order for restricting imports.
2. It can have agreement with other competition authority but only with prior provision from central government.
3. It has fewer jurisdictions over exports.

The point which I want to emphasize is the matter related with the exemption to the export cartel.

5. Exemption to export cartel- Export cartel are association of the firms that co-operates with one another in various ways e.g. fixing a common price in order to export their goods.

Export cartels are exempted from competition law as it is believed that they have anti competitive effects mainly on foreign markets. In this regard OECD considers that, “the rationale for permitting export cartel is that it may facilitate co-operative penetration of foreign markets, transfer income from foreign consumer to domestic producer and result in favourable balance of payments.”

Section 3(5)[ii] of competition act 2002, explicitly exempted export cartels in India. Exemption can be explicit and implicit.
Explicit exemption is that in which “a state has an explicit exemption system when a statute explicitly excluded export cartels from the scope of its national competition law.”

Implicit exemption is that when domestic competition law, covers only the conduct of firms operating on national market. In this regard it is worth to mention the export cartels in US as our competition law lacks this type provision.

US export cartels legislation encompasses 3 specific acts-
- Webb Pomerene act 1918.
- Export trading company act.
- Foreign Trade Anti trust Improvement act.

I have dealt only with the 1st one.

Webb Pomerene act of 1918 gives registered export association qualified immunity from section 7of Clayton act. It under section 62 exempts export association from section 1 of Sherman Act, 1890 that says-
- The export association shall not restrain trade with US.
- It shall not restrain the export trade of any domestic competitor that is not a member of association.
- It shall not, artificially enhance trade or depress prices within US of commodities exported by association.

Export cartels are exempted on the ground that they work for countries interest but there is also adverse and anti competitive effects of export cartels to-

**Impact on international trading system** - The export cartel are generally formed of oligopolistic firms which aim to restrict rather than to promote their exports thereby imposing a higher prices on their exported commodities. Export cartel generate trade friction by stabilizing an international trend favourable to their world wide duplication.
Impact on domestic market- If export and domestic market are similar or if there are Constant Returns to Scale firms tend to reduce production in both markets that lead to increase in prices thereby hearting domestic consumers.

But one new aspect which I want to raise about export cartel is shown in this figure-

Let’s have a hypothetical example that in India there is Export cartel of Iron ore and due to this export cartel the prices are fixed high. If this is exported to US and US uses iron ore as a raw material in producing machine or automobiles. Then the cost of production will be high in US automobile industries and they will charge high prices for their finished products and suppose India imports that finished good at that high price. Thus India is at loss due to cartel in India.

This side of export cartel should be kept in mind and CCI should look after it with the other government agencies like Export Inspection Council of India.
Apart from this I have discussed briefly the interface between trade policy and competition policy.

6. **Competition policy and trade policy:-**

Competition law has a huge impact on foreign commerce of a country because it partially regulates the conduct of the country during international trading activities. The consistency between the two captioned policy fields depend upon the method of their enforcement. However, broadly it seems that trade and competition policy both works in tandem with each other wherein both contributes in making the domestic market more competitive through some way or the other for achieving an enhanced efficiency and promoting consumer welfare. Trade liberalization without a sound competition policy might result in engulfing of small and medium size enterprises by big giants of the market or may lead to anti-competitive/restrictive business practices. In this regard, it was noted that the two policies operated in somewhat different areas. Trade policy was basically concerned with governmental action, whereas competition policy focused on the behavior of enterprises. Trade policy was traditionally focused on measures at the border, whereas competition policy regulated competitive conditions and the behavior of enterprises within the country. In illustrating this complementarily, reference was made to the role of competition policy in ensuring effective market access and the role of trade liberalization in facilitating the removal of governmental measures that facilitated anti-competitive behavior by enterprises.

Due to the decisions taken at the 1996 Singapore Ministerial Conference WTO the subject of the interaction between trade and competition policy was added to the work programme of WTO.
It is believed that trade policy can be a substitute for antitrust policy for regulating the firms to behave in a more competitive manner. Due to reduction in trade barriers firms will be wide-open to foreign competition, leading to penetration of domestic markets by imports from abroad and opportunities for domestic firms to sell in new export markets. The trade and competition policies, support, match and strengthen each other, facilitating market discipline and competitive behavior by both domestic and foreign companies. If firms behave competitively, global efficiency is achieved through a complete elimination of trade barriers (i.e., free trade) and without the need for any government intervention into product markets. But firms often exercise market power discussed in chapter 1.

Then problem is that the instruments that are available to a government to discipline a domestic firm are not accessible in the case of a foreign-based enterprise. The exporting country could, of course; also use AT policies to force its firms to behave more competitively in foreign markets, but it frequently is not in the interests of the nation to do so.\textsuperscript{11} Here arises the problem of substitute. For this purpose Anti dumping policies can be used, which allow governments to impose duties whenever goods are sold in export markets at less than their “fair value”. These policies, in essence, prevent firms from price discriminating between markets.

\textsuperscript{11} Many AT laws provide exceptions of some sort for export cartels. For example, in United States actions in violation of AT are permitted if firms are engaged exclusively in export activities.
6.1 Anti-dumping and competition policies: conflict

Hypothetically, anti-dumping laws and competition laws aim at remedying "transnational price predation" and public interest. Antidumping rules allow practices such as price undertakings and quantitative trade restrictions that are forbidden under competition law. On the contrary, antidumping rules penalise certain types of price differentiation that may be justifiable under the competition laws. There is a difference of goal of both the laws. Competition law promotes competition and attaches sanction to only those price discrimination that adversely affects competition in markets. On the other hand, anti dumping law do not take competition issues while addressing price discrimination. Its basic goal is to protect domestic industry from injury caused by dumping of the like products.\(^{12}\)

Competition laws are aimed at curbing the market power of domestic producers, whereas antidumping laws tries to use market power in order to shift rents from foreigners to domestic producers.\(^{13}\)

**Antidumping and competition laws: overlaps**

There is an overlap in the two laws in terms of "price discrimination" which necessitates a higher price can be charged to customers who are willing and able to pay the higher price, and a lower price to customers who are either unable or

\(^{12}\) For more on dumping and like products see “AGREEMENT ON IMPLEMENTATION OF ARTICLE VI OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE 1994

\(^{13}\) Cadot Oliver, Grether Jean-Maries and Melo de Jaime, “Trade and competition policy: where do we stand” Journal of World Trade vol.34 no. June
unwilling. Price discrimination, so long as it is not anti-competitive is recognized as a legal measure under competition law whereas, the same is unlawful in terms of the anti-dumping rules.

Despite the differences there are certain types of dumping if they occur will definitely be dealt under the realm of competition laws as they have something anticompetitive. These are Predatory dumping and strategic dumping (instances of market power dumping)\textsuperscript{14}.

Thus apart from being in conflict in the manner of objective there are some areas in which both laws can intermingle. Due to this, some times it was suggested to replace antidumping by competition laws. But these suggestions were discarded in some quarters\textsuperscript{15}. Therefore anti-dumping rules can act as a necessary addendum to national competition laws.

\textbf{Instances of anti dumping and competition with reference to India:}

Actually, interface between competition policy and anti-dumping rules in India started when domestic competition laws were applied to cases\textsuperscript{16} of alleged under-valued or dumped imports under the realm of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act"). As these cases can’t be resolved under MRTP Act new competition act was enacted.

Recently, India's decision to impose anti-dumping duty on imports of polypropylene from Saudi Arabia and Oman is being alleged to be a protectionist

\textsuperscript{14} Far a description of various types of dumping see Bartfeild, supra.

\textsuperscript{15} As the Clinton administration stated in WTO trade and competition policy working group: “if the anti dumping laws were eliminated in favour of competition laws or modified to be consistent with competition principles, the problem which anti dumping rules seek to remedy would go unaddressed”, cited in Bartfeild, supra

\textsuperscript{16} Alkali Manufacturers’ Association of India (AMAI), vs. American Natural Soda Ash Corporation (ANSAC) and All India Float Glass Manufacturers(AIFGMA) vs. Indonesian companies.
measure that will artificially reduce competition in Indian polypropylene market and strengthen monopolistic positions.

The motive behind this type of anti-dumping duty on polypropylene by the Indian government is to protect Indian petro-chemical companies from global Competition. But this will be at the cost of down stream industries, importers and average consumers. There will be harm to those Indian downstream industries that use polypropylene in production due to this increase in the dominant position of the Indian polypropylene producers and will also lead these industries less competitive both in domestic and global markets. Higher costs incurred by the downstream industries will also lead to higher prices for average Indian consumers.

Similarly, India's decision to impose antidumping duty on phosphoric acid from countries across the globe (including China, Korea, Israel, Taiwan etc) are means adopted by the monopoly holding Indian industries to systematically eradicate any kind of competition within the domestic Industry in order to sustain their market power and continuously increase prices of their product.

China is using predatory pricing tactics to drive rivals out of the business and to capture the Indian market and then raise prices to more normal values. To deal with the situation, India’s Small and medium size enterprises are urging the government to step up the pace of its anti-dumping investigations and impose tougher safety and quality checks to protect Indian companies from cheap Chinese goods. It is estimated that Chinese imports were 10 to 70 percent cheaper than like Indian products. Its effect is felt in the industries of processed food, light engineering, building materials and heavy engineering, chemicals and textiles. Indian companies will not be able to fight a Chinese price mechanism of an artificial nature that targets specific industries and wipes them out. As the imports of Chinese toys, Government announced a six-month ban on the import of Chinese
toys. However, the ban was lifted after two months, when Beijing threatened to take the issue to the World Trade Organisation (WTO).

Apart from this, there is deliberate abuse of provisions of anti-dumping laws, which if scrutinized under the principle of competition law may not be found to be reasonable and sustainable at all. In the recent times, there is misuse of anti dumping laws. There is trend of approaching anti-dumping authorities for creating trade barriers and restricting competition (from foreign exporters). Anti-dumping statistics clearly establish that Indian companies have been among the top users of antidumping laws and have been abusing the provisions to maintain/sustain their dominant positions in their respective markets/industries.

In 2008, in India 54 anti dumping investigations were initiated. Since 1995-2005, India had initiated 564 antidumping investigations.

It is now widely believed that "anti-dumping is a trouble making diplomacy, the downside of antidumping policies is that they do not satisfactorily address the concerns relating to abuse of dominant position and market power.

The case of abuse of dominant position by soda ash producers in Europe, as well as the ferrosilicon cartel in the United States, prove the unquestionable supremacy of competition policy.

**Harmonisation between both the policies**

Thus there is need to harmonise competition and antidumping law. while taking steps to harmonise policy makers should keep it in their mind that government policy should serve the interests of the governed. Thereby implying that, harmonisation of antidumping law to conform with competition law ought to promote the welfare of the many consumers, rather than the welfare of the few domestic producers (who may be dominant players in the market) in order to be
more consistent with serving the interests of the public. There are many alternative ways to harmonise are-

First, Directorate General of Anti Dumping case with CCI. So that anti dumping cases can be judged under the competition law criteria.
Second, commission should try to induce DGAD to update methods used by anti dumping law to segregate harmful conducts from the conduct that are not harmful.

6.2 Quantitative and qualitative restrictions and competition-
These are important Non tariff barriers under which a country restricts imports from other countries by applying some quality and quantity restrictions like packaging conditions and labeling condition, product standards. We can see the example of US that imposed qualitative restriction on Indian tyres. Although all the tariff barriers are relaxed but US is protected its industries by imposing these restrictions that is anti competitive behaviour on there part. Our domestic competition laws don’t have jurisprudence over it under MRTP act but under the new competition act there is provision of Extra territorial jurisdiction under section 32.
7. Extra territorial jurisdiction

Due to the overreaching effects of anti-competitive activities of a domestic firm especially in cases of exports, Competition laws are applied to the conduct of foreign companies. If any problem occurs outside the country but its affecting our domestic market then it can be resolved at two levels 1) at international level, 2) at domestic level. In the absence of binding international policy every country likes to have a national solution. The international component of Competition Law was predominantly concerned with the question of whether one Country could apply its competition rules extraterritorially against an undertaking or undertakings in another country, where the latter behave in an anticompetitive manner having adverse effects in the territory of the former and whether there should be laws to prevent the “excessive” assertion of extraterritorial jurisdiction.\(^{17}\) Section 32 of the Competition Act, 2002 we find that it makes provision with regard to extraterritorial jurisdiction of Indian Competition Authority. The Provision of Section 18 states the Competition Commission may enter into any Memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provisions of this Act. There is difference between a treaty and understanding. Thus the mandate of the Competition Commission extends beyond the margins of India. In case any agreement that has been arrived from outside of India and is anti-competitive under sec.3 of the Act; have an appreciable adverse effect on competition or likely to have in the Indian market, the CCI shall have the power to inquire into such agreement, combination or abuse of dominant position.

\(^{17}\) Richard Whish, “COMPETITION LAW”, Fifth edition, Oxford University Press, 2003,
8. Trade liberalization and competition policy

Trade and economic liberalisation aided competition in the market, by enhancing the basket of goods and services with various varieties, better quality and lower prices. Yet, anti-competitive practices undertaken by economic players refuted gains of liberalisation. With the adoption of market oriented reforms, there were several players in the market resulting in competition. But at the same time, many abuses too creep into the system. In order to balance the system, price controls and market regulations were put in place. But by and large they proved ineffective. This is why countries adopted competition and economic regulatory laws to promote a healthy market and economic democracy. There are two views regarding the relation of trade liberalization and competition policy:

1) Trade liberalization triggers competitive pressures which can act as a Substitute to competition policies.  

2) both have complementary relation 
   Trade liberalisation generally promotes competition by exposing domestic producers to increased import supplies while providing greater access to technology and investment.

First view does not seem to be true as trade liberalisation leads to presence of anti competitive forces. For instance, higher markups have been observed following trade liberalisation in sectors with high market concentration (oligopolies), low elasticity of demand (lack of substitutes), anti-competitive organisation of markets (cartels and collusive agreements), and companies

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18 Trade and Competition Policy: Perspectives for Developing Countries by Sanoussi Bilal Overseas Development Institute, London.
enjoying (and abusing their) dominant position, hence foreclosing entry to the domestic market. Trade liberalisation alone can’t generate trade discipline. Thus there is a strong complementary relation between trade liberalization and competition policies. There should be International agreements on competition that should target anti competitive practices that affects international trade.

Problems that occurred due to cross border practices should be resolved through-

1) Co-operation between countries- the competition authorities of different nations should co-operate with each other in order to resolve the problem
2) International agreements should be made in accordance with the competition laws of each country.
3) The basic idea behind the trade liberalization is to benefit the whole world from trade thus there should be mutual understanding between countries that they will not hamper the ways of development of each other by practicing anti competitive behavior
9. Conclusion-

In order to face the cross border competition challenges, a well functioning, national competition regime is insufficient and also there is problem with developing countries that they lack the resources or experience to tackle international competition challenges. Although there is provision of extra territorial jurisdiction in competition law but that also have a limited capability.

Due to this some countries have entered in bilateral or regional treaties to solve these type of problems. But these treaties have limited impact. As a result the anti competitive practices across the border can be best dealt with multilateral framework.

Many steps were taken at international level e.g. this issue was discussed in UNCTAD\(^{19}\), WTO\(^{20}\), and OECD\(^{21}\). The competition authorities of different countries have come together to promote International competition network. There is need of pushing other international agreement on cooperation on competition.

Some suggestions can be recommended –

- Extra territorial jurisdiction in the competition act (2002) is a right step, but to make it effective- Competition commission of India would require substantial capacity building and co-operation arrangements with foreign authorities and this provision should be judicious as it may turn in bad situations.
- Areas should be found where international co-operation can take place.
- Efforts should be made to promote international co-operation at different levels: bilateral, regional and multilateral.

\(^{19}\) United nations conference on trade and development, “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices”.

\(^{20}\) World trade organization “ministerial conference in Singapore in 1996”

\(^{21}\) THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT
Apart from this in our own Country there are some areas in which Competition authority should have to extend its hand like

- As we know that Export cartels are out of jurisdiction of competition authorities on the ground that these cartels work for the interest of the country but CCI has to look after it that the gain from export is not at the cost of domestic customers. For example if there is lack of sugar in country for consumption but exporters are still exporting. Although government regulates it but Competition authority should check it.

- Competition authority should look after it that if there is any harm to our country by importing those finished products whose raw material is exported by India itself. For Example take a hypothetical situation if there is export cartel of iron ore in India and it is exporting iron ore to USA at reasonable prices and USA uses that iron as raw material in making equipment’s and that is exported to India at some high cost then it is not in our favour. Competition authority should enquire into it.
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