EXTRA-TERRITORIAL JURISDICTION OF COMPETITION LAW IN INDIA

-By Gauri Sachdeva

[IVth Year, B.A. LL.B.(Hons.)]

NATIONAL LAW UNIVERSITY, DELHI
ACKNOWLEDGMENT

The first and most substantial academic debt that I have incurred during the preparation of this project on “Extra-Territorial Application and Jurisdiction of CCI” goes to Mr. Shiv Ram Bairwa, Joint Director in Competition Commission of India. The idea for the study emerged out of the contemporary events. I am really grateful to him for his guidance in the completion of this project. He has guided me in right and motivated direction. I am also grateful to the library staff for their help and cooperation in searching the related data. This project has been possible with their guidance, inspiration and co-operation. I am thankful to all of them.
# TABLE OF CONTENTS

<table>
<thead>
<tr>
<th>Chapter</th>
<th>Title</th>
<th>Page No.</th>
</tr>
</thead>
<tbody>
<tr>
<td>CHAPTER I: INTRODUCTION</td>
<td>1-3</td>
<td></td>
</tr>
<tr>
<td>1.1:</td>
<td>Introduction</td>
<td></td>
</tr>
<tr>
<td>1.2:</td>
<td>Scope and Objective of Research Paper</td>
<td></td>
</tr>
<tr>
<td>1.3:</td>
<td>Research Methodology</td>
<td></td>
</tr>
<tr>
<td>1.4:</td>
<td>Research Questions</td>
<td></td>
</tr>
<tr>
<td>1.5:</td>
<td>History of Competition Law in India</td>
<td></td>
</tr>
<tr>
<td>1.6:</td>
<td>Jurisdiction Issues in Cross-Border Anti-Competitive Activities and Reach of Competition Laws</td>
<td></td>
</tr>
<tr>
<td>CHAPTER II: EXTRA-TERRITORIAL JURISDICTION AND ENFORCEMENT OF US COMPETITION LAW</td>
<td>4-7</td>
<td></td>
</tr>
<tr>
<td>2.1</td>
<td>Introduction</td>
<td></td>
</tr>
<tr>
<td>2.2</td>
<td>Case Laws</td>
<td></td>
</tr>
<tr>
<td>CHAPTER III: EXTRA-TERRITORIAL JURISDICTION AND ENFORCEMENT OF EU COMPETITION LAW</td>
<td>8-10</td>
<td></td>
</tr>
<tr>
<td>3.1</td>
<td>Introduction</td>
<td></td>
</tr>
</tbody>
</table>
3.2 Case Laws

CHAPTER IV: JURISDICTION OF CCI 11-19

4.1 Introduction

4.2 Issues regarding Extra-territorial Jurisdiction under Competition Law

4.3 Historical Background of Extra-territorial Jurisdiction of Indian Competition Law

4.4 The Extra-territoriality Principle

4.5 The Enforcement and Application of Extra-territorial Jurisdiction of Indian Competition Law

CHAPTER V: COMPETITION LAW AND INTERNATIONAL TRADE 20-30

5.1 Introduction

5.2 International Trade and Competition Policy- Agreements and Disagreements

5.3 Competition Policy at International Level

5.4 International Competition Policy Agreements

CHAPTER VI: CONCLUSION 31
CHAPTER I

INTRODUCTION

1.1 INTRODUCTION

The researcher through this paper intends to give a brief introduction of Competition Law and would then proceed on to the research topic undertaken of extraterritorial jurisdiction of Competition Law. Competition law is the body of law dealing with the market behavior of corporate and business entities. It is known by various names, including restrictive trade practices in Australia and antitrust law in the United States. Different jurisdictions competition laws may be influenced by different economic and political considerations. However, competition laws are generally based on the premise that while free market behavior is desirable, some interference in the market is necessary to maintain competitive pressures and promote competition amongst producers, and hence to obtain an efficient allocation of resources. World problems need world solutions. Thus, there is a need to determine the jurisdiction of application of Antitrust laws.

1.2 SCOPE AND OBJECTIVE OF RESEARCH PAPER

---

1 Competition Law, known in the United States as antitrust law, are laws that promote or maintain market competition by regulating anti-competitive conduct.
2 Peter Nygh and Peter Butt (eds), Australian Legal Dictionary, (1997), 233.
4 See primarily the Sherman Act (15 USCA ## 1-7) and Clayton Act (15 USCA ## 12-27).
The scope of the study is limited to the extraterritorial jurisdiction of CCI under Indian Competition Law and the objective of the researcher is to find out the solution that how there may be sound and effective enforcement of extraterritorial jurisdiction of Indian Competition Law.

1.3 RESEARCH METHODOLOGY

The writer has adopted analytical, descriptive and comparative methodology for this paper and she is relying on books, journals, newspapers and online databases and on the views of writers in discipline of Competition law.

1.4 RESEARCH QUESTIONS

1) To analyse the history of competition law in India and jurisdiction issues in cross-border activities and reach of competition laws in India.

2) To analyse the evolution of the concept of extra-territorial jurisdiction of competition laws in various jurisdictions, namely EU and US, from which the Indian law has shaped up.

3) To analyse the jurisdiction of CCI, issues regarding extra-territorial jurisdiction of CCI under the Indian Competition law, Historical jurisdiction of Indian competition law in India, Extraterritoriality principle, Extraterritorial application and enforcement of competition laws in India.

4) To analyse the concept of anti-trust laws and their extra-territorial application/enforcement with regard to international trade while analyzing various issues.

1.5 HISTORY OF COMPETITION LAW IN INDIA

India enacted the Competition Act, 2002 as part of the second-generation economic reforms. The new act was based on the report of a High Level Committee on Competition Law and Policy set up by the Government of India to study the Monopolies and Restrictive Trade Practices Act, 1969 and legislative changes required for the emerging new economic scenario. The Government appointed the Committee under the chairmanship of Shri S.V.S. Raghvan in October 1999 for shifting the approach from curbing monopolies to promoting competition in
line with the international environment. The Committee recommended the enactment of Competition Act with the objective, inter alia, to establish the Competition Commission of India, and to repeal the MRTP Act, 1969. The Competition Commission of India has been established under the Act by a Government Notification dated 14th October 2003. The Commission consists of a Chairperson and not less than ten other members to be appointed by the Central Government.

1.6 JURISDICTION ISSUES IN CROSS BORDER ANTI-COMPETITIVE ACTIVITIES AND REACH OF COMPETITION LAWS

Due to the overreaching effects of anti-competitive activities of a domestic firm especially in cases of exports, competition rules are applied to the conduct of foreign enterprises occurring in a foreign state but affecting the domestic market of a applying state. In principle, there are two possible approaches to finding a solution to this problem. One is international, the other is national. In the absence of a binding international competition policy, countries’ generally search for a national solution by applying their domestic laws to the foreign defendants. The rules of establishing jurisdiction and extraterritorial effect of the domestic laws differ from country to country. Sometimes, rules of private international law are also applied to determine the jurisdiction over defendant. “Extraterritoriality” refers to country’s ability to govern activities in foreign countries. “Territoriality” describes the situation in which a country’s laws apply only to national activity.

---

CHAPTER II

EXTRA-TERRITORIAL JURISDICTION AND ENFORCEMENT OF US COMPETITION LAW

2.1 Introduction

The main U.S. antitrust statute, the Sherman Act, is a criminal statute in that violations of it are criminal offences. However, it can also be enforced through private action. Because the Sherman Act dates from 1890 its extraterritoriality reach inevitably became an issue before the EEC even existed. The ‘Effects Doctrine’ propounded on the US courts has provided the central concept around which the discussion of extraterritoriality in competition law is usually conducted. Two points about US law should be noted at the outset.

First, there is a multiplicity of actors in US antitrust law. The federal agencies, the Department of Justice (DOJ) and the Federal Trade Commission (FTC) are not decision makers as is the European Commission as antitrust law is enforced in the ordinary courts. The Sherman, Clayton and FTC Acts all apply to ‘commerce ………….with foreign nations’. The origin of modern competition policy can be traced back to the end of the 19th century, mainly a reaction to the formation of trusts in the United States. The Sherman Act debates began in 1888. The United States has two agencies enforcing competition law on the national level.

---

16 The ‘trust’ was originally a device by which several corporations engaged in the same general line of business
2.2 CASE LAWS

The “territorialist” approach describes the position adopted by the US Supreme Court in 1909 in *American Banana Co. v. United Fruit Co.* stating that “the character of an act as lawful or unlawful must be determined wholly by the law of the country where the acts is done”. Justice Holmes, writing for the majority, hold that deposit the fact that both the plaintiff and defendant were American corporations, the conduct of the defendant was beyond the reach of the Sherman Act, because the acts in question took place in Panama and Cost Rica. Under the American Banana approach, the reach of domestic law is coextensive with the geographic territory of the country. Acts that take place within the physical confines of the country are subject to local law; those acts that occur abroad are not.

This approach was overruled by the US courts in *United States v. Aluminium Company of America*, wherein the United States courts applied US anti-trust laws to conduct that occurs in a foreign state but is intended to affect the United States and does in fact bring about such an effect.

Under US legal system, the federal courts have jurisdiction over a defendant corporation if the corporation is incorporated or has its principal place of business in the state where the federal court sits. A court has general jurisdiction over a nonresident corporation if the corporation’s contacts with the forum state are “continuous and systematic”. In case, if a

---

20 Ibid at 356.
22 148 F 2d 416 (2d Cir 1945).
court lacks general jurisdiction over the nonresident corporation, then the court may be able to exercise specific jurisdiction over it under “minimum contacts theory”.

Under US legal system, the federal courts have jurisdiction over a defendant corporation if the corporation is incorporated or has its principal place of business in the state where the federal court sits. A court has general jurisdiction over a non resident corporation if the corporation’s contacts with the forum state are “continuous and systematic”. In case, if a court lacks general jurisdiction over the nonresident corporation, then the court may be able to exercise specific jurisdiction over it under “minimum contacts theory”.

In the globalized economy, it is necessary to have extraterritorial application of domestic competition laws to regulate the anti-competitive activities of foreign firms taking place in the foreign country. With regard to jurisdiction over foreign anti-trust defendants, principle authority in the US is Hartford Fire Insurance Co. case, wherein a number of states and a private plaintiff sued the defendant companies, alleging that the insurance companies had violated section 1 of the Sherman Act by conspiring to restrict the terms of coverage of commercial general liability insurance available in the United States. The court also clarified that “international comity” is not a bar to the court’s jurisdiction over foreign defendant. The court stated:

“The “comity” they refer to is not the comity of courts, whereby judges decline to exercise jurisdiction over matters more appropriately adjudged elsewhere, but rather what might be termed “prescriptive comity”: the respect sovereign nations afford each other by limiting the reach of their laws. That comity is exercised by legislatures have enacted. It is a traditional component of choice-of-law theory.”

This shows that the principles of international comity should be used only where there exists a “true conflict” between American and foreign law. The court explained that a true conflict exists only when a party cannot simultaneously comply with the laws of both countries.

In the era of disappearing national boundaries in economic world, extraterritorial application of competition rules is to a degree inevitable. Without such an extraterritorial reach of the rules, transnational business entities could engage in restrictive business practices in a “twilight zone” where no state could fully exercise jurisdiction and yet the harmful effects of such restrictive business practices would be felt in one or more states.\(^2\)

\(^{28}\) See District Court’s Decision and Order in In Re, Insurance Litigation, Antitrust and Trade Reg. Rep. (BNA) No. 1434 at 432, 444.
3.1 INTRODUCTION

It is difficult to consider the question of extraterritoriality in EC competition law without first looking at the position in US law. The main U.S. antitrust statute, the Sherman Act, is a criminal statute in that violations of it are criminal offences. However, it can also be enforced through private action. Because the Sherman Act dates from 1890 its extraterritoriality reach inevitably became an issue before the EEC even existed.\(^{29}\)

The practice followed in European courts is much similar to the decision of Hartford case. The European Court of Justice in A. Ahlstroon Osakeytio v. Commission,\(^{30}\) approved an extraterritorial application of the EU competition rules to conduct by the foreign enterprises which occurred in the foreign countries but affected the commerce among the member states.

3.2 CASE LAWS

“Wood Pulp” Case\(^ {31}\):

This was a case where the EC had imposed fines on certain enterprises, having their registered offices outside the EC, for violation of Article 81. The charges against them were that they fixed, in concert, prices to customers in the EC, provided exchange of individualized data concerning prices with certain other wood pulp producers, and made price recommendations through the trade association. The appellants, producers of wood pulp and two associations of wood pulp producers challenged that decision in an appeal to the European Court of Justice.

---


\(^{31}\) Ibid.
The Commission had based its decision on the ground that all the addresses of the decision were either exporting directly to purchasers within the Community, or were doing business within the Community through branches, subsidiaries, agencies or other establishments in the Community and that the action in concert applied to the vast majority of the sales of those undertakings to and in the Community. The Commission concluded:

“The effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EEC was therefore not only substantial but intended, and was the primary and direct result of the agreements and practices.”

The jurisdiction of the Commission to apply its competition rules to them was challenged by some of the appellants. The argument was that conduct outside the Community could not be sought to be regulated merely because the repercussions of that conduct were felt within the Community. Meeting the objection, the Court held:

“Where wood pulp producers established in those countries sell directly to purchasers established in the Community and engage in price competition in order to win orders from those customers, that constitutes competition within the common market. It follows that where those producers concert on the prices to be charged to their customers in the Community and put that concertation into effect by selling at prices which are actually coordinated, they are taking part in concertation which has the object and effect of restricting competition within the common market within the meaning of Article 85 of the Treaty.”

The Court pointed out that such conduct had two elements, one relating to the formation of the agreement or decision and the other, the implementation and that the place of implementation was the decisive factor. Holding that in as much as the place of implementation was within the Community, ‘the Community’s jurisdiction to apply its competition rules to such conduct is covered by the territoriality principle as universally recognized in public international law’, the Court added that when the overseas enterprises implemented their decisions within the Community, it was immaterial whether or not they had recourse to subsidiaries, agents, sub-agents or branches within the Community in order to make their contacts with purchasers within the Community.
CHAPTER IV

JURISDICTION OF CCI
4.1 JURISDICTION OF CCI

The mechanism for controlling anti-competitive acts carried on by persons having the location of their operations at some place in India and, therefore, directly subject to the territorial jurisdiction of Indian courts and tribunals. It is possible for enterprises without having a fixed place of business in India to control the operations of any enterprise in India in a manner injuring the process of competition in India. Share-holding is not necessary for this purpose and it could be through a distribution agreement, price-fixing arrangement, or exclusive dealing agreements that have as their object the elimination of a competitor or partitioning the market. There are overseas cartels operating from different countries and engaged in conspiracies to carry out such anti-competitive practices that are the serious concern of industrially advanced countries and they are grappling with the problem of methods of cooperation in rendering these cartels ineffective, as it is well understood that domestic legislation has only territorial effect.

The objective of the establishment is to regulate agreements likely to have an “Appreciable Adverse Effect on Competition”32 in India. Such acts may even take place outside India.33 This refers to the principle of extra-territorial jurisdiction. Section 32 of the Act provides that the Commission has the power to inquire into any agreement, abuse or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India. The Commission has jurisdiction to34:

i) Enquire into Anti-competitive Agreements35 (eg. Cartel, bid-rigging, etc.);

ii) Enquire into Abuse of dominant position36 (eg. Predatory pricing, etc.);

iii) Regulate Combinations37 (mergers/amalgamation, acquisition of shares or controls etc.);

---

32 THE COMPETITION ACT, 2002, No. 12 of 2003 OBJECTIVE.
iv) Undertake Competition Advocacy (including advice to the Central Government on Competition policy issues.

The jurisdiction of the Commission includes seeking compliance of its mandate by taking both enforcement and non-enforcement measures whereas the enforcement measures extend to enquiries and regulations, the non-enforcement measures includes undertaking competition advocacy, creating public awareness and imparting training on competition issues.  

The section offers no indication of the type of order that may be passed in such cases and the recommended action that would disable the person not resident in India from continuing his anti-competitive arrangement that has effect in India. It should have been specifically stated in the section itself. The language of section 14 of the MRTP Act in this context may usefully be considered. It runs as follows:

“Where any practice substantially follows within monopolistic, restrictive, or unfair, trade practice relating to the production, storage, supply, distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, an order may be made under this Act, with respect to that part of the practice which is carried on in India.

It is well recognized that declaring unlawful any agreement or practice and restraining the local enterprise that is a party to such an agreement is sufficiently effective to make the arrangement inoperative within the country enforcing its domestic law. This is how courts have been so far aided in giving effect to the provisions of any national law in such circumstances.

4.2 ISSUES REGARDING EXTRA-TERRITORIAL JURISDICTION UNDER COMPETITION LAW

38 Supra n.13.
The application of a State’s antitrust laws to conduct outside that state raises several key issues. Some of the key issues being:

- First, it must be determined whether the law of a particular country (or subdivision thereof) extends to conduct taking place outside its borders.
- Second, it must be confirmed whether any domestic court or tribunal has jurisdiction to hear the matter.
- Third, if the law does have extraterritorial reach and a domestic court or tribunal has jurisdiction to hear the case, practical problems of enforcement will arise, both with respect to the obtaining of evidence and the implementation of any fines or penalties.

4.3 HISTORICAL BACKGROUND OF EXTRA-TERRITORIAL JURISDICTION UNDER THE INDIAN COMPETITION LAW

Dramatic changes have taken place in the World’s economy in a remarkably short period of time. These developments present significant challenges for systems of competition law. The economic effects of cartels and anti-competitive behavior on the part of firms with market power and of mergers are not constrained by national boundaries. Until relatively recently 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 anti-competitive manner having adverse effects in the territory of the former and whether there should be laws to prevent the “excessive” assertion of extraterritorial jurisdiction.

---

The All India Float Glass Manufacturers’ Association (the Association) filed a complaint and so did The Alkali Manufacturers’ Association of India (AMAI) the MRTP Commission instituted an enquiry and passed orders against M/s. Haridas Exports on behalf of Indonesian companies and the ANSAC.

In *Hridas Exports v. All India Float Glass Mfrs. Association*, a complainant before the MRTP Commission against three Indonesian companies alleging that they were manufacturing float glass and were selling the same at predatory prices in India, and were hence resorting to restrictive and unfair trade practices. In the complaint, it was stated that the float glass of Indonesian origin was being exported into India at the CIF price of US $155 to 180 PMT. At this price, some float glass had been shipped into India during the period December, 1997 to June, 1998. It was alleged that these sale prices were predatory prices as they were less than not only the cost of production for the product in Indonesia but also the variable cost of production of the product. The complainant gave figures indicating the estimated cost of float glass in India with a view to demonstrate that the Indian manufacturers of float glass in India would not be able to compete with the price at which the Indonesian manufacturers were presently selling or intending to sell to Indian consumers. On this basis, it was contended that the sale of float glass by the Indonesian manufacturers at the said price of US$ 155 to 180 PMT will restrict, distort and prevent competition by pricing out Indian producers from the market. This would result in lowering the production of the Indian producers from the market. This would result in lowering the production of the Indian industry and the consequent idle capacity and losses would force the industry to become sick which would lead to its closure which would have a direct impact on the employment in the Industry. The respondent replied that it has never exported glasses into the India and the MRTP Act dosen’t contain any ‘long arm provision’ in this regard. The case appealed to the Supreme Court of India and the court held that:44

43 AIR 2002 SC 2728.
44 Haridas Exports v. All India Float Glass Mfrs. Association AIR 2002 SC 2728 at p. 2742.

18
“Reading sections 1(2), 2(e) and 14 together can leave on manner of doubt that the Act has no extra territorial operation. Section 1(2) specifically provides that the Act extends to the whole of India except the State of Jammu and Kashmir, thereby defining the geographical boundary of the operation of the Act. Section 2(e)(iii) defines goods as including those goods which are supplied, distributed or controlled in India or goods imported into India”. In the present, we are concerned with float glass which was sought to be imported into India. For the purpose of the Act, it is only the goods imported into India which will fall within the definition of the word “goods” in section 2(e). As such for the Commission to exercise any jurisdiction goods must be those which are imported into India. For the purpose of the Act, it is only the goods imported into India which will fall within the definition of the word “goods” in Section 2(e). As such for the Commission to exercise any jurisdiction goods must be those which are imported into India. As long as the import has not taken place and the goods are merely intended for export to India the same will not fall within the definition of the word “goods” in section 2(e)”.

The Supreme Court of India while dealing with the application of “effects doctrine” in India and the jurisdiction of the MRTP Commission for the actions and agreements which are entered into outside India but the resultant adverse effect is experienced in India held that:45

“This “effects doctrine” will clothe the MRTP Commission with jurisdiction to pass an appropriate order even though a transaction, for example, which results in exporting goods to India at predatory price, which was in effect a restrictive trade practice, had been carried out outside the territory of India if the effect of that had resulted in a restrictive trade practice in India. If power is not given to the MRTP Commission to have jurisdiction with regard to that part of trade practice in India which is restrictive in nature then it will mean that persons outside India can continue to indulge in such practices whose adverse effect is felt in India with impugnity. A competition law like the MRTP Act is a mechanism to counter cross border

45 Ibid.
economic terrorism. Therefore, even though such an agreement may enter into outside India can continue to indulge in such practices whose adverse effect is felt in India with impugnity. A competition law like the MRTP Act is a mechanism to counter cross border economic terrorism. Therefore, even though such an agreement may enter into outside the territorial jurisdiction of the Commission but if it results in a restrictive trade practice in India then the Commission will have jurisdiction under section 37 to pass appropriate orders in respect of such restrictive trade practice”.

The court finally concluded that:

(a) The MRTP Commission can inter alia take action when a restrictive trade practice is carried out in India in respect of imported into India and hence the matters are beyond the jurisdiction of the MRTP Commission;

(b) Under the MRTP Act, there is no power to stop import;

(c) The MRTP Act does not confer extra territorial jurisdiction on the MRTP Commission;

(d) If a cartel is selling goods to India and still making profit then it is not in the interest of the general body of consumers in India to prevent the import of such goods.

It was realized that in certain aspects the MRTP Act was too narrow in its sweep to deal with competition issues especially in the era of liberalization and globalization. The MRTP Commission had taken up complaints against anticompetitive practices but was handicapped on account of certain limitations in the law. These limitations have been adequately covered in the new law.

They thus filed an appeal in the Supreme Court of India which inter alia passed the following order:

➢ The MRTP Act does not confer extra territorial jurisdiction on the MRTP Commission;

Therefore, due to the shortcomings of the MRTP Act Section 32 has been incorporated in the Competition Act, 2002 which makes provision with regard to extraterritorial jurisdiction.
4.4 THE EXTRATERRITORIALITY PRINCIPLE

Some countries seek to protect their customers and firms from anti-competitive conduct by applying their laws extraterritorially. In other words, a country may purport to apply its competition laws to foreign enterprises that operate in foreign countries but have an impact on its domestic economy.\(^{46}\)

The limits upon a State’s jurisdicational competence and thereof upon its ability to apply its competition laws to overseas undertakings- are members of public international law.\(^{47}\) The increase in cross-border antitrust enforcement is the result of following identifiable trends\(^{48}\):

- The increasing globalization of business;
- The increasing proliferation of new antitrust laws around the world;
- The increasing acceptance of the principle that foreign conduct may fall conduct may fall within the subject-matter scope of a nation’s courts if that conduct has adverse “effects” on consumers in that country;

The principle of extraterritoriality is based on two elements:

- **SUBJECT-MATTER JURISDICTION:** A State has jurisdiction to make laws, that is to say to ‘lay down general or individual rules through its legislative, executive or juridicial bodies’.\(^{49}\) This is known as a State’s legislative, prescriptive or subject-matter jurisdiction.\(^{50}\) As for as subject-matter jurisdiction is concerned, it is generally accepted in public international law that a State has power to make laws affecting conduct within its territory (the ‘territoriality principle’) and to regulate the behavior of its citizens.

---


\(^{47}\) Brownlie, “Principles of Public International Law” (Claredon Press, 6\(^{th}\) ed, 2003) ch XV; see also Mann, “The Doctrine of Jurisdiction in International Law” 111 RDC (1964) 9.


\(^{49}\) Per Advocate General Darmon in Cases 114/85 etc (The Wood Pulp Case) 1988 ECR 5193, 1988 4 CMLR 901, P.923.

abroad, citizens for this purpose including companies incorporated under its law (the ‘nationality principle’). 51

- **ENFORCEMENT JURISDICTION**: A State has jurisdiction to enforce its laws, that is ‘the power of the State to give effect to a general rule or an individual decision by means of substantive implementing measures which may include even coercion by the authorities. This is known as State’s enforcement jurisdiction. 52 It is generally recognized that even if subject-matter jurisdiction exists in relation to the conduct of someone in another State, it is improper to attempt to enforce the law in question within the State’s territory without its permission. 53 For sound and effective enforcement jurisdiction, it requires Bilateral or Multilateral or both Agreements.

### 4.5 EXTRA-TERRITORIAL APPLICATION AND ENFORCEMENT OF INDIAN COMPETITION LAW

Section 32 of the Competition Act, 2002 we find that it makes provision with regard to extraterritorial jurisdiction of Indian Competition Authority. 54 The Proviso 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. A treaty is different from an understanding. Thus the mandate of the Competition Commission extends beyond the boundaries of India. In case any agreement that has been entered outside India and is anti-competitive in terms of sec.3 of the Act; or any party to such an agreement 55 is outside India; or any enterprise 56 abusing the dominant position is outside India; or a combination has taken place outside India; or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, if such agreement, combination or abuse of dominant position has or are likely to

---

51 Ibid, p. 429.
53 Supra n. 26, p.430.
54 Here Indian Competition Authority shows the Competition Commission of India.
56 Ibid, S. 2(H).
have an adverse effect on competition in the Indian market, the CCI shall have the power to inquire into such agreement, combination or abuse of dominant position has or are likely to have an adverse effect on competition in the Indian market, the CCI shall have the power to inquire into such agreement or dominant position or combination if have or are likely to have an appreciable adverse effect on competition in the relevant market in India.

By looking at the language of Section 32 of the Competition Act, 2002 it may be concluded that in India also the ‘Effects Doctrine’ may be applied as it has been recognized under Section 32. It would be pertinent to say at this juncture that the Commission has not notified any special regulation for the enforcement of Section 32 of the Act and very recently in May, 2009 has notified the Competition Commission of India (General) Regulations 2009, 2 of 2009, so the process for the enforcement of extraterritorial jurisdiction shall be according to this regulation and the Code of Civil Procedure, 1908 wherever applicable.

CHAPTER V

COMPETITION LAW AND INTERNATIONAL TRADE

57 The Effects Doctrine is applicable only when the action taken outside the Country has ‘direct, substantial, and reasonably foreseeable’ effects within the Country.
5.1 INTRODUCTION

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 competition law herein referred to includes national legislations, international conventions and any other applicable bilateral, multilateral or regional agreements. The sweeping ambit of both trade and competition law has also made a large number of companies to deal with legal issues in the international context that they may have previously considered only in terms of their domestic impact. Thus, with the growth of international trade, the need for internationalization of competition policy was also recognized and a number of attempts have been made to develop an international competition policy.

5.2 INTERNATIONAL TRADE AND COMPETITION POLICY - AGREEMENTS AND DISAGreements

Analogous to the relationship between competition law and intellectual property, the competition law and international trade too have complementary functions to each other. Contrary to the common belief, free market too needs to be regulated and competition law serves as a regulatory mechanism. Soon after the liberalization of economy and coming into effect of WTO, need for effective competition laws and policies to address anti-competitive practices of enterprises that impact on international trade was realized.58 International trade law regime aims at establishing a free and open system of international trade between countries inter se and competition law aims at preventing the market and ensuring the market to be “free and fair”. Apart from this, the importance of competition policy has been recognized in restrictive economies also wherein competition has been curtailed by way of an industrial policy which restricts import and entry of new firm. With market competition thus restricted, competition policy was required to prevent collusive behavior and abuse of dominance by those firms that were allowed to function, both public and private, but few developing countries thought that it

58 See in particular, the discussion of “The impact of anti-competitive practices of enterprises on international trade” which took place during the meeting of 11-13 March, reported in M/4, at paragraphs 21-46; and written contributions referred to therein.
was important. This shows that competition law is necessary for market regulation both at national and international level for preventing firms from practicing anti-competitive behavior.

The consistency between the two captioned policy field depends 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.\textsuperscript{59}

Restrictions on trade in the form of tariff and non-tariff barriers are imposed by governments, whereas restrictions on competition are imposed by the firms. These divergent aims of trade and competition policy were noted by the WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) in the following words:\textsuperscript{60}

“A number of reasons why trade policy and competition policy might sometimes have divergent aims and effects were put forward. It was suggested that, whereas competition policy focused on the effect of enterprise behavior on the welfare of the consumers, trade policy tended to focus on producer interests, and was more amenable to capture by special interests groups. Competition policy was described as being more concerned with protecting competition and trade measures with protecting competition and trade measures with protecting competitors. It was also stated that, in addition to providing a measure of protection, trade policy often had

\textsuperscript{59} See M/2, paragraphs 8 and 9; M/3, paragraphs 4 and 9.
\textsuperscript{60} See M/2, paragraph 11.
objectives which could lead to divergences from competition policy goals, such as raising revenue, promoting self-sufficiency and encouraging exports. Another difference referred to in this connection was that, whereas nationality was a key element in trade policy, it was not generally a consideration in competition policy. On the other hand, it was suggested that competition policy was susceptible to application in ways that gave excessive weight to the interests of national consumers and producers, to the neglect of the interests of consumers in other countries- as evidenced, for example, in the exemption of export cartels from many countries’ competition legislation. Moreover, the point was made that competition policy sometimes encompassed producer oriented goals such as the protection of small businesses or the pursuit of national industrial policy”.

The Working Group further noted that 61

“While competition policy indeed focused primarily on the goals of efficiency and consumer welfare, trade policy often sought to protect or advance the interests of a country’s individual producers. There was nothing intrinsically objectionable to this. Different policy instruments often served different objectives. For example, with regard to the matter of market access, depending on the facts in a particular market, it could be the case that the use of vertical market restraints by firms would be considered acceptable from the standpoint of competition policy, perhaps due to the existence of a sufficiently large number of competing domestic firms. The same situation could, nonetheless, give rise to legitimate concerns from a trade policy point of view, if it was deemed to impede access to the market by foreign firms. Another distinguishing feature of competition and trade policy was that, in many cases, competition policy issues could be resolved through private actions by firms, whereas this was not true of trade policy”.

The noted conflict between the two policies can’t be neglected but while looking from a broader perspective, it seems that both aims at an efficient allocation of the resources and promoting the consumer welfare.

61 See M/3, paragraph 7.
5.3 COMPETITION POLICY AT INTERNATIONAL LEVEL

(I) INITIAL EFFORTS AT THE HAVANA CHARTER

The trade and competition interface has been debated a lot at the international level, especially in the aftermath of the growing highly restrictive trade policies pursued by many countries and the growth of the international cartels in the face of the economic depression of the 1930s. Similarly, in the present context, when the government barriers to trade and investment have been reduced, there have been increasing concerns that the gains from such liberalization may be thwarted by private anti-competitive practices. Moreover, the role of a sound competition policy in economic growth and realizing the benefits of liberalization of individual economy was also realized.

The relationship between trade and competition policy was discussed at an international forum for the first time in Havana Charter 1996. Article 46 of the Charter states that:

“Each Member shall take appropriate measures and shall co-operate with the Organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control, whenever such practices have harmful effects on the expansion of production or trade and interfere with the achievement of any of the other objectives set forth in Article 1”.

The Havana Charter though could not establish the International Trade Organization but the serious considerations at the interactions of these two policy fields were recognized by the member states.

(II) ISSUES AT THE SINGAPORE MINISTERIAL CONFERENCE

The World Trade Organization too realized the need of a comprehensive international competition policy to ensure that the progress made over many decades on reducing direct
barriers to trade is not neutralized by private arrangements amongst the firms to reduce competition. For the first time, the issue was debated in a substantial manner at Singapore Ministerial Conference in December 1996, wherein the relationship between trade and competition policy was one of the four “Singapore Issues” which was put on the WTO agenda for discussion. The WTO Working Group on the Interaction between Trade and Competition Policy (WGTCP) suggested that three broad categories of practices having such effects could be identified:

(i) Practices affecting market access for imports.

(ii) Practices affecting international markets, where different countries are affected in largely the same way; and

(iii) Practices having a differential impact on the national markets of countries.⁶²

(III) EFFORTS AT THE UNCTAD

National competition laws may effectively tackle anti-competitive practices that are exclusively implemented on a domestic market, but are carried out by firms operating from third countries. But national competition laws and law enforcement institutions, especially those of developing countries, are not always fully equipped to deal with transboundary anti-competitive practices. This situation prompted the United Nations Conference on Trade and Development (“UNCTAD”) to adopt a comprehensive code on restrictive business practices on 5th December 1980. The “Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices” includes:

(1) Guidelines addressed to enterprises concerning anti-competitive agreements and abuses of dominant position that restraints international trade;

(2) Recommendations to governments for effective control of restrictive business practices and fair treatment of enterprises under national legislation;

⁶² See M/4, paragraph 22.
(3) Provisions for bilateral consultation between governments to resolve issue arising out of alleged restrictive business practices; and

(4) The establishment of follow up machinery in UNCTAD to continue work designed to improve developing countries’ ability to deal with restrictive business practice.

(IV) THE ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT’S (OECD’s) COMMITTEE ON COMPETITION LAW AND POLICY

The OECD provides a forum to discuss and debate upon the issues relating to competition policy. The Competition Committee, made up of the leaders of the world’s major competition authorities, is the premier source of policy analysis and advice to governments on how best to harness market forces in the interests of greater global economic efficiency and prosperity.63

(V) GATT/WTO CONNECTION

(V-1) ABSENCE OF COMPETITION PROVISIONS IN GATT

Unfortunately, the concerns regarding anti-competitive practices of multinational corporations were not discussed during the debates of GATT. Infact, in spite of the request from the developing nations to include a speared item devoted to competition policy or restrictive business trade practices, Uruguay round was concluded without including competition policy as a separate item to debate upon. The primary objective of the GATT was to carry forward the freeing of international trade for next few couple of decades and the GATT successfully did so without containing any explicit and comprehensive provisions for an effective competition policy. GATT rules appear to confirm this assessment.

(V-2) NON-COMPREHENSIVE APPROACH IN THE WTO AGREEMENT

63 See http://www.oecd.org/department/0,3355, en_2649_34685_1_1_1_1_1_1_1_1,00.html (last visited on 10th November 2007).
Notwithstanding the absence of explicit binding WTO competition rules, in practice it has been impossible to exclude competition policy considerations altogether. The WTO approach differs from that of the GATT by its much greater emphasis on broader and integrated market access guarantees. While not directly addressing competition law per se, there has been an ad hoc development of competition-related rules in the WTO systems, which are binding, albeit not in the form of an explicit comprehensive body of rules but rather scattered in an archipelago of legal bases in the WTO Agreement. A number of agreements entered upon under the WTO encompass provisions relating to competition laws.

5.4 INTERNATIONAL COMPETITION POLICY AGREEMENTS

In the absence of any agreed framework regarding competition policy and trade under WTO, there are a number of multilateral and bilateral agreements entered upon by different countries. The principle of pacta serv servanda can be applied while enforcing the provisions of these agreements. The agreements usually contain both ‘positive comity’ and ‘negative comity’ requirements.

➢ POSITIVE COMITY

The positive comity requires active co-operation and this co-operation involves a requested country’s conducting a law enforcement proceeding into conduct in its territory that is allegedly harming the interests of some other country. Positive comity may be particularly useful in those cases in which illegal activity impedes “market access”. In competition law agreements, positive comity requires competition policy authorities to consider, taking into account their own laws, procedures, interests and resources, complaints against anti-competitive conduct by firms in their jurisdiction which adversely affect parties in the other jurisdiction. The first noted bilateral competition agreement based on the positive comity was entered upon between the EU and the US in 1991.64 The positive comity was further

strengthened by the EU/US Positive Comity Agreement 1998. It was stated that under the rules of positive comity, one party may request the other party to remedy anti-competitive behavior which originates in its jurisdiction but affects the requesting party as well. The agreement clarifies both the mechanics of the positive comity co-operation instrument, and the circumstances in which it can be availed of. The provisions of positive comity have not been frequently used by the companies (i.e. complainants) because they prefer to address directly to competition authority they consider to be best suited to deal with the situation.

The agreement laid down an affirmative duty on both the parties to investigate each other’s complainant. However, it does not oblige the authorities to initiate prosecutions, and excludes mergers and also export cartels (which are exempted from competition laws in both jurisdictions). Though the US and the EU took around three years to come to a point of entering into an agreement, it paved path for a web of bilateral agreements. Initially, the other countries of the world were of the view considered the US-EU agreement as a special case, applicable only to fairly homogenous states at approximately at the same level of development, that it could provide little guidance for any wider arrangement. However, later on couple of similar bilateral agreements was mutually entered into between developed and developing countries. The US-Israel agreement (March, 1999), the US-Brazil agreement (October, 1999) and the US-Mexico agreement (July, 2000) were the first few bilateral agreements signed by the US with the developing nations.

➢ CO-ORDINATION AND CO-OPERATION

One of the peculiarities of these agreements is co-operation and co-operation and co-operation. Article IV of EU-US agreement provides for rather flexible provisions, and recommends co-ordinations especially when it will have an effect on the ‘ability of both parties to achieve their respective enforcement objectives’. The extent of the co-ordination depends upon the relative abilities of the parties and the extent to which either party’s competition authorities can secure effective relief against the anti-competitive activities involved. This shows that at the roots of the agreement, the parties have a better understanding and acceptance of international competition.

The classic example of bilateral co-operation is Microsoft’s case, which was investigated by both the US and the EU competition authorities and with the exchange of information between them; they came up to the same conclusion. The conclusion was that Microsoft had infringed both sections 1 and 2 of the Sherman Act and Articles 81 and 82 of the Treaty of Rome. After this, when both the Commission and the Department of Justice were ready to bring an action against Microsoft, the firm not only agreed to negotiate remedies with the agencies, but also requested that the European Commission take part in the DoJ’s negotiations.

➢ EXCHANGE OF INFORMATION

The agreements usually contain a provision for mandatory exchange of information between the relative parties. Most of the agreements commit party’s competition authorities to:

(1) Provide information already in their possession on request, and

(2) Provide information voluntarily.

Article III of the agreement provides that each party will provide the other party with any significant information that comes to the party with any significant information that comes to the attention of its competition authorities on anti-competitive activities that its competition authorities. Furthermore, a party can request for any information from the
other party and the party will provide to the requesting party such information within its possession as the requesting party’s competition authorities. Furthermore, a party can request for any information from the other party and the party will provide to the requesting party such information within its possession as the requesting party may describe that is relevant to an enforcement activity may describe that is relevant to an enforcement activity being considered or conducted by the requesting party’s competition authorities. However, under this provision, the parties are not bound to take any action or disclose any information inconsistent with their national laws.  

During the investigation and enforcement and enforcement, the parties regularly are asked to waive the protection governing materials submitted in connection with merger notification so that competition authorities may co-ordinate their reviews.

➢ NEGATIVE COMITY

Negative comity requires each party undertakes to notify the other when it is proposing to enforce its competition laws in a way that might affect the latter’s important interests, and to take their views into account. Article VI of the EU-US agreement calls on each party to seek, at all stages in its enforcement activities, to take into account the important interests of the other party. Each party shall consider important interests of the other party in decisions as to whether or not to initiate an investigation or proceeding, the scope of an investigation or proceeding, the nature of the remedies or penalties sought, and in other ways, as appropriate. This approach has been encouraged by a 1995 Recommendation on Cooperation between Member Countries on Anti-competitive Practices Affecting International Trade issued by the Organization for Economic Cooperation and Development (OECD), which comprises all developed countries and more recently three developing countries (Korea, Mexico and Turkey). The agreement lists down the following factors to be taken care of by each party while enforcing its competition laws:

---

66 See Article IX of the EU-US agreement. Similar provision is also there in the US-Canada, the US-Israel and the EC-Canada agreement.
67 See Article VI of the EU-US agreement.
(a) The relative significance to the anti-competitive activities involved of conduct within the other party’s territory;

(b) The presence or absence of a purpose on the part of those engaged in the anti-competitive activities to affect consumers, suppliers or competitors within the enforcing party’s territory;

(c) The relative significance of the effects of the anti-competitive activities on the enforcing party’s interests as compared with the effects on the other party’s interests;

(d) The existence or absence of reasonable expectations that would be furthered or defeated by the enforcement activities;

(e) The degree of conflict or consistency between the enforcement activities and the other party’s laws or articulated economic policies; and

(f) The extent to which enforcement activities of the other party with respect to the same persons, including judgments or undertakings resulting from such activities, may be affected.

CHAPTER VI

CONCLUSION
On the basis of research carried out by the researcher, a conclusion can be drawn that as MRTP Act did not make any provision with regard to extraterritorial jurisdiction which affected competition in India. The shortcomings arising thus, compelled the Parliament to remove this difficulty and by virtue of Section 32 of the Competition Act, 2002 the extraterritorial jurisdiction has been conferred on Competition Commission. However, only mentioning of extraterritorial jurisdiction under Section 32 is not sufficient but it also requires ‘Enforcement Jurisdiction’. As it is seen the basis of enforcement jurisdiction may be Memorandum of Understanding, Bilateral or Multilateral Agreement or any international Doctrine or Principle recognized by States with regard to Competition Law. It maybe said that if really the beauty i.e. the object of the Competition Act, 2002 is to be sought, India must enter into Bilateral or Multilateral Agreements and Competition Commission should sign the Memorandum of Understanding under Proviso of Section 18 of the Competition Act, 2002.