EFFECT DOCTRINE IN CROSS BORDER MERGERS

Submitted on: 30 January, 2012

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ACKNOWLEDGEMENTS

I take this opportunity to express my gratitude towards my Guide, Mr. P.K Purwar for extending all possible help during my tenure as an intern at the Commission. This project would not have been possible without his help and guidance. I would like to thank the Librarian and all other staff for providing access to all the relevant books from the library. I thank other officials and office staff, who have also extended their help whenever needed. I thank my co-interns and friends in Competition Commission of India for helping me, whenever I needed help. Last but not the least I would like to thank the Competition Commission of India for providing me with this opportunity.
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1. INTRODUCTION

With the progressive opening of the trade regimes, the developing countries have to deal with the influence of actions which take place or originate outside its borders. As India integrates more & more in global economy, they become more prone to anti-competitive practices operating on a global scale or originating elsewhere in the globe. Their ability to deal with the cross border competition concerns is of utmost importance to the level of competition in the domestic markets. Some of the international challenges can be international cartels, cross border mergers & acquisitions, anti competitive practices by TNC’s and dumping.

Cross border merger and acquisitions affect markets of more than one country. Consequently, the review of such mergers involves multiple jurisdictions. The assertion of jurisdiction by any country in such cases is usually determined by the “effects doctrine”. According to this doctrine, a country can claim antitrust jurisdiction over any anticompetitive activity that affects their domestic markets, irrespective of the location or nationality of the participant’s involved. While this arrangement provides a safeguard to the domestic markets, the interests of the global economy and international competition are adversely affected since national regulatory authorities take into account the effect of the merger or acquisition on their home country only disregarding its effect on foreign countries or the world economy as a whole. This in turn increases the scope of conflict between jurisdictions over merger reviews.

1 Mavroidis and Neven 1999
2 Bode and Budzinski 2005
3 Evenett and Hijzen 2006
4 Klien 2000
2. CROSS BORDER MERGER CONFLICTS – ITS ORIGIN

Although the issue of cross border merger conflict got much highlighted after the GE/Honeywell merger case in 2001, instances of differences between international authorities over assessment of merger effects leading to potential conflicts can be traced back to early 1990s. For instance, in the Ciba-Geigy and Sandoz merger case in 1996 the EU member states were not adversely affected by the deal while the U.S market faced more anti-competitive situation. Consequently, the European Union did not propose any remedial measures but U.S authorities demanded divestitures in all the product categories. This shows that when countries are concerned with their national markets only and a merger affects different countries differently the outcome of its review is likely to differ across jurisdictions. The nature of the effect of a merger on a particular country depends on the characteristics of the national firms, markets and the distribution of the merging and rival firms across the countries, etc. For instance, in the 1996 Boeing McDonnell Douglas merger, one of the concerns of the authorities was related to the effect on efficiencies in the presence of high market concentration and high market shares. This has important implications in the context of mergers across advanced and developing countries where the firms belonging to the two sets of countries are different in terms of the cost structures and at the same time there is a marked difference between country characteristics.

6 ibid.
7 ibid.
3. WHAT IS EFFECTS DOCTRINE?

According to this doctrine, domestic competition laws are applicable to foreign firms - but also to domestic firms located outside the state’s territory, when their behaviour or transactions produce an "effect" within the domestic territory. The "nationality" of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality. The "effects doctrine" was embraced by the Court of First Instance in Gencor when stating that the application of the Merger Regulation to a merger between companies located outside EU territory "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community".

The Effects Doctrine is applicable only when the action taken outside the Country has ‘direct, substantial, and reasonably foreseeable’ effects within the Country. Whether this Doctrine is against the spirit of International Law? In International Law there is no standard to determine the ‘direct, substantial, and reasonably foreseeable’ effects within the Country. Therefore, this Doctrine is not against the spirit of International Law. In the first half-century following the enactment of the Sherman Act the US courts were diffident about applying the rules of extraterritoriality. In the American Banana Case Justice Oliver Wendell Holmes said in the Supreme Court that ‘the general and almost universal rule is that the character of an act as lawful or unlawful must be determined wholly by the law of the country where the act is done’. Later cases retreated from this self denying ordinance, and in the Alcoa case in 1945 Judge Learned Hand laid down what is known as the ‘effects doctrine’. The case concerned a cartel of aluminium producers based in Switzerland which fixed production quotas to boost prices. The Court (the Second Circuit Court of Appeals) held that the Sherman Act applied to a Canadian...

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9 Kamala Dawar and Peter Holmes, “Competition Policy,” pg364
13 Antitrust Policy, reference: http://ingrimayne.com/econ/Monopoly/AntiTrust.html
Company which had participated in the cartel\textsuperscript{14}. Judge Learned Hand said that the Sherman Act did apply to agreements concluded outside the USA which were intended to affect US imports and did actually affect them\textsuperscript{15}. Sherman Act and FTC Act jurisdiction may be asserted over export trade and purely extraterritorial foreign trade activity only if the defendant’s conduct has a “direct, substantial and reasonably foreseeable effect” on either\textsuperscript{16}

(1) United State domestic trade
(2) United States import trade, or
(3) export trade of a person engaged in U.S. export trade.

Not surprisingly, the extraterritorial application of US antitrust laws met with hostility from other States. In Timberlane the Ninth Circuit Court of Appeals considered the notion of ‘international comity’ in this context\textsuperscript{17}. ‘Comity’ means living peacefully with other nations in mutual respect and accommodating their interests or, as one authority puts it, the ‘rules of politeness, convenience and goodwill observed by States in their mutual intercourse without being legally bound by them\textsuperscript{18}.

The so-called effects doctrine has gained more and more support internationally throughout the last 20 or 30 years\textsuperscript{19}. Following the initial Alcoa decision of the US Court for the 2nd Circuit, it has specifically been approved by the US Supreme Court and, in the 1950s, by the German legislature in what is now S. 130 (2) of the German Act against Restraints on Competition\textsuperscript{20}. After a long period of hesitation, Commonwealth countries such as the United Kingdom, Australia and New Zealand have adopted statutory rules to the same effect and this is also true for many European states including France, Italy,
Denmark, Poland, Sweden and Switzerland\textsuperscript{21}. In South-America there is evidence in Argentina, Brazil and Chile of the recognition of the effects doctrine\textsuperscript{22}. In practice, the enforcement of the respective competition statutes may differ in the various countries mentioned above\textsuperscript{23}. But there is general agreement that the national competition statute applies to anti-competitive conduct if it has direct, substantial and foreseeable domestic effects. Until about 20 years ago there were many countries which held the effects doctrine to be in conflict with public international law and in particular with the principles of territoriality and non-intervention\textsuperscript{24}. This objection has faded away.

Although the ‘effects doctrine’ could theoretically be applied to all kinds of activities, it has been most energetically maintained in the area of antitrust or competition regulation, particularly by the United States. In the famous Alcoa case\textsuperscript{25} the US Supreme Court declared that ‘any state may impose liabilities, even upon persons not within its allegiance, for the conduct outside its borders that has consequences within its borders which the state reprehends’.\textsuperscript{26} The wide-ranging nature of this concept aroused considerable opposition outside the US, as did American attempts to take evidence abroad under very broad pre-trial discovery provisions in US law.\textsuperscript{27} Especially the European Community has taken a strong stance against the US approach.\textsuperscript{28} However, it is generally accepted now that the Community competition law subscribes to an ‘effects doctrine’ for determining the reach of Articles 81 and 82\textsuperscript{29}. Under this ‘effects doctrine’,

\begin{itemize}
  \item \textsuperscript{21} Vijay Kumar Chaurasia, “the vacillation and crux of extraterritorial jurisdiction of competition law (Canada, USA, EU and India) and international cooperation: application and enforcement issues”, \textit{http://cci.gov.in/images/media/ResearchReports/VijayKrChaurasia.pdf}, retrieved on January 15, 2012.
  \item \textsuperscript{22} Trade & Competitiveness in Argentina, Brazil & Chile, OECD retrieved from \textit{http://books.google.co.in} on January 15, 2012.
  \item \textsuperscript{23} Jürgen Basedow, “\textit{Private enforcement of EC competition law}”, Pg 242, 2007 Kluwer law international BV, the Netherlands.
  \item \textsuperscript{24} Jürgen Besdow, “\textit{International Competition law series}”, \textit{Kluwer Law International}
  \item \textsuperscript{25} United States v. Aluminium Co. of America, 148 F.2nd 416 (1945)
  \item \textsuperscript{26} \textit{Id.}, page 443
  \item \textsuperscript{27} See e.g. the statement of the UK Attorney-General that ‘the wide investigating procedures under the United States’ antitrust legislation against persons outside the United States who are not United States citizens constitute an ‘extra-territorial’ infringement of the proper jurisdiction and sovereignty of the United Kingdom’, Rio Tinto Zinc v. Westinghouse Electric Corporation [1978] 2WLR 81; 73 ILR, page 296.
  \item \textsuperscript{28} This stance has mainly been against other extra-territorial extension of US laws such as the Helms Burton Act
  \item \textsuperscript{29} Pradeep S Mehta, “Essays on the international trading system”, \textit{Cameron May Limited}
judicial jurisdiction exists to apply Community competition law to restraints or abuses of dominant positions occurring outside the EU, provided that there are effects within the EU between Member States.  

30 http://www.antitrust.de/kartellrecht.htm
4. EVOLUTION OF EFFECTS DOCTRINE

4.1. United States of America:-

The ‘effects doctrine’ in US jurisprudence been developed in the Court rulings over a period of time. In the 1908 American Banana Case\(^{31}\), where all the acts complained of were committed outside the territory of the United States, including the defendant’s alleged inducements of the Costa Rican government to monopolize the banana trade, the US Supreme Court, categorically denied jurisdiction over the issue on the basis of the traditional territorial principle. However in the American Tobacco case\(^{32}\), later followed in the Sisal case\(^{33}\), the territorial principle was applied more flexibly and the US Supreme Court exercised jurisdiction over the defendants on the ground that although the agreements in question were concluded by foreigners outside the United States, jurisdiction was limited to what was performed and intended to be performed within the territory of the United States. A tectonic shift came in the US approach in the Alcoa Case\(^{34}\). In this case the defendants were foreign companies which concluded agreements outside the United States. The Court of Appeal for the Second Circuit held ‘that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders’. It went on further to state that the agreements, although made abroad, were unlawful if they were intended to affect imports and did affect them. This approach was severely criticized but nevertheless, since the Alcoa case, U.S. courts continued to follow the new jurisdictional formula of the effects doctrine for some time. After facing severe antagonistic reactions from other countries, against the excessive application of the US anti-trust laws\(^{35}\), U.S. courts began to show some restraint in assuming extraterritorial jurisdiction. In the 1984 Timberlane case\(^{36}\), the

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35 Australia, France, the United Kingdom, the Netherlands, and New Zealand enacted blocking legislations.
court concluded that it had jurisdiction over alleged anticompetitive conducts committed in Honduras but refrained from asserting extraterritorial jurisdiction. Subsequently the Foreign Trade Antitrust Improvements Act was enacted in 1976. It applies to foreign conduct that has a direct, substantial and reasonably foreseeable effect on U.S. commerce. Presently this principle is being followed by the US courts. For instance in the Nippon Paper case\(^\text{37}\), where a Japanese company was prosecuted under the Sherman Act, the Japanese government submitted a brief stating, inter alia, that the extraterritorial application of the Sherman Act to a conduct of a Japanese company engaged in business in Japan is unlawful under international law\(^\text{38}\). Nonetheless, the U.S. Supreme Court affirmed the Court of Appeal decision, which assumed the extraterritorial application of the Sherman Act to a criminal case for the first time. In 1994, the International Antitrust Enforcement Assistance Act was enacted which authorizes the FTC and DOJ to negotiate assistance agreements with foreign counterpart.

The main objective was to improve the ability of DOJ and FTC’s ability to obtain evidence located abroad in antitrust investigations. The DOJ signed one such agreement with Australia in 1999\(^\text{39}\). Protection of Exporters- a new dimension in effects doctrine- In the last decade, the extent of ‘effects doctrine’ has been taken to a completely different realm by the US. Export Cartels were already exempted from the US Antitrust law since, 1982; furthermore the United States began to expand the extraterritorial application of its antitrust laws so as to improve market access by protecting U.S. exporters’ interests. In the early 1980s, the Sherman Act was applied extraterritorially against Japanese importers for the protection of U.S. exporters in several precedents. In the Daishowa case,\(^\text{40}\) a U.S. association of lumber companies challenged an agreement by Japanese paper manufacturers to depress the prices paid for wood chips and to boycott American producers who refused to comply with the Japanese terms of purchase. Although the Japanese producers claimed that they were acting together to counter the joint selling

\(^{39}\) DOJ press release of April 27, 1999.
agreement of the U.S. association, the U.S. district court in northern California assumed jurisdiction and held that the complaint stated a cause of action and granted an injunction against the boycott. Thus a U.S. court assumed jurisdiction over the Japanese defendant and the Sherman Act was enforced extraterritorially.

In furtherance of this objective the US Government passed the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA). The FTAIA has two important effects. Firstly, it ensures that the US export conduct is not affected by the US competition law unless it has a direct, substantial and reasonably foreseeable effect on the US markets or on the US exports. Secondly, the FTAIA ensures that the US competition law applies to foreign conduct that affects the US exports provided the effect is direct, substantial and reasonably foreseeable. It is the latter effect that is important here. Thus, a boycott of a US exporter (organized by a foreign competitor or group of competitors) would be actionable on the part of the US exporter in the US courts even though there was no adverse impact on US consumer welfare. Arguably the FTAIA leaves little scope for US courts to refuse jurisdiction on comity grounds. As with inbound commerce, only if the foreign boycott was mandated by foreign law would the necessary conflict between the US and foreign law exist so that the US courts could exercise their discretion to refuse jurisdiction. The association engaged solely in the export of wood chips and qualified for an exemption from the Sherman Act, provided for in the Webb-Pomerene Act.

. This suggests that there is ample scope for the application of US competition law beyond the US borders. No other country claims such a broad and controversial power to discipline extraterritorial conduct, although this may change if the EU perceives that its efforts to internationalize competition law are not successful.

In April 1993 the DOJ announced that it would withdraw footnote 159 which stated that the DOJ “is concerned only with adverse effects on competition that would harm U.S. consumers by reducing output or raising prices.” and take appropriate enforcement action against foreign anticompetitive conduct that restrains U.S. exports, regardless of whether
the conduct results in direct harm of U.S. consumers. This change of policy was confirmed by the 1995 Guidelines of the DOJ and the FTC, which replaced the 1988 Guidelines. It is important to note that even the European Commission, which itself adheres to the effects doctrine, criticized the withdrawal of footnote 159 of the 1988 DOJ guidelines, and this was one of the main reasons the E.C. negotiated the 1988 E.C.-U.S. Supplement Agreement.

It is submitted that this new dimension of the US antitrust policy is not in consonance with the principles of Public International Law and will be a major obstacle in the formation of any future multilateral agreement in relation of Antitrust law.

4.2. European Union

Evolution of Effects Doctrine- Though the competition provisions in the Treaty of Rome, i.e. Article 81 and 82 lack specific stipulation as to the territorial scope of the Jurisdiction, the European Commission, as the enforcement agency of competition law, has repeatedly applied the effects doctrine in its decisions. In the sixth report on Competition Policy in 1977 the Commission restated its view, concluding that the Community Authorities “can act against restrictions of competition whose effects are felt within the territory under their jurisdiction, even if companies involved are locating and doing business outside the territory, and of foreign nationality, have no link with that territory, and are acting under an agreement governed by foreign law.”

But this view has not found complete support with the European Court. For instance in the Wood Pulp Case, where a number of Finnish, Swedish, American and Canadian wood pulp producers established outside the EC created a price cartel, eventually charging their customers based within the EC, the European Commission justified its

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44 European Court Judgment of 27 September 1988, European Court Reports 1988, 5193.
jurisdiction on the basis that the producers involved were exporting and selling directly to
customers in the EC or were doing business within the Community through branches,
subsidiaries or other agents and that not less than two-thirds of the total shipment and
60% of the consumption of wood pulp in the Community had been affected by the
alleged restrictive practices. Following the Commission’s decision eleven of the forty
addressees of the Commission decision brought an action for annulment of the decision.

The European Court in its decision upheld the territorial scope of Article 85 of the Treaty
as construed by the Commission. Article 85 prohibits all agreements or concerted
practices between undertakings "which may affect trade between Member States and
which have as their object or effect the prevention, restriction, or distortion of
competition within the common market..." As to the question of compatibility of the
decision with public international law the Court draws up a distinction between the
formation of the concerted practice and its "implementation." The application of Article
81 depends, not on the place where the agreement at issue is concluded but solely on the
place where the agreement is implemented. The Court also concluded that it is immaterial
in that respect whether or not the producers had recourse to subsidiaries, agents, or
branches within the Community. The Court noted that the Community’s jurisdiction to
apply its competition rules to such conduct is covered by the territorial principle as
universally recognized in public international law. On the other hand, the Court held that
the Commission’s decision be void so far as it concerns the association of wood pulp
producers (KEA), noting that the KEA did not engage itself in manufacture, selling, or
distribution, and that the KEA had not played a separate role in the implementation of the
pricing agreements.

In the Wool Pulp case, while the Commission adopted the effects doctrine, the Court
based its judgment on the ‘implementation test’. According to this test the only essential
requirement for the exercising jurisdiction is that the implementation (sale) takes place
within the European Community, while the existence of a branch, a subsidiary, etc.,
within the Community was irrelevant. In effect, the judgment endorsed the effects
doctrine because there cannot be an implementation, without its consequential effects.
This was confirmed in the Gencor case\textsuperscript{45} concerning a merger of two South African companies, in which the territorial scope of the E.E.C. Merger Regulation (Regulation No. 4064/89) and its justification under international law was reviewed. The Court of First Instance of the European Community observed that:

“According to Wood Pulp, the criterion as to the implementation of an agreement is satisfied by mere sale within the Community, irrespective of the location of the sources of supply and the production plant. It is not disputed that Gencor and Lonrho carried out sales in the Community before the concentration and would have continued to do so thereafter. Accordingly, the Commission did not err in its assessment of the territorial scope of the Regulation by applying it in this case to a proposed concentration notified by undertakings whose registered offices and mining and production operations are outside the Community.” The Court further observed that the: “application of the Regulation is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community” And then after having applied the three criteria of immediate, substantial, and foreseeable effect to the case held that “the application of the Regulation to the proposed concentration was consistent with public international law.” In should be noted that in Gencor Case, although the Wood Pulp case was referred to and the “implementation” test was applied in connection with the territorial scope of the E.E.C. Merger Regulation, the effects doctrine was applied for the justification of jurisdiction under public international law. But it should further be noted that this case was never challenged in the European Court of Justice.

4.3. Brazil

Reason for Studying Brazil as a Model- I have chosen Brazil to study as a model because of the similarity between India and Brazil. Brazil is the fifth largest country in the world,

possessing large and well-developed agricultural, mining, manufacturing, and service sectors. Till the Change in Constitution in 1988, Brazil’s economy was characterized by State Control. Since the change in Constitution, Brazil has now opened its market and is heading towards globalization. Its economy outweighs all other South American Countries and is expanding its presence in world markets. According to most indicators, Brazil is about the 10th largest economy in the world. Moreover it is a step ahead of us in terms of Competition law since it has had an Effective Competition Law since 1994. Hence a study of Brazil can give us an idea about the issues related to effects doctrine that can come up for Indian Competition Law in near future. Effects Doctrine under Brazilian Competition Law- Article 2 of the Brazilian Competition Law i.e. Law No. 8.884/94 defining the applicability of the Law makes use of the effects doctrine. It lays down:

Article 2: Without prejudice to any agreements and treaties to which Brazil is a party, this Law applies to acts wholly or partially performed within the Brazilian territory, or the effects of which are or may be suffered therein.46

This article was amended by Law No. 10149/2000 and the following additions were made to it: Art. 1. Arts. 2, 26, 30, 35, 53 and 54 of Law No. 8884 of 11th of June, 1994, shall read as follows:

Section 1. A foreign company is deemed resident in the Brazilian territory if it operates or has a branch, affiliate, subsidiary, office, place of business, agent or representative in Brazil.

Section 2. The person in charge of the branch, affiliate, subsidiary, office, or place of business in Brazil shall be notified and informed on behalf of the foreign company of all procedural acts, notwithstanding any power of attorney or contractual or statutory provision”.

46 Official Translation.
The criteria to establish personal jurisdiction over foreign enterprises was clearly defined with a view to facilitating subpoenaing and giving legal notice to foreign companies operating, even though indirectly, in Brazil, thus allowing SDE to speed up investigation into anti-competitive conducts. The Brazilian Competition Authorities made effective use of effects doctrine in the case of merger between New Holland N.V. and Case Corporation in 2001. New Holland was a Dutch company controlled by Fiat, in the business of industrial machinery, particularly tractors, harvesters and other agricultural equipment. Case Corporation was a North-American firm, in the same line of business. The transaction resulted in a horizontal concentration in the relevant markets of tractors, mowers, harvesters and of other construction equipment. The merger took place abroad, but since both firms had subsidiaries in Brazil and it had impact in the Brazilian market, the transaction was notified and to the SBDC which approved it after reviewing it. Further, presently Brazil is also carrying out investigation against the American Airlines as part of a worldwide investigation into a possible price fixing in the Air Cargo industry. Recently on 23rd February the Brazilian Competition Authorities raided the offices of the American Airlines’ parent company.

Hence Brazil has made it clear that it is going to give extra-territorial effect to its laws.
5. Justification of Effects Doctrine

5.1. Cartels:

Cartel is an explicit agreement among rival firms not to compete, restrict output and to raise the price of their products

Types of Cartels:

Price Fixing: collusive attempt by suppliers to control prices and thus fix prices at a level close to what one would expect from a monopoly.

Market Division Agreements: Competitors agree to divide the customers, territories or the products that each will make and sell

Concerted refusal to deal: Competitors may agree not to deal with others or to do so only on collectively determined terms, with the intention of reducing competition in the market.

Bid Rigging: Agreement among competitors as to who should win the bids.

Effects doctrine is a solution for prohibition on cartels The unilateral application of antitrust law by the importing actions against cartels hosted by foreign states could be a partial solution to the problem.

The United States has successfully used the “effects” to prosecute international cartels that harm US consumers (Hauser and Schone, 1994). This doctrine allows one country to enforce its competition laws against conduct that occurs primarily or exclusively in the territory of another country, when it is intended to have some injurious effect in the territory of the enforcing country, and has that very effect (US v Aluminum Co. of America, 1945).

Most parts of the world have accepted some form of the effects doctrine (Fox, 2002). Both Canadian and European competition authorities have taken tentative steps towards
the assertion of extraterritorial jurisdiction of their own. The limit of the effects doctrine is the ability of foreign countries to access the information needed to prosecute cartels that have anticompetitive effects within their borders.

5.2. Abuse of Dominance

Abuse of dominant position occurs when a firm holds a position of such economic strength that allows it to operate in a market without significantly affected by competition and it engages in conduct that is likely to impede the development of effective competition.

Market-distortionary practices and anti-competitive forces may restrict the working of healthy competition in the economy. Also, the era of economic reforms has unleashed ever increasing competitive forces through liberalization and globalization. In the absence of adequate safeguards, enterprises may undermine the market by resorting to unfair practices for their short term gains. Thus, there arises the need to have a proper regulatory environment which can ensure a healthy competition in the economy so that all business enterprises can grow and expand and stimulate economic development of a country. Hence, for protecting the interests of consumers and producers by promoting and sustaining a fair competition, “effects doctrine” is a solution.

Dominance is not considered bad per se but its abuse is. Abuse is stated to occur when an enterprise or a group of enterprises uses its dominant position in the relevant market in an exclusionary or/and an exploitative manner and constitutes of following:

* Directly or indirectly imposing unfair or discriminatory condition in purchase or sale of goods or service;

* Directly or indirectly imposing unfair or discriminatory price in purchase or sale (including predatory price) of goods or service;

* Limiting or restricting production of goods or provision of services or market;
* Limiting or restricting technical or scientific development to the prejudice of consumers;

* Denying market access in any manner;

* Making conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts;

* Using its dominant position in one relevant market to enter into, or protect, other relevant market.

Abuses as specified in the Act fall into two broad categories: exploitative (excessive or discriminatory pricing, including predatory pricing) and exclusionary (for example, denial of market access).

Effects doctrine is the solution to the problem of the abuse of dominance and is reflected in section 4.

5.3. **Mergers & Acquisitions**

Cross-border mergers are the sign of a vibrant economy. Its importance can be gauged from the fact that they constitute approximately 70% of the total number of mergers worldwide. A buoyant Indian economy coupled with progressive government policies and newly found dynamism in Indian businessmen have contributed to the growing trend of inorganic expansion, by way of mergers and acquisitions, amongst Indian corporates also.

In a world where businesses and individuals are increasingly operating in a global context, the issue of the extraterritorial application of national laws is assuming progressively greater importance. Traditionally, the exercise of jurisdiction by a country was generally limited to persons, property and acts within its territory. However, the
growth of multinational corporations doing business across borders and on a global scale, the ease of modern travel between states, the globalization of banking and stock exchanges, technological developments such as the internet, and the emergence of transnational criminal enterprises and activities, have combined to encourage states to exercise jurisdiction beyond their territorial boundaries. In the given economic scenario, every country has the right to regulate its own public order, so it is entitled to legislate for conduct occurring within its territory. This principle is often considered to be a corollary of country sovereignty.

In this era of globalization; the emergence of multinational corporations, interdependence of economies and the role of private enterprises in economic development is emerging as a watershed in the “regulatory and reform” thinking. The need is to prohibit mergers and acquisitions which are anti-competitive and to permit at the earliest such mergers and acquisitions which are beneficial.
6. Relevant Case Laws

6.1. The Hartford Fire Insurance Case

In Hartford Fire Insurance in 1993 the Supreme Court recognized the claims of comity but took a robust approach to applying the effects doctrine. Re-insurers based in London were alleged to have agreed with parties in the USA to boycott certain types of insurers, which meant that some types of insurance cover were not available in the USA. The Supreme Court, by majority, held that the Sherman Act could be applied to the acts of the British insurers. Justice Souter, delivering the majority opinion, said that ‘it is well established by now that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some substantial effect in the United States’.

6.2. The Nippon Paper Case

The effects doctrine was applied in Nippon Paper, the Antitrust Division of the Department of Justice commenced criminal proceedings under the Sherman Act against a Japanese company for a cartel fixing the price at which fax paper should be sold in the USA. The conspirators were all Japanese and all the activities of the cartel-the meetings, monitoring, and the sales of distributors with instructions about the resale price in the USA--- took place in Japan. This was the first case in which extraterritorial criminal jurisdiction had been taken under the Sherman Act. It showed that the USA had lost none of its enthusiasm for the application of its antitrust laws beyond its borders.

47 Alison Jones, Brenda Sufrin, “EC competition law: text, cases and materials” pg 1360, third edition, oxford university press
48 Ibid
50 Alison Jones, Brenda Sufrin, “EC competition law: text, cases and materials” pg 1362, third edition, oxford university press
51 Ibid
7. Resistance to Extraterritorial Application of Competition Law

The earliest attempt made by the UK Government to prevent the extraterritorial application of US law came in 1952\(^5\); thereafter it secured the passage of the Shipping Contracts and Commercial Documents Act 1964, the provisions of which were used on several occasions to prevent disclosure of information to US authorities\(^5\). The UK courts are obliged by the Evidence (Proceedings in Other Jurisdictions) Act 1975 to assist in request for discovery by foreign courts. The 1975 Act did not allow a court to resist a request for information simply because the foreign court was making a claim to extraterritorial jurisdiction; this is now dealt with Section 4 of the Protection of Trading Interests Act, 1980\(^5\). At Common Law the UK Court has discretion to order a litigant to restrain foreign proceedings which are oppressive: in Midland Bank PLC v. Laker Airways\(^5\) the Court of Appeal ordered Laker to discontinue proceedings against Midland Bank in the US which would have involved the extraterritorial application of US Antitrust Law.

7.1. Foreign plaintiffs in US courts

Private litigation of antitrust cases is far more common in US courts than it is anywhere in Europe\(^5\). As well as the differences in the systems of enforcement there are various

\(^{53}\) Supra note 21
features of the US legal system which make it easier or more attractive for plaintiffs in the US to bring actions. These are:

- very broad discovery rules;
- class actions (in which, moreover, injured parties need not join in at the start of the case);
- contingent attorneys’ fees;
- treble damages;
- Joint and several liabilities among the defendants.

In US actions are heard before juries, which can be very generous in awarding damages to those they as wronged by big corporations.

57 Alison Jones, Brenda Sufrin, “EC competition law: text, cases and materials” pg 1364, third edition, oxford university press
8. Relevant Sections in the Competition Act, 2002

The various aspects & provisions of the effect doctrine in cross border mergers are defined in Section 5 of the Competition Act 2002 and the change proposed in it by the notification taken out by the MCA on 4th March 2011 and how it affected cross border transactions. Section 32 of the competition act 2002 throws light on extraterritorial jurisdictions.

8.1. Section 32 of the Competition Act

Section 32 of the Competition Act states that the Acts taking place outside India but having an effect on competition in India. The Commission shall, notwithstanding that,-

- an agreement referred to in section 3 has been entered into outside India; or
- any party to such agreement is outside India; or
- any enterprise abusing the dominant position is outside India; or
- a combination has taken place outside India; or
- any party to combination is outside India; or
- any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.

8.1.1. Powers of CCI under Section 32

Section 32 of the Competition Act, 2002 gives CCI, the power to enforce Indian Competition law against foreign entities whose actions have ‘appreciable adverse effect’ on competition in the relevant Indian market.

58 See competition act 2002, section 5
59 See competition act 2002, section 32
60 Ibid
Sec 32 is primarily a statutory embodiment of ‘effects doctrine’, which is the antithesis of the ‘principle of territoriality’, dealing with jurisdiction. It is the brain child of US jurisprudence. It was in the case of US v. Aluminum Company\(^{61}\) of America et al; famously known as the ‘Alcoa case’ that Court of Appeal for the Second Circuit held ‘that any State may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders’\(^{62}\). This doctrine was given statutory recognition in US in 1994 by the International Antitrust Enforcement Assistance Act. Similarly, European Union also recognizes this concept, though with minor theoretical differences.

Hon’ble Supreme Court of India recognised this doctrine in the famous ANSAC case\(^{63}\) but held that under the MRTP Act, 1969, MRTP Commission could take action only against the Indian leg of the restrictive trade practice\(^{64}\). This restriction has been done away with under the new Competition Act, 2002. Therefore, CCI would have complete power to take action against a foreign entity in a similar situation.

However, Cross-border enforcement of competition law is not about simple implementation of domestic laws. It’s a complex interplay of delicate diplomacy and brute economic strength. For instance most of countries, including India, have so drafted their laws that they cannot be enforced against ‘export cartels’. The US Foreign Trade Antitrust Improvements Act ensures that its ‘export cartels’ are not affected by the US competition law unless it has a direct, substantial and reasonably foreseeable effect on the US markets or on the US exports\(^{65}\). As a matter of fact, US government takes active interests in protecting its ‘export cartels’. For instance, in 2000, when the ANSAC case was still pending in the Supreme Court, it is alleged that the then US Trade

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61 United States v. Aluminum Co. of America et al., 148 F.2d 416 (2d. Cir. 1945)
62 Ibid
63 “Sec 32 – An albatross around CCI’s neck?”, http://www.competitionlawindia.com/ as retrieved on January 10, 2012
64 Ibid
65 Ibid
Representative, Charlene Barshefsky and the US Secretary of Commerce, William A. Daley, sent a joint letter to the then Indian Minister of Commerce and Industry, Murasoli Maran and reportedly threatened that up to USD 1 billion of India’s duty free imports of a variety of goods under the Generalised System of Preferences into the US could be jeopardised over the embargo on US soda ash. Possibly, it was a result of this letter, that in the 2001-02 budget Government of India reduced the import tariff on soda ash from 35% to 20%.

Similarly, in cases of certain mergers with multinational aspect, the interest of different countries may come into conflict. For instance, the merger proposal of Boeing and McDonnell Douglas, both US based companies, was enquired into by both US Department of Justice (USDOJ) and European Commission. While USDOJ approved it, European Commission rejected the proposal as being anti-competitive. It was only after intense political pressure and threats of a trade war, emanating from Washington that a compromise was reached between Boeing and the EU Authorities, and the merger was approved by the European Commission.

8.2. Section 5 of the Competition Act

The Competition Act, 2002 regulates the various forms of business combinations through Competition Commission of India. Section 5 of the Act stipulates that any person who proposes to enter into an agreement or combination shall give a notice to the Commission in the prescribed form within seven days of occurrence of any of the following:

(a) The board of directors of respective companies accepting a proposal of merger;

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66 Ibid
68 Supra Note 49
(b) The conclusion of negotiations of an agreement for an acquisition or acquiring control;

(c) The execution of a joint venture agreement or shareholder agreement or technology agreement

Section 5 of the Competition Act, which deals with combinations, lays down asset and turnover thresholds for parties to a combination. If these thresholds are exceeded, the combination would be subject to review. The thresholds are defined separately for assets and turnover inside and outside India. This seems to suggest that mergers of foreign firms will also be subject to review, although it is not clear how an injunction against such a merger can be enforced. At best, the Indian subsidiaries of the merging firms can be prevented from merging. But since they will be under the control of their merged foreign parent, they might engage in anti-competitive which will amount to be violating the principle of effects doctrine.

Government of India has, in consultation with the Competition Commission of India (CCI) – the regulator appointed under the Act - enhanced by 50% the threshold of monetary limit of "assets" and "turnover" under Section 5 of the Act for reckoning ‘Combination’.

8.2.1. Meaning of Combination

As per the Act, a ‘Combination’ comprises of any of the following any acquisition of – control / shares / voting rights / assets of enterprises; acquiring of control by person over an enterprises, where such person already has direct / indirect control over another enterprise engaged in similar / competitive business; any merger or amalgamation

between enterprises. If it exceeds the monetary threshold of assets and or turnover as under

<table>
<thead>
<tr>
<th>Person/Enterprise</th>
<th>Rs.</th>
<th>USD/Rs.</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>In India</td>
<td>In or Outside India</td>
</tr>
<tr>
<td></td>
<td>Assets*</td>
<td>Turnover</td>
</tr>
<tr>
<td>Acquirer + Target</td>
<td>&gt; 15 billion</td>
<td>&gt; 45 billion</td>
</tr>
<tr>
<td>Group post acquisition</td>
<td>&gt; 60 billion</td>
<td>&gt; 180 billion</td>
</tr>
</tbody>
</table>

* Assets – book value as per audited accounts and includes intangibles

Group means two or more enterprises, which directly or indirectly –

_ Exercise => 26% of voting rights in other enterprise
_ Appoint > 50% of board members in other enterprise
_ Control (#) the management or affairs of the other enterprise

# Control includes controlling the affairs or management, either singly or jointly:

  · by one or more enterprises over another enterprise or group; or
  · by one or more groups over another group or enterprise

As mentioned above, GOI has enhanced the monetary limit of “assets” and “turnover” under section 5 of the Act. The above table is after considering such enhancement under section 5 of the Act. The above table is after considering such enhancement.

71 Ibid
8.2.2. Exemptions from Section 5 of the Act: - 4th March Notification of MCA

An enterprise, whose control, shares, voting rights or assets are being acquired, has assets of the value of not more than 2.50 billion or turnover of not more than 7.50 billion is exempted from the provisions of Section 5 of the Act for a period of 5 years from 4 March 2011\(^\text{72}\).

A ‘Group’ exercising less than 50% of voting rights in other enterprise is exempted from the provisions of Section 5 of the Act for a period of 5 years from 4 March 2011\(^\text{73}\).

\(^{73}\) Provisions relating to combination, Advocacy series 6, Competition Act 2002, March 2011
9. BILATERAL ANTITRUST COOPERATION AGREEMENTS

The reasons and vires to make such agreements:

Section 18 of the Competition Act 2002 states that “subject to the provisions of this Act, it shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in the markets in India; Provided that the Commission may, for the purpose of discharging its duties or performing its approval of the Central Government, with any agency of any foreign country.”

Under principles of competition law and policy, the Effects Doctrine,\(^{74}\) allows domestic competition laws to be applicable to foreign firms - but also to domestic firms located outside the state's territory, when their behaviour or transactions produce an "effect" within the domestic territory\(^ {75}\). The "nationality" of firms is irrelevant for the purposes of functions under this Act, enter into any memorandum or arrangement with the prior competition law enforcement and the effects doctrine covers all firms irrespective of their nationality. This is reflected in the Indian Competition Act 2002, under Section 32 which says that “the Commission shall, notwithstanding that, an agreement referred to in Section 3 has been entered into outside India or any party to such agreement is outside India or any enterprise abusing the dominant position is outside India or an combination has taken place outside India or any party to a combination is outside India or any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.”

These two sections interrelate when, to investigate and inquire into any combination,

\(^{74}\) The "effects doctrine" was embraced by the Court of First Instance in Gencor when stating that the application of the Merger Regulation to a merger between companies located outside EU territory "is justified under public international law when it is foreseeable that a proposed concentration will have an immediate and substantial effect in the Community." Retrieved from (site) on (date)

\(^{75}\) United Nations, “Competition related provisions”, United National conference on trade & conference
agreement or dominant position involving a foreign element, the Commission would need to have the power, subject to Government approval, to make memorandums or agreements with the foreign Competition Authorities or other agencies that could facilitate the investigation and enforcement of Indian Competition law. Previously under the Monopolies and Restrictive Trade Practices Act 1969, the MRTP Commission had no powers under extra-territoriality to pursue such actions as per the ruling of the Supreme Court in the ANSAC case76. However, the new provisions under the Competition Act 2002 repeal these provisions and allow such actions to be pursued against foreign bodies or persons.

9.1.  A brief overview of developments

Internationally, cross-border competition is a much debated subject. An increasing number of antitrust agencies review many of the multinational mergers that characterize our global economy. There are international cartels and collusions that could affect the trade in many different jurisdictions and the investigation of such cases may be undertaken by many different authorities simultaneously77. When transactions are reviewed by multiple authorities, the risk of substantive and procedural conflicts can increase dramatically, and effective cooperation among a large number of agencies can be extra - ordinarily difficult. On the substantive side, the potential for inconsistent outcomes increases substantially. On the procedural side, the burdens, costs, and uncertainties associated with filing in and dealing with a large number of reviewing jurisdictions pose serious concerns for the international business community. Among other things, they may discourage, unduly delay, or at best, constitute a tax on efficient, consumer-friendly transactions78. These developments support the popular wisdom that increased cooperation between and among antitrust agencies is essential. But as important

76 Vijay Kumar Chaurasia, “The Vacillation and Crux of Extra-territorial Jurisdiction of Competition Law (USA, EU, Canada and India) and International Co-operation: Application and Enforcement Issues”, Research Paper
77 Minter Ellison, ”Cartels Overview”, Asia Pacific Antitrust Review
78 Ibid
as cooperation is, it is sometimes quite difficult to achieve.\textsuperscript{79}

There have been many attempts to regulate the enforcement of competition related laws outside the territory of the state. This issue is well illustrated by the International Cartels for vitamins or graphite electrodes, as the companies were based in different jurisdictions as well as the effect of the cartel was felt in more than those countries. International cooperation becomes vital at such a level to ensure that wrongdoers are brought to justice based on the full facts of the situation. As far back as 1946,\textsuperscript{80} the ITO initiated the Havana Charter on RBPs affecting trade, but met with opposition from the US. Under the World Trade Organisation (WTO) there are a few existing agreements on extra-territoriality\textsuperscript{81}. Under GATS a ‘full and sympathetic consideration of requests for consultations’ should be undertaken along with the supply of publicly available non-confidential information\textsuperscript{82}. Further WTO discussion\textsuperscript{83} however have shown that some developed countries were unwilling to control cartels or mergers having effects outside their markets; to apply or extend stricter standards to other areas of market competition and they were willing only to extend voluntary cooperation to the competition authorities of developing countries. On the other hand, developing countries were unwilling to make a large commitment of resources for international cooperation in this regard as they were mostly unfamiliar with this area and have many other demands on their resources. Though no overall international agreement has resulted from the WTO discussion, some countries have made bilateral/multilateral/regional agreements with varying degrees of commitment to competition enforcement and investigation\textsuperscript{84}. These agreements deal with several issues such as supply of non confidential information, assistance in investigation, supra-national enforcement in EU, CARICOM and MERCOSUR etc as well as the issue of comity (mutual recognition and respect of other legal systems). Agreements are also

\begin{itemize}
\item \textsuperscript{79} extracted from a speech by CHARLES A. JAMES, Assistant Attorney General, Antitrust Division, US Department of Justice. http://www.oecd.org/dataoecd/62/57/2438935
\item \textsuperscript{80} Information extracted from presentation on Cross Border Issues and the Competition Act 2002 at http://www.cuts-international.org/documents/Day1/Cross%20Border%20Competition%20Issues3.ppt
\item \textsuperscript{81} Aditya Bhattacharjea, “The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective”, \textit{Journal of International economic law}
\item \textsuperscript{82} \textit{Ibid}
\item \textsuperscript{83} \textit{Ibid}
\item \textsuperscript{84} Multilateral competition policy & WTO, \textit{Consumers International}
\end{itemize}
made on technical assistance and capacity building; consultation, information exchange and experience sharing; peer review of national policy; progressive cooperation in investigation and non controversial forums.

The International Chamber Of Commerce had also issued a policy statement\(^85\) in this regard. The statement identified two major developments on cooperation between competition authorities of different countries. Firstly, in 1994 the US enacted the International Antitrust Enforcement Assistance Act authorising US authorities to cooperate with foreign antitrust authorities in antitrust investigations pursuant to an antitrust mutual assistance agreement that stipulates reciprocity and protection of sensitive business information\(^86\). This legislation authorizes antitrust agreements under which otherwise confidential information can be shared, and antitrust authorities can use their investigative powers on one another's behalf. Secondly, the EC Council of Ministers in 1991 enacted the US-EC Antitrust Cooperation Agreement which obliged the US and EC authorities to take into account the important interests of other parties at all stages in their enforcement activities and to promote positive comity\(^87\). It also provided for information exchange under confidentiality conditions and the restricting of certain categories of information that can be exchanged. The US since, has entered into several bilateral antitrust agreements with countries such as Australia, Austria, Belgium, Brazil, Canada, EU, France, Germany, Israel, Italy, Japan, Mexico, Spain, South Korea, Switzerland and UK.\(^88\)

### 9.2. The types of bilateral antitrust agreements

The simplest and most common of the tools available to enhance cooperation is informal communication between antitrust agencies. While there are important statutory and

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\(^86\) Roscoe B. Starek, "International Cooperation in Antitrust Enforcement and other International Antitrust Developments", *Federal Trade Commission*

\(^87\) *Ibid*

prudential limits that constrain the ability to share confidential information with colleagues in foreign antitrust agencies, there is a wealth of useful non-confidential information that can be and is shared. At a more formal level, the various types of agreements they use are antitrust cooperation agreements, antitrust mutual assistance agreements, mutual legal assistance agreements (Mutual Legal Assistance Agreements) "MLATs" are agreements that provide generally for assistance in criminal law enforcement, including the obtaining of evidence and Improving Bilateral Antitrust Cooperation sharing of information. They provide an opportunity to cooperate in such a way to make sure that cartels operating across borders have no opportunity to use the border as a shield) and extradition treaties. They cover the topics of information sharing, foreign-located evidence, coordination (for example to coordinate searches in international cartel cases and pool the evidence obtained by the respective efforts - something that would enhance both jurisdictions anticartel efforts) and notification as well as extradition when needed. These may also address technical assistance and capacity building: consultation (for example, in cases in which both sides are examining the same matter, to let one another's officials attend the hearings, as the case may be, subject to the parties' consent. The Companies being investigated are often concluding that it is in their interest as well as that of the agencies to facilitate this kind of coordination), experience sharing and peer review of national policy.

Provisions are made for notification about antitrust enforcement activities, enforcement cooperation and coordination, conflict avoidance and consultations, positive comity, and confidentiality and use limitations. Each antitrust agency should notify the other of antitrust enforcement activities that may affect the other's important interests. Each antitrust agency should give careful consideration to a request by the other to take antitrust enforcement action against illegal behaviour occurring within its jurisdiction that

89 Charles S. Stark, “IMPROVING BILATERAL ANTITRUST COOPERATION”, US Department of justice
92 Konrad von Finckenstein, “International Antitrust Cooperation”, Competition Bureau
93 Ibid
injures the other party's interests and consider carefully one another's interests in carrying out enforcement activities, and the agreement includes a non-exhaustive list of factors to be considered in this regard. The antitrust agencies, and the parties, should agree to consult with each other on matters that arise under the agreement. The parties should agree to exchange antitrust-related information, within applicable confidentiality constraints. These agreements could be executive agreements that are subordinate to and don't change or override the existing laws of either party - including, in particular, confidentiality laws that restrict the sharing of information, such that they differ from other forms of international agreements.\(^4\)

The issues that can arise:

The non convergence of aims of the competition laws and underlying economic parameters to be applied such as protection of competition or competitor, consumer interest and the extra territoriality concept can create problems in cooperation. The General Electric/Honeywell\(^5\) merger demonstrates, however, that close cooperation and goodwill between antitrust agencies does not guarantee consistent results in individual cases. A good working relationship cannot overcome significant differences in views about the proper scope of antitrust law in national and world markets. The ICC urged a move towards harmonisation if these aims are to be met, but also recognised that there could be problems when certain information when taken out of context, may not travel well to other regulatory regimes\(^6\). Harmonisation at a basic level would be essential to resolve this.

Divergent antitrust approaches to the same transaction undermine confidence in the process; they risk imposing inconsistent requirements on the firms, or frustrating the

\(^4\)Ibid.

\(^5\) The merger was passed by the US authorities but blocked by the EU authority. This was not a result of lack of cooperation as discussion and information exchange was fully facilitated by both countries, but the way in which the aims of antitrust legislation are viewed in the 2 countries. The US treats economies of scale that lead to better, cheaper and more efficient products with more leniency than the EU who felt that the merger would have forced other competitors out of the market. Further, the US believes that the antitrust law should protect the public from market failures rather than protect business from workings of the market, i.e., that the laws should protect competition and not the competitors

\(^6\)Natashaa Shroff, “Bilateral Antitrust Cooperation Agreements” 9th June 2005
remedial objectives of one or another of the antitrust authorities; and they may create frictions or suspicious that can extend beyond the antitrust arena as witnessed in the Boeing/McDonnell Douglas matter Confidential information and the exchange of such information under any agreement is of great concern to businesses in both the sending and receiving countries as the competitive position of the company whose position is being investigated could be jeopardised by a leak at either end97. The ICC policy statement also stressed the importance of the agreements in outlining how the various authorities when exchanging information both publicly available and confidential, will ensure that there is no abuse of such information at either end98. This is essential to the confidence of the business community members whom are being investigated with regard to confidential information, resources and investment that are price sensitive. One of the solutions to this could be to ask for the company’s consent to pass on the information to the foreign authority, but with respect to the investigation aspect, the company would not voluntarily divulge much of its confidential information, which would defeat the purpose of the investigation. Prior notice to the company whose information is being exchanged is another solution that could be used, with the obvious exception where it would prejudice the case against the company. It is also possible to include legislative provision for the exchange of information that has certain procedural safeguards regulating the use of the information concerned and to reaffirm the need for its confidentiality. Though the Competition Commission in India has the authority to enter into such agreements (subject to government approval), it may not be so in other countries where the authority could need the government to make such an agreement on its behalf. The CCI should be aware of the capacity of any such agency to enter into such international agreements.

98 Supra Note 85
9.3. Antitrust Agreements

9.3.1. United States and Japan Bilateral Antitrust Agreement

Highlights of the new agreement which will enable both the countries to work together to improve antitrust enforcement in both countries are as follows:

Agreement on the Importance of Cooperation: The parties acknowledge the importance of antitrust cooperation in enhancing enforcement of each party's competition laws, and that the sound and effective enforcement of competition law is important both for the efficient functioning of each market and to trade between the United States and Japan.\(^99\)

Notification of Enforcement Activities: Each antitrust agency will notify the other of antitrust enforcement activities that may affect the other's important interests.

Enforcement Cooperation and Coordination: The antitrust agencies agree to provide assistance to each other in antitrust enforcement activities and to consider coordination of investigations involving both the U.S. and Japanese markets. In any coordinated arrangement, they will seek to conduct their activities consistently with the other party's enforcement interests.

Positive Comity: The antitrust agencies also agree to a "positive comity" provision whereby each antitrust agency would give careful consideration to a request by the other to take antitrust enforcement action against illegal behaviour occurring within its jurisdiction that injures the other party's interests.

Conflict Avoidance: The parties agree to consider carefully one another's interests in carrying out enforcement activities, and the agreement includes a non-exhaustive list of factors to be considered in this regard.

Consultations and Exchange of Information: The antitrust agencies, and the parties, agree to consult with each other on matters that arise under the agreement. The parties agree to

\(^{99}\) A. Douglas Melamed, "An Important First Step: A U.S./Japan Bilateral Antitrust Cooperation Agreement", *US Department of Justice*
exchange antitrust-related information, within applicable confidentiality constraints.

Existing Laws: The parties recognize that the agreement will be implemented in accordance with existing laws in each country.

9.3.2. Antitrust Cooperation Agreement signed between United States and Canada

Highlights of the new agreement include:

The parties acknowledge that it is in their mutual interest to cooperate in antitrust enforcement generally. In the context of cooperation, the parties agree to exchange antitrust-related information, consistent with existing confidentiality constraints.

In a "positive comity" provision, modelled on the 1991 U.S.-EU antitrust cooperation agreement, each party agrees to give serious consideration to a request by the other party to take antitrust enforcement action against illegal conduct within its jurisdiction that injures the requesting party's important interests.

Each party will notify the other of antitrust actions that might affect the important interests of the other. In order to minimize possible conflicts arising out of antitrust enforcement actions, the parties agree to give careful consideration to one another's important interests in conducting enforcement activities. The parties will also consult each other upon request.

- Each party agrees to maintain the confidentiality of sensitive information provided by the other party.

9.3.3. 1991 EU/US Competition Cooperation Agreement\textsuperscript{101}

- This agreement aims to promote cooperation between both competition authorities. The Agreement provides for:

- **notification of cases** being handled by the competition authorities of one Party, to the extent that these cases concern the important interests of the other Party (Article II), and exchange of information on general matters relating to the implementation of the competition rules (Article III);

- **cooperation and coordination** of the actions of both Parties' competition authorities (Article IV);

- a "**traditional comity**" procedure by virtue of which each Party undertakes to take into account the important interests of the other Party when it takes measures to enforce its competition rules (Article VI);

- a "**positive comity**" procedure by virtue of which either Party can invite the other Party to take, on the basis of the latter's legislation, appropriate measures regarding anti-competitive behaviour implemented on its territory and which affects the important interests of the requesting Party (Article V).

9.3.4. 1998 EU/US Positive Comity Agreement\textsuperscript{102}

Under the rules of positive comity, one party may request the other party to remedy anti-competitive behaviour which originates in its jurisdiction but affects the requesting party as well. The agreement clarifies both the mechanics of the positive comity cooperation instrument, and the circumstances in which it can be availed of. Positive comity provisions are not frequently used as companies (i.e. complainants) prefer to address

\textsuperscript{101} "European Union – Anti trust competition” retrieved from http://eurunion.org/eu/Antitrust/Antitrust-Competition.html

\textsuperscript{102} European Commission – Comity Agreement retrieved from http://ec.europa.eu/competition/international/bilateral/usa.html
directly the competition authority they consider to be best suited to deal with the situation.

### 9.3.5. Administrative Arrangement on Attendance (AAA)\(^{103}\)

The AAA sets forth administrative arrangements between both competition authorities concerning reciprocal attendance at certain stages of the procedures in individual cases, involving the application of their respective competition rules. These arrangements were concluded in the framework of the agreements between the EU and the US concerning enforcement of their competition rules, and in particular the provisions regarding co-ordination of enforcement activities.

The AAA is not a new agreement but an understanding about administrative arrangements to apply the 1991 Agreement.

- Report on the application of the Agreement between the European Communities and the Government of the United States of America regarding the application of their competition laws in 1999, 2000, 2001 and 2002\(^{104}\).


In 2002, a set of best practices on cooperation in reviewing mergers was agreed\(^{105}\). These best practices were updated and revised in 2011. These best practices are not legally binding but simply intend to set forth an advisory framework for interagency cooperation. They put in place a structured basis for cooperation in reviews of individual merger cases.

The best practices recognise that cooperation is most effective when the investigation

\(^{103}\)Ibid
\(^{104}\)Ibid
\(^{105}\)Ibid
timetables of the reviewing agencies run more or less in parallel. Merging companies will therefore be offered the possibility of meeting at an early stage with the agencies to discuss timing issues. Companies are also encouraged to permit the agencies to exchange information which they have submitted during the course of an investigation and, where appropriate, to allow joint EU/US interviews of the companies concerned. The practices designate key points in the respective EU and US merger investigations when it may be appropriate for direct contacts to occur between senior officials on both sides.

9.4. US & Russia antitrust competition law

The U.S. antitrust agencies and FAS Russia intend to keep each other informed of significant competition policy and enforcement developments in their respective jurisdictions, including proposed legislative and policy changes. The U.S. antitrust agencies and FAS Russia recognize that it is in their common interest to work together in technical cooperation activities related to competition law enforcement and policy. Subject to reasonably available resources, the parties may jointly engage in appropriate activities in furtherance of that interest, such as, inter alia:

(a) participating in training courses on competition law and policy organized or sponsored by one another;

(b) providing comments on proposed changes to competition laws, regulations, guidelines or other policies; and

(c) assistance, where appropriate, in promoting understanding of sound competition policy among important supporting institutions, such as the judiciary, other government agencies, and universities.

106 Charles Smitherman, Transatlantic merger cases: United States--European Community merger review cooperation, Cameron may ltd, 2007


108 Ibid

109 Ibid
agencies, the business community, bar associations, and academic institutions. The U.S. antitrust agencies and FAS Russia plan to evaluate the effectiveness of the technical cooperation under this MOU on a regular basis to ensure that their expectations and needs are being met.

9.5. US & China Antitrust agreement

The Agreement provides for:

- keeping each other informed of significant competition policy and enforcement developments,
- enhancing each agency’s capabilities with appropriate activities related to competition policy and law such as training programs, workshops, study missions and internships,
- exchanging experiences on competition law enforcement,
- seeking information or advice from one another regarding matters of competition law enforcement and policy,
- providing comments on proposed changes to competition laws, regulations, rules and guidelines,
- exchanging views with respect to multicultural competition law and policy, and
- exchanging experiences in raising awareness of competition law and policy.

10. ISSUES FACED BY DEVELOPING COUNTRIES

10.1. Export Cartels and M&A Activity

Quite recently, with the growth of export cartels and M&A activity, some developing countries are again beginning to appreciate their vulnerability to anticompetitive practices. Empirical studies find that cartels exist on a large scale and that imports by developing countries are often subject to cartel influence. Hoekman and Saggi (2004) argued that, in principle, by invoking the effects doctrine, domestic competition policy can be enforced against cartels organized abroad. But in the real world, many developing countries lack the expertise and resources to pursue this avenue of relief.

Moreover, export cartels are often exempted from home country discipline because the firms joining these cartels arguably do no harm to domestic consumers. But starting with the Organization of the Petroleum Exporting Countries (OPEC), and ranging across multiple commodities, transport services and industrial products, export cartels clearly impose higher prices on importing countries, of which many of them are impoverished nations.

As criticisms of export cartels have mounted, some exporting countries have voluntarily eliminated or circumscribed their legal exemptions. Yet many countries still maintain exemption rules. Developing nations have urged that foreign export cartels which inflict high prices on poor countries be abolished. At the same time, many developing countries—especially those that produce natural resources—want to preserve their own ability to forge export cartels.

International mergers present another challenge to developing countries. Since the 1990s, the pace of M&As has significantly increased, though the past year has seen a sharp drop.

111 Jeffrey Fear, “Cartels and Competition: Neither Markets nor Hierarchies”, Harvard Business School
112 Ibid
113 Ibid
114 Hassan Qaqaya, “The effects of anti-competitive business practices on developing countries and their development prospects”, United Nations Conference on Trade and Development
Cross-border M&As have enhanced the market power of certain giant multinational corporations\textsuperscript{115}.

Fox (2003)\textsuperscript{116} has argued that global mega mergers could have harmful effects in nations that have economically separated markets, no local competition, and lack the legal power to protect themselves. As examples, she has pointed to Boeing/McDonnell Douglas, Exxon/Mobil, Sandos/Peiba-Geigy (Novartis), Gencor/Lonrho, British Oxygen/Air Liquide, WorldCom/Sprint, and GE/Honeywell\textsuperscript{117}. Like export cartels, cross-border M&As are usually not restricted by the home jurisdiction where the MNE headquarters are located, because there seldom is a significant reduction of competition in the home market. On the other hand, few developing countries have the legal or economic clout to tackle large MNEs.

\section*{10.2. Possible solutions-}

\subsection*{10.2.1. Bilateral and Regional Agreements}

While WTO negotiations on an international competition regime have stalled, some countries have addressed competition policy issues in their bilateral or regional agreements. The most successful case is the European Union. Over several decades, the European Commission has developed a body of European law (drawing on the laws of member states), and has worked out a division of competence between the European Commission and national authorities. As a result, the European Union has made great strides toward creating a single market, now covering 27 countries. The United States has enacted its own laws related to international competition policy, notably the International Antitrust Enforcement Assistance Act (IAEAA) of 1994. This statute authorizes US

\begin{flushleft}
\textsuperscript{115} Hal Hill and Jutha thi p Jongwanich, “Outward Foreign Direct Investment and the Financial Crisis in Developing East Asia”, \textit{Asian Development Review} \\
\textsuperscript{116} Henning Klodt, “Towards a Global Competition Order”, \textit{Kiel Institute of World Economics} \\
\textsuperscript{117} Eleanor M. Fox, “International Antitrust and the Doha Dome”, \textit{Virginia Journal of International Law}
\end{flushleft}
authorities to enter into agreements for sharing business information in the context of investigations of cross-border transactions\textsuperscript{118}.

Bilateral and regional trade agreements have blossomed since the early 1990s, and they have become an effective alternative to the WTO for addressing competition policy questions. According to the UNCTAD (2005), of the 300-odd bilateral and regional trade agreements in force or in negotiation, over 100 contain provisions related to competition policy\textsuperscript{119}. The main reason is to ensure that efforts to liberalize trade by eliminating border barriers are not undercut by restrictive practices behind the border. The United States is quite active among countries that have incorporated competition policy provisions in trade agreements. Several US free trade agreements (FTAs), either in force or awaiting congressional ratification, include chapters on competition policy. However, by contrast with competition laws in the European Union and ASEAN, which promote high-level economic integration, the competition provisions in most bilateral and regional agreements are not binding commitments, and instead depend on the goodwill of the parties to have meaningful effect\textsuperscript{120}.

Nonetheless, these agreements may offer an opportunity for developing countries to level up their competition policy. In its study, the OECD (2006) analyzed 86 trade agreements that include competition-related provisions, and found that about two-thirds were between developing countries (often referred to as South-South agreements), and more than a fourth covered signatories from developing and industrialized economies (so-called North-South agreements). This pattern suggests an opportunity for developing countries to address their own competition policy concerns in bilateral or regional trade agreements.

\begin{center}
118 Natashaa Shroff, “Bilateral Antitrust Cooperation Agreements”, \textit{CCI Research Reports}
\end{center}
10.3. Perspectives on Future Competition Policy under the WTO

A multilateral agreement on competition policy may be highly desirable. Given sharply divergent views, however, the prospect for a WTO agreement covering all 150-odd members is remote. Over the next decade (after the Doha Round is concluded or abandoned), the best prospect is for a plurilateral agreement reached among a subset of WTO members. Within this more limited ambit, it would be important to have some developing countries on board. An acceptable agreement under WTO auspices should thus resolve some issues of interest to developing countries, such as export cartels and the anticompetitive aspects of large M&A deals. To end on an optimistic note, scope exists for a constructive WTO competition policy agenda that covers the interests of both developed and developing countries.

10.3.1. Solution/Remedies to the problem

One possible solution for CCI and India would be to goad other countries in South Asia to form a regional framework for competition. Such regional framework can resist or build diplomatic pressure on a foreign government which may try and support its export cartels or domestic firms, indulging in anti-competitive practices. However, considering the volatility of this region and mutual animosity of the member nations, it would be a herculean task to build consensus over any such issue.

The future, it seems, is pregnant with opportunities. CCI can be instrumental in bringing vast benefits to Indian Consumers. But it is to be seen, whether CCI becomes a superhero of consumer interest or Section 32 proves to be an albatross around its neck.
11. IMPACT OF FOREIGN-TO-FOREIGN MERGERS ON DOMESTIC MARKET

In today’s globalized world, mergers involving TNCs (typically from developed nations) may impact competition in numerous jurisdictions. For example, where two foreign suppliers merge, this may result in oligopsony or even monopsony situation in a third country’s market whose firms were previously reliant on both suppliers.

In order to deal with such cross-border anticompetitive effects, competition law agencies (primarily in the developed world) reach beyond their borders and apply national merger control laws to concentrations between companies based abroad. This position is justified by the “effects doctrine” under public international law.

A recent example of unilateral merger control enforcement on a foreign-to-foreign cross-border merger can be found in Brazil. In its ordinary session of 4 October 2006, CADE (Conselho Administrativo de Defesa Econômica) approved with restrictions a merger in pharmaceutical sector between two European companies, Axalto Holding (Netherlands) and Gemplus International (Luxembourg). The companies produce plastic security cards and commercialized software, hardware and related services and the analysis was mainly based on the impact of the dominance of technological resources on competition. CADE imposed commitments upon the companies obliging them to license their patents related to subscriber identity module (SIM) cards that are deposited in Brazil to any interested parties operating in the Brazilian market in a fair, reasonable and non-discriminatory manner. However, this seemingly tidy solution to the potential anticompetitive effects of cross-border mergers does not always play out so easily in practice. Competition law agencies of developing countries in particular, struggle to unilaterally enforce their domestic laws on an international scale again owing to their limitations in relation to financial and human resource scarcity, a lack of competition culture, and political economy constraints, amongst other reasons. In fact competition authorities in the developing world are often impotent in the face of global mergers and

122 Ibid
acquisitions for fear of retaliatory action by some large firms’ home country, political interference, and again fear of frightening way FDI\textsuperscript{123}. This is particularly problematic in light of the often vulnerable status of the markets of developing countries. Given their comparatively small size and limited market diversity, markets in developing countries are more keenly affected by large cross-border mergers; be they positive or negative. Any negative impact, including anti-competitive effects, is therefore compounded by low levels of effective regulation\textsuperscript{124}.

\textbf{11.1. Possible Solutions}

As a first priority, developing countries and economies in transition must strive to establish well-functioning competition law and policy regimes as well as credible enforcement institutions, in order to effectively regulate cross-border mergers.

Three activities that can contribute to this end are as follows.

\begin{itemize}
  \item \textbf{(1) Implementation of competition laws and policies and creation of competition institutions}
  
  There are now over 112 countries with competition laws around the world, many of which are developing countries and economies in transition. However, although fundamental, this is just the first step. Developing countries and countries in transition are at varied levels of actual implementation and effective application of competition rules and merger regulations. This is fundamentally because establishing and maintaining an effective competition authority is not easy. Considerable political, human resources and financial investments are required as well as mechanisms of monitoring and enforcement. In addition, it is essential that competition laws and institutions of developing countries are independent and command the respect of both market and political players at home
\end{itemize}

\textsuperscript{123} \textit{Ibid}
and abroad if they are to be effective in their enforcement activities. Again, this is not easily achieved. Developing countries must therefore be proactive and seek financial and technical assistance wherever available. Robust domestic advocacy campaigning is also essential in this respect.

(2) Engage in cooperative activities on bilateral, regional and international levels to achieve greater convergence on application of merger rules, share experiences and exchange information

As merger control is implemented at the domestic level, different jurisdictions conduct independent analyses simultaneously leaving room for discrepancies in the quality and standards of merger control enforcement among different jurisdictions in relation to the same cross-border merger. In addition, such duplication of regulatory effort increases costs for both competition authorities and businesses and creates uncertainty for businesses.

In the absence of a binding multilaterally agreed framework for competition law and policy, national competition authorities have chosen instead to enter into regional and bilateral cooperation agreements in a bid to achieve convergence on merger control rules. Such agreements often incorporate provisions on the exchange of information and a requirement to consider any anticompetitive impact of a given merger on another jurisdiction. For example, under the Cooperation Protocol for Merger Review between the Australian Competition and Consumer Commission and the New Zealand Commerce Commission, the agencies agree to inform each other of proposed merger transactions that may involve trans-Tasman operations or impact the other country’s market. Although a number of regional groups in the developing world, such as Caribbean Community (CARICOM) and East African Community (EAC), have developed regional competition law regimes, they continue to struggle with effective enforcement (Stewart, 2010).

On the bilateral level, few bilateral agreements exist either among competition authorities in the developing world or between competition authorities of developed countries and developing countries (Stewart, 2005). In relation to the latter, this is partly due to the focus of developed countries on cooperation with authorities from other developed economies, whose anticompetitive activities have greater potential to cause harm on their domestic markets. A combination of limited resources, low levels of confidence and conflicting political objectives between countries and competition agencies also dampens incentive to enter cooperation agreements, which require authorities to relinquish a degree of power and autonomy, particularly in the exchange of (sometimes confidential) information.

Nonetheless, increased cooperation among competition authorities reduces inefficiencies and inconsistencies, raises the bar on the quality of merger analysis and improves merger control enforcement. Such cooperation should not be limited to official agreements but should include informal interactions and relationships which competition authorities have found to be equally or even more valuable than official agreements. Developing countries should also seek capacity building and technical assistance from competition authorities of developed countries and international organizations in order to assess the likely impact of individual mergers on the market structure in their countries.

It is also in the interests of developed countries to make efforts to cooperate with competition authorities in developing countries and countries in transition given the changing dynamics of cross-border merger activities. There are an increasing number of mergers originating from larger developing countries and targeting businesses and markets in the developed world. The recently announced joint venture between China’s oil and gas producer, Petro China and INEOS, a leading British chemical company in

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126 Supra Note 171
127 Supra Note 167
128 (UNCTAD, 2007)
relation to trading and refining activities at INEOS’s refineries in Scotland and France is one example of this.129

However, it should be noted that cooperation will be most likely and beneficial where national perspectives coincide and where cooperation is well managed. For developing countries therefore, it would be beneficial to focus merger control on shared issues with nearby and like-minded countries.

(3) Develop a competition culture by engaging in advocacy (domestically and internationally) and participating in international forums on competition such as the OECD Global Forum, UNCTAD and the ICN to raise awareness and seek technical assistance

The role of advocacy cannot be overemphasised for the effective regulation of cross-border mergers. On the national level, policy makers should be made aware of the potential long term adverse effects on domestic markets if anticompetitive cross-border mergers are not prevented. On the international scale, developing countries should endeavour to apprise more advanced agencies of the effects of cross border mergers on developing countries’ markets and express a need for more cooperation. This will also require greater openness from competition authorities of developed countries. International forums such as UNCTAD, the ICN and the OECD Global Forum present ideal opportunities to facilitate such interaction and dialogue and also allow for exchange of best and relevant practice, encouraging convergence and cooperation even without bilateral or regional agreements.130

129 UNCTAD, “Roundtable On Cross-Border Merger Control: Challenges For Developing And Emerging Economies”


130 Supra note 175
12. CONCLUSION

(A) Based on the facts presented in the earlier sections of the report, it can be concluded that cross border mergers are relevant and important especially for developing economies. There are various industry segments which benefit from a merger and thus stopping mergers per se is not the solution in today’s economic scenario. The developed economies are developed because they dared to take steps which were foreseeable in future for the overall economic development of their economy.

(B) There is a need for proper regulation mechanism in place, but regulation should not become a hindrance to economic development and mergers especially cross border in nature are necessary for the economy. International examples can be of some assistance for the purpose of serving a broad guideline or a roadmap. They cannot be definitive for other jurisdictions where the legal systems are differently positioned. It is undeniable that authorities in India have embodied the ‘effects doctrine’ for the purpose of controlling the cross border mergers and controls. This is an importation of the law as prevalent in the US. The need and the rationale for including such a provision in the Indian landscape are valid. There are lessons India can and should learn from the experiences of the Europe and US instead of imitating their legal regimes. The entrepreneurship spirit of the corporate sector need to be encouraged and the same needs to be supported by regulation rather than restricting it. As India integrates at a fast pace with the global economy there is a need to ensure international co-operation to tackle cross border challenges.

(C) Even though the CCI embodies the ‘effects’ doctrine, its implementation has not been fully ineffective. The experience has been a mixed bag. The legislative and administrative mechanism for cross border merger control as prevalent in US and Europe can serve little purpose while determining the competition policy for India. For instance, a plethora of agencies apart from CCI regulate mergers and acquisitions in India. These include the Telecom Regulatory Authority of India, Petroleum and Natural Gas Regulatory Board, Central Electricity Regulatory Commission, Reserve Bank of India, Securities Exchange Board of India, Company Benches, etc. While the fast-paced development has lifted millions of people up from poverty levels, it has also led to concomitant challenges. India
has seen several economic scandals and other crises during the period of economic boom. A significant feature of the Indian economic and legal regime during this period has been a mushrooming of innumerable regulatory authorities. Hence, with several regulatory authorities cropping up simultaneously, it is natural that they might end up having overlapping jurisdictions.

(D) The government also needs to resolve the complexities that exist due to the inter-relationship between various government policies like trade policy, industrial policy with competition policy as a whole. It is suggested that government should assess all laws and government policies on the touchstone of competition and evolve a system of ‘competition audit’ which could be applied to all existing and future policies.

(E) The CA seeks to regulate ‘combinations’ including acquisitions, mergers or amalgamations of enterprises. Notifications of combinations are mandatory. Acquisitions of one or more enterprises by one or more persons, or mergers or amalgamations of enterprises are combinations if they meet the jurisdictional thresholds based on assets and turnover. Thresholds for parties having assets or turnover in India are different from parties that have assets or turnover within and outside India. However, the threshold levels for the purpose of regulating the combinations are very high. There are a few industries which do not have the size contemplated under the regulations but can have tremendous localized impact. This is another factor that needs to be looked into while considering the provisions of regulations which regulate mergers.

(F) Regulation of an industry has three primary dimensions; technical, economic and competition. These three elements have to be distributed between the sectoral regulators and competition authority. Different countries have used different kinds of permutations and combinations vis-à-vis these elements in order to achieve coherence in the regulatory environment. It is suggested that complete exclusion of any sector from CCI’s jurisdiction would be a tragedy and amount the defrauding Indian consumers of the benefit of an efficient industry.
“Marriage of two lame ducks will not give birth to a race horse.” With the recent global trends of M&A and India being a favorite destination, the country may regain the status of being the “Golden Bird”. George Bernard Shaw said, “we are made wise not by the recollection of our past, but by the responsibility to our future” and the future of India is bright if good regulatory framework is in place.
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