



Extra-Territorial Jurisdiction of Competition Commission of India: An Overview of its Pragmatic Aspect

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Abstract: *The era of globalization has opened way where domestic market is exposed to foreign trade, legal monopoly being eliminated and because of this the boundary has increased or being removed which has resulted into a challenge for competition law. The effects of anti-competition cannot be limited within the boundary because of international trade and investment. With the increased globalization and trans-border trade the laws of the nations are not able to limit anti-competitive practices carried out in another country which have the adversely affect the competition in that particular country. Because of rise of such situation the countries have given their domestic competition law an extraterritorial effect. The Competition Act, 2002 under section 32 empowers the Competition Commission of India to look upon the activity which has appreciable adverse effect in India in a relevant market by an act which is anti-competitive being taken place outside India. But merely mentioning that CCI has extra-territorial jurisdiction would it be suffice? What pragmatic step CCI needs to take in order to enforce its extra-territorial jurisdiction effectively?*

Key Words: *Competition Commission of India, Extraterritoriality Principle, Effects doctrine, MoU, Bilateral or Multilateral Agreement*

I. INTRODUCTION

International transactions have increased because of globalization and investment opening the way for foreign investors. Very drastic change took place in the market with the domestic market being exposed to foreign trade, legal monopoly being eliminated and because of this the boundary has increased or being removed which has resulted into a challenge for competition law. The anti competitive effects of such transaction cannot be limited within the boundary because such transactions are international such as mergers, acquisitions etc. The transaction such as a cartel formulated may have the effect at international level affecting the whole world because of the formation of cartel and extending the anti-competitive effects to other jurisdictions.

To overcome such a situation or such a transaction whose affect crosses the territory of one nation either international law or the national law has to come forward. The international law has not taken any step with this respect hence the nations have taken the step by enacting a legal framework in order to regulate the effect of a conduct over its territory.

The competition law is the regime where the developed countries have the long history while the Indian competition Act i.e. The Competition Act, 2002 has been enacted in the year 2002 and is very new in comparison to them. With the increased globalization and trans-border trade the laws of the nations are not able to limit anti-competitive practices carried out in another country which have the adversely affect the competition in that particular country. Because of rise of such situation the countries have given their domestic competition law an extraterritorial effect. This recognition by almost every country has further given rise to other issue because laws of one country cannot be enforced upon the other country and it is not allowed by international law. The Competition Act, 2002 under section 32 empowers the competition commission to look upon the activity which has appreciable adverse effect in India in a relevant market by an act which is anti-competitive being taken place outside India. Also the commission is empowered to pass an order under the Act if the inquiry contented that there is an anti-competitive practice.

II. HISTORICAL BACKGROUND

The economic activity taken place in one country has the effect over the economy of the other country and now these effects cannot be limited by the boundaries. Now the question arises that whether the laws of one country could be applied over the undertaking in a different country carrying on an activity which adversely affects competition in the market of the one country. Along with this also raise the question that how to avert the excess of extraterritorial jurisdiction affect.¹

In the case of *Hridas Exports v. All India Float Glass Mfrs. Association*,² where a complaint was filed against the Indonesian manufacturer of float glass selling the product in India at price which was predatory as it was less than the cost of production in Indonesia and also less than the variable cost. It was contended that the competitors in India would not be able to sell at that price and it would result into making of those companies into sick company. The appeal went to SC and it was held that

¹ RICHARD WHISH, COMPETITION LAW 427 (Oxford University Press, 5th ed. 2003).

² AIR 2002 SC 2728



the commission does not have the power to stop the import and does not have extraterritorial jurisdiction, it can only take action if the good have been imported into the country.

The MRTP Act does not have any provision providing for the extraterritorial jurisdiction of the commission and also with the advent of globalization the Act was not having the provision to prevent the anti-competitive activities. The Competition Act, 2002 has eradicated these lacunae by which under section 32 competition commission got the extraterritorial jurisdiction.

III. RAGHAVAN COMMITTEE REPORT

The Raghavan committee had the opinion that though there are countries where the cases related to competition issues are being dealt by the judiciary of that country but competition is an area where the courts have to deal with the issues of free and liberal market and the judiciary does not have expertise over such an issue because of being inexperienced. The issue of free market and the activities which are prohibited can only be dealt by an institution which has an expertise over the matter. The Raghvan committee recommended that an agency having specialization over the issues of competition should be set up for dealing with the competition issues. It would be better if the competition issues are dealt by the specialized agency because it will better serve the welfare of the consumers and would be able to manage the competition law.

Hence it was recommended by the Raghvan committee that the competition law issues should be dealt by a specialized court/ tribunal having expertise over the matter of competition and not the judiciary. It was also recommended by the committee that it should be independent and autonomous with its proceeding being transparent. It also suggested that the jurisdiction of such body should be extra-territorial so that it can deal with the issues and anti competitive activities carries out in other country having appreciable adverse effect in India and also having power to impose fine if found guilty. The committee also recommended that competition advocacy should be done to create awareness among the stakeholders along with the state and central governments.

In the light of the recommendations of the Raghvan committee the Competition Act, 2002 has provided the provisions establishing the CCI under section 7 of the Act. The CCI has been established with the aim to prevent the activities which are anti-competitive and to promote the competition at the same time consumers' interest being protected. The CCI has been enacted to receive the complaints with respect to the competition law ensuring free and fair trade Indian markets. The CCI will be formed with the two important functions to be performed which are-

- a. In order to advance the efficiency in the economy and the welfare of the consumers it has to enforce and control the competition law and its policies.
- b. Positive participation in the formulation of the policies of the government ensuring free and fair market trade.

According to subsection 2 of section 7 of the Act, the CCI would be a body corporate which can be created by the Act of the Parliament the CCI is a statutory corporation having its existence under the Competition Act, 2002. Central Government may decide on the place of head office of the CCI. The composition of CCI will be a Chairperson and six members. The CCI has replaced the MRTP Commission and it is also a regulatory authority and its provision is compared with the provision of establishing SEBI, IRDA and TRAI by their respective Act.

IV. COMPOSITION OF THE COMMISSION

The CCI shall be headed by a Chairperson and its other members shall be appointed by Central Government which shall be minimum two members and maximum ten members. There shall be a selection committee which will be preparing a list of the person who could be appointed as the Chairperson and the members of the commission and the Central Government while considering that panel would be giving the name of chairperson and other members from that panel. The selection committee shall be composed of-

- a. Chief Justice of India or the person appointed as his nominee would be the Chairperson of the selection committee.
- b. Secretaries of the Ministries of Corporate Affairs and Law and Justice
- c. Two other members who have the professional expertise and knowledge in the field of economics, business, law, international trade, finance, accountancy, public affair or competition matters, etc;
- d. Governor of the Reserve Bank of India.

The tenure of the members of the commission and its chairman shall for five years and can be reappointed. According to the Act the salaries and expenses shall be made by the Competition Fund. The Chairperson and other members of the commission can be removed by the Central Government on the grounds mentioned under section 11 of the Act. The Chairperson and others members appointed in the commission shall be refrained from any other employment in any of the enterprise in any manner (management or administration) which has been one of the parties in the proceedings before the Commission within two years of their resignation from the office. They shall be the whole time members.

According to section 21 of Indian Penal Code, the Chairperson and the other members shall be deemed as public servants and they will be given the benefit given to a public servant as cannot be proceeded against in any suit for the act done in good faith under the provision of the Competition Act, 2002, its rules and regulations. The CCI have the power to initiate an action on



suo moto, where the Chairman of the commission has over the administrative matter of commission the power of superintendence and control.

V. THE EXTRATERRITORIALITY PRINCIPLE

There are countries like U.S whose competition law have extra-territorial effect and can control and regulate the conduct carried out in the other country having adverse and anti-competitive effect in their domestic economy, so that they better protect the customers from such anti-competitive conduct.³

There has been increase in the enforcement of the antitrust laws beyond the territory of the country because of the increase in globalised business activities, increase in propagation of the antitrust laws and increased acceptance that of there is adverse effect on the interest of consumers within the territory because of the conduct outside the country then the court of that country can take an action against that conduct.⁴

The principle of extraterritorial jurisdiction is based on the following two of the essentials-

V. 1. *Subject matter jurisdiction-*

The state has subject matter jurisdiction which means that it has the jurisdiction to make the laws to formulate rules and it is done by either of its bodies i.e. Legislature, Executive or Judiciary.⁵ According to the territoriality principle the state has power to make laws in order to regulate the conduct within its territory and according to the nationality principle to regulate the conduct of its citizen including the corporate outside the country through the law incorporated.⁶

V.2. *Enforcement Jurisdiction-*

According to the Enforcement Jurisdiction every state has power to enforce or give into effect the rules and decisions using various implementing measures which also include the coercive power of the state to give effect to the rules made it.⁷ It is considered that if the state has subject-matter jurisdiction over the conduct of person outside its territory then it would not be right to initiate a proceeding against the conduct outside the territory by the laws within its own territory without permission. Now the enforcement jurisdiction can be sound only if there is any Bilateral or Multilateral or both Agreements between the countries to that effect allowing the enforcement of laws of one country over the conduct taken place in other country having adverse effect over the territory of the first country.

VI. APPLICABILITY AND ENFORCEMENT OF THE DOCTRINE IN INDIA

The Competition Commission of India has been given extra-territorial jurisdiction under section 32 of the Competition Act, 2002. Also under the proviso section 18 of the Act it is mention that the Competition Commission India may, after obtaining prior permission of the Central Government, sign an agreement with the foreign agency so as to fulfill its duties under the provisions of the Act. This makes clear that authority of the CCI expands outside the territory of India and extends to any country. If any agreement which is conducted outside India but has according to the section 3 of the Act, anti-competitive effect or if the party to such anti-competitive agreement is outside India or if the enterprise having dominant position but abusing its dominant position, or any combination outside India which have or likely to have an adverse effect over the Indian market then such agreement, or combination etc. can be enquired by the CCI. The language of section 32 of the Act makes clear that effects doctrine has been recognized by this section and hence can be applied in India. Applicability of the doctrine arises when there is a *“direct, substantial, and reasonably foreseeable”* effect in the economy of India because of a conduct taken place outside India. It has been notified in the Competition Commission of India (General) Regulations 2009, 2 of 2009 that the extra-territorial jurisdiction can enforced in accordance with the provisions of the Competition Act, 2002 and Code of Civil Procedure, 1908.

VII. JURISDICTION OF CCI

If there is an act carried on in India which is anti-competitive in nature then the director jurisdiction would be of Indian courts. It can happen that the enterprise not having a fixed place of business in India but is carrying on certain activities which are anti-competitive in nature which is affecting the competition in India either by way of eliminating a competitor from the market or by the way of price fixing, exclusive dealing or cartels operating outside India but have effect within the territory of India effecting the competition in India, these are some of the issues which are grave in nature and increases the concern of the authorities. The provision of extra-territorial jurisdiction has been inserted in the Act giving the commission the extra-territorial

³ Mitsuo Matsushita, *Competition Law and Policy in the Context of the WTO System*, 44 DE PAUL LAW REVIEW 1107 (1995).

⁴ Larry Fullerton, Camelia C. Mazard, *International Antitrust Co-Operation Agreements in Jose Rivas*, 24 WORLD COMPETITION LAW AND ECONOMIC REVIEW 405 (2001).

⁵ WHISH, *supra* note 1.

⁶ Id.

⁷ Re Wood Pulp Cartel: A. Ahlstrom Oy and Others v. E.C. Commission, 1988 ECR 5193.



power in order to control and regulate the activities which though are conducted outside India but have “*Appreciable Adverse Effect on Competition*” in the territory of India. This is called the extra-territorial jurisdiction principle as mentioned under section 32 of the competition Act, 2002 and under this provision the powers have been given to CCI to conduct an enquiry over the activities which are though conducted outside India but has or likely to have appreciable adverse effect on the Indian market (relevant market) affecting the competition in the country.

The Extra-territorial jurisdiction of the commission extends to⁸ enquire upon the anti-competitive agreement, abuse of dominant position, combinations regulation, and competition advocacy. The commission can take enforcement measures which are enquiry and regulating in order to comply with its authority over a matter and also it can take non-enforcement measures which includes competition advocacy program, awareness creation among the people and government for the competition issues.

Issues

The antitrust law of the State requires that⁹ -

- Whether the law of other state widen out for the activities taking place outside its territory.
- Whether any domestic court has jurisdiction over the matter.
- If both of them exist then arises the issue of enforcement, obtaining evidence and implementing penalties.

VIII. ENFORCEMENT OF THE CCI'S ORDER

The section of extraterritorial jurisdiction does not make it clear about the order and the action that may take place for regulating the activity of an enterprise outside India having adverse effect in the competition in relevant Indian market, so that such a an activity of enterprise could be stopped from further continuations. The section does not specifically states about the about the issue but the section 14 of the MRTP Act in its language says that “*order may be passed with respect to part of practice carried on India*”. The courts have so far been helpful in passing an order restraining a local enterprise which is a party to an agreement which is anti-competitive in nature so that the agreement becomes non operative in India with that respect and curtail the anti-competitive effect of that agreement.

IX. EFFECTS DOCTRINE

The section 32 of the Competition Act, 2002 is based on the effects doctrine according to which the regulator of one country can extend its jurisdiction beyond its territory. The effect doctrine was firstly laid down in the case of *US v. Aluminium Company of America*¹⁰, which is commonly known as the “*Alcoa case*”. In this case the U.S. Court of Appeals held that imposition of liabilities can be made also on the person which is beyond the adherence of the State for the consequences of the activity conducted outside the territory of the State but have some effect within the territory of the State. The case has further laid down the test of “intended and actual effects” according to which if the activity have an anti-competitive effect on the economy and trade of the country then the applicability of the U.S. laws over the foreign company is extended. It is required that the test of “intended and actual effects” is conducted to find the effect of the anti-competitive activity. It was held in the case that the activity of the Canadian Company was in contravention to the Sherman Act where the Canadian company has entered into agreement with the European aluminum producers that they would not be supplying aluminum in the American Markets at the same time distributing it to the world market.

The case though laid down the effects doctrine in the case but it was given statutory recognition only in the year 1994 by International Antitrust Enforcement Assistance Act. In the same line U.K. has recognized the concept of effect doctrine with some difference by enacting the Protection of Trading Interests Act, 1980.

The effects doctrine was for the first time mentioned in India with respect to competition law when a complaint was filed against the American Natural Soda Ash Corporation (ANSAC) before MRTP Commission by the Alkali Manufacturers Association of India. It was alleged that almost six of the producers of natural soda ash formed a cartel for the purpose of export of the soda ash by entering into an agreement. They also alleged that this cartel would affect the reasonable price of natural soda ash in India which would have an adverse affect over the market of soda ash in India. Thereafter, an enquiry was conducted by the MRTP Commission which resulted in passing an *ad interim* injunction, it was directed to the ANSAC that it should not become involved in the activity of cartel for export of soda ash in India directly or indirectly. At the same time, another petition was filed by the All India Float Glass Manufacturers’ Association (AIFGMA) where a complaint was made against three Indonesian companies, and an injunction was passed against the import carried on. Being aggrieved by the order of the MRTP Commission, the ANSAC and the Haridas Exports made an appeal to the Supreme Court of India. The court here clubbed both the cases¹¹. The court has in its judgment set aside the order passed by the commission an held that the MRTP Commission did not have

⁸Dr. Alok Ray, *Globalisation and Competition: The Role of a Professional*, THE CHARTERED ACCOUNTANT, 1452 (2007).

⁹ 2 CALVIN S. GOLDMAN, Q.C. AND J.D. BODRUG, COMPETITION LAW OF CANADA 13 (Juris Publication 2005)

¹⁰ 148 F.2d 416

¹¹ Haridas Exports vs. All India Float Glass Mfrs. Association and Ors. AIR 2002 SC 2728



jurisdiction upon the matter and has acted extra-territorially and the lacked jurisdiction. The court further held that the MRTP Act does not have extra-territorial operation, it also further laid down for the *AIFGMA* case that for the applicability of the effect doctrine it is required that there is a restrictive trade practice carried on after the goods have been imported in India. While for the case of *ANSAC*, it was held that there is a foreign cartel framed and MRTP Commission does not have jurisdiction over the foreign cartel unless the members of cartel are carrying on business or trade in India.

The MRTP Act was restricted to the involvement only in the cases where an Indian party is involved in the restricted trade practice which was also settled in the case of *Haridas*, where it was held that the MRTP Act does not have extraterritorial operation and the it became almost impossible for the commission to conduct an enquiry or take any action against the anti-competitive activity conducted outside but having its impact in India.

Because of this lacuna of the earlier Act, section 32 was inserted in the Competition Act, 2002, where the commission is empowered to have jurisdiction over the activities outside India having impact (adverse) in the Indian market, by applying the effects doctrine. The MRTP Commission lacked the power in the case of *Haridas* while now CCI has been given power to deal in the similar matter.

X. POWER OF THE CCI

According to section 32 of the Competition Act, 2002 the CCI has been given power to conduct an enquiry in the matter involving the abuse of dominant position or any combination by the parties outside the country or the agreement which is anti-competitive conducted outside the country but has appreciable adverse effect on the competition in the Indian market. It has also been given power to pass any order with respect to that as the CCI deems fit.

The extra-territorial jurisdiction of CCI when combined with the power to conduct an enquiry and procedure as laid down under Sections 19, 20, 26, 29 and 30 of the Act, the CCI has also been give power to regulate its own procedure which would be effective in passing of the orders.

Since there are certain problems with respect to extra-territorial jurisdiction the section 18 has been inserted in the Act to take care of the matter involved in the enforcement of the private international law, so that CCI after entering into an agreement with the any agency of foreign government after getting approval of the Central Government can make that agency to conduct the duties of CCI in that foreign jurisdiction.

XI. CONCLUSION

In order to remove the shortcomings of the MRTP Act, in Competition Act, 2002 section 32 has been inserted so that the CCI has the jurisdiction over the anti-competitive activity outside India having the adverse effect over the relevant market in India. But merely mentioning that CCI has extra-territorial jurisdiction would not suffice because there is also needed enforcement jurisdiction for which it is required for the CCI to enter into agreement with agency of foreign government under section 18 of the Act. India is required to enter into MoU, Bilateral or Multilateral Agreement or any international Doctrine or Principle recognized by States with regard to Competition Law under the proviso of the section 18 of the Act.

The statute clearly gives wide power to CCI to enquire into the activity and can also pass the order with respect to the activity which is though outside India but have adverse effect over the competition in Indian market. Also the CCI has been empowered to regulate its own procedure and in this way for the effectively exercising its power CCI can adopt any procedure.

The effects of section 32 of the Act are similar to the effects of Article 81 and 82 of EC treaty and also to that of section 1 and Section 2 of US Sherman Act. But this extra-territorial jurisdiction of CCI is dependent upon the diplomatic relations of India with other nations. This can be overcome if the commission in accordance with proviso of section 18 enters into agreement with agency of foreign government so that its duties can be conducted easily. The commission should give recognition to the comity principle. The principle can be considered as “*a manner to express the extent of obligation of the laws of one nation within the territories of another*”.¹² To achieve the effective and efficient enforcement of competition law is the main objective of this agreement. If there is an anti competitive activity which is directed towards one of the party to the agreement the other party would leave the matter for the authorities of the first county to take an action. This principle has been adopted by various other jurisdictions also. There are circumstances when an enterprise, does not has an establishment in the country, which is operating overseas increases the issues of jurisdiction which respect to enforcement matter. Such issue can be resolved by bilateral and multi lateral agreements where as under this agreement the states would be agreeing to cooperate in investigation, prosecution of offenders residing in an outside country, so that investigation can be done in a proper manner when there is a beach of antitrust legislation by such an enterprise. So it is required for India to enter into more and more bilateral and multi-lateral agreements so that there is more cooperation from the other country which would ultimately resolve the issue.

¹² WHISH, *supra* note 1.



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