‘Effects Doctrine’&Competition Regulators: A Comparative Study.

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Abstract:

The issue of extra-territorial jurisdiction of the competition regulators/authorities is that the domestic authorities having jurisdiction over the acts of firms outside the jurisdiction or domestic firms acting from outside but having appreciable adverse effects on competition inside the country. The anti-trust authorities, in many countries, do not have this power through the statute and thus acquired by itself or by the courts decisions due to ‘effect doctrine’. If there is any ‘effect’ of the actions of the firm within a specific territory which eliminates the competition, regulators can take appropriate action even though the firm acted outside the country. A comparative study of extra-territorial power across jurisdiction has been made in this paper.

Key words: Effect doctrine, competition authorities, anti-competitive business practices.

Introduction:

Competition is the process of rivalry among the producers or where they strive against each other to enhance profit and to attract more customers or to get the patronage of consumers.Competition in economics is a condition that is present in markets where buyers and sellers interact to establish prices and exchange goods and services. Economic competition is the means whereby the self-interest of buyers and sellers acts to serve the needs of society as well as those of individual market participants. Competition puts producers or manufacturers under constant pressure to offer the best possible range of goods and the provisions of services at the best possible prices, because if they don't, consumers have the choice to shift to interchangeable or substitutable goods. In a free market, business should be a competitive process with consumers as the beneficiaries. But, sometimes the firms either by some agreements or by their dominant position or by mergers, abuse their position for maximum profits to the detriment of the consumers. Hence the Competition laws came to existence. Competition law is designed to protect businesses and consumers from anti-competitive behaviour of producers.

The Competition Authorities all over the world follows the philosophy of modern competition laws and aims at encouraging competition and at protecting markets against anti-competitive practices by enterprises. The Competition Commission of India has been established to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets in India, and for matters connected therewith or incidental thereto.[2] The competition laws and authorities across the globe primarily prohibit three activities namely- anti-competitive agreements, abuse of dominant position by enterprises, and regulate combinations, consisting of mergers, amalgamations and acquisitions

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[2] Preamble to the Competition Act, 2002.

with a view to ensure that there is no adverse effect on competition and markets.

In the era of globalisation and liberalisation, the effects of economic actions are not restricted by the political or geographical limits. There may be possibility that any firm having any agreement beyond the limits of one country, adversely affect the business environment of that country due to the anti-competitive effects of the agreement/ combination.

In this paper, I will analyse the 'effects doctrine' and the extra territorial jurisdiction of the competition commissions with case laws and the comparative study of the US and EU laws.

<u>Global Markets and Effects of Firm's Conduct throughout the World:</u>

International economic integration is not a new phenomenon. Tradetook place between distant civilizations even in ancient times and since the travels of *Marco Polo*, global economic integration—through trade, factor movements, and communication of economically useful knowledge and technology—has been on a generally rising trend. This process of globalization in the economic domain has not always proceeded smoothly; nor has it always benefited all whom it has affected. The intensification of competition at both domestic and international levels has driven firms to look beyond their domestic markets for new opportunities.[3] The progressive removal of barriers to trade and capital movements has stimulated greater flows of exports, imports and foreign direct investment (FDI).

Multinational enterprises have emerged as the key agents of international economic co-ordination. They provide the capability to generate innovations and deliver new goods and services to the market.[4]In this era of globalisation, the World Trade Organisation (WTO) agreements and the easy accessto global markets, the effects of economic actions are not restricted to a specific political or geographical territorial limit. The results of the actions of transnational or multinational companies will spread far and wide depending on the strength of the company. With the opening of markets, and increasing inflow of goods and international players entering the developing markets, cross border issues are bound to arise.

Controlling the commercial behaviour of entities beyond one's own border is clearly a difficult task. It has been observed by *Karel van Miert*, former EU Competition Commissioner, that national or even regional authorities are ill equipped to grapple with the problem posed by the commercial behaviour occurring beyond their borders.[5] The competition issues that arise due to the increased cross border trade include-market power in the global or export market, barriers to import competition, issues relating toforeign investment and intellectual property rights related issues.[6] In the economic liberalised and globalised environment, the companies are having business in various countries.If a firm has adopted some anti-competitive behaviour,

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[3]NikiGeiersbach, *The Impact of International Business on the Global Economy;Business Intelligence Journal - July, 2010 Vol.3 No.2, p. 124.*

[4]*Ibid* at p. 120.

[5] Alison Jones and Brenda Sufrin, *EC Competition Law*, London: Oxford University Press, 2001, p. 1040.

[6] CUTS Institute of Regulation & Competition (CIRC), *Emerging Issues in Competition Law* (Module 8 Unpublished study notes for D-CPL).

and the firm is having business all over the world, as a result, the effect of that very anti-competitive activity spills all over the world. If the firms have an illicit arrangement as cartel, the whole world will have adverse effect of the cartel as either the prices will be hiked or the markets will be divided hence competition will be eliminated andultimately consumers will be harmed.

Effect Doctrine:

Effects doctrine means, domestic competition laws are applicable to foreign firms - but also to domestic firms located outside the state's territory, when their behaviour or transactions regarding supply of goods and provisions of services, produce an "effect" within the domestic territory. The effect of these firms acting from outside the territory must have such appreciable and substantial harm not only to the competitors but also the consumers within the territory.The "nationality" of firms is irrelevant for the purposes of antitrust enforcement.[7]The effects doctrine covers all firms irrespective of their nationality- even domestic company acting outside the jurisdiction.[8]

The effects doctrine is justified under public international law when it is foreseeable that a proposed activity or concentration will have an immediate and substantial adverse effect in the Community.[9] The principle of comity also applies to the extra territorial application of the competition law, where the states help each other to apply its jurisdiction and to take action against the firm which infringes the monopolies and restrictive laws of the affected state.[10]The effect doctrine is a doctrine that gives regulating authorities extra territorial jurisdiction to act, investigate, collect evidences, apprehend, restrain and penalise acts which have taken place beyond the political borders, but have an effect on the markets of the regulating nations.

Evolution of the doctrine:

The US:

In the US commercial law jurisprudence, the effect doctrine has been developed through the US court's interpretation of the antitrust law to restrain, prohibit and penalise the activities outside the territory having adverse effect on business within the US territory. In 1909, *American Banana Case*,[11] where all the acts complained of were committed outside the territory of theUnited States, including the defendant's alleged inducements of the Costa Ricangovernment to monopolize the banana trade, the US Supreme Court, categorically deniedjurisdiction over the issue on the basis of the traditional territorial principle.[12]

However, inthe *American Tobacco case,[13]* the US Supreme Court held that, the public policy manifested by the Anti-Trust Act is expressed in such general

[7] Glossary of Competition Term, *available at:* http://www.concurrences.com/Droit-de-la-concurrence/Glossaire-des-termes-de/Effects-doctrine_(Visited on October 25, 2013).

[8] Ryan Paul Knott, *Extraterritoriality, the Effect Doctrine and Enforcement Cooperation through Bilateral Agreements with regard to Antitrust Law* (2010) (Unpublished LL.M dissertation, University of Johannesburg).

[9]Brownlie, *Principles of Public International Law* 303 (4th edn.).

[10]Pitofsky, "Competition in a Global economy" *Journal of international EconomicLlaw* 403 on 407 (1991).

[11] American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909).

[12]GautamShahi, *Effects Doctrine: Evolution and Execution* (2007) (Unpublished project report under internship programme, Competition Commission of India).

[13] US v. American Tobacco Co., 221 U.S. 106 (1911).

language that it embraces every conceivable act which can possibly come within the spirit of its prohibitions, and that policy cannot be frustrated by resort to disguise or subterfuge of any kind.... this case discloses a combination with the purpose of acquiring dominion and control of interstate commerce in tobacco by methods and manners clearly within the prohibition of the Anti-Trust Act.Later in the *Sisal case*,[14] the territorial principle wasapplied more flexibly and the US Supreme Court exercised jurisdiction over thedefendants on the ground that although the agreements in question were concluded byforeigners outside the United States, jurisdiction was limited to what was performed andintended to be performed within the territory of the United States.

Inthe *Alcoa case*,[15] the United States took action against the Aluminium Company of America and others for adjudication thatthe named defendant was monopolizing interstate and foreign commerce, and that it should be dissolved, and toadjudge that such defendant and defendant Aluminium Limited had entered into a conspiracy in restraint of suchcommerce and for other relief under the Sherman Anti-Trust Act, Sec. 4, 15 U.S.C.A.

It was 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 which the state reprehends; and these liabilities other states will ordinarily recognize, but for argument we shall assume that the Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them. Both agreements would clearly have been unlawful, had they been made within the United States; and it follows from what we have just said that both were unlawful, though made abroad, if they were intended to affect imports and did affect them*".Since the Alcoa case, U.S. courts continued to follow the new jurisdictional formula of the *effects doctrine*.

[14] US. v. Sisal Sales Corporation, 274 U.S. 268 (1927).

[15] US v. Aluminium Company of America et al, 148 F. 2d. 416 (1945).

Tests for the application of effects doctrine:

In the *Timberlane case*[16],the court laid down certain tests which have to be applied before asserting legitimate claim to extraterritorial jurisdiction over alleged anticompetitive conducts.The court ruled in affirmative that the U.S. has a legitimate claim to jurisdiction, but there are some situations where they shouldn't exercise that jurisdiction. Court uses a 3-part test to decide if this is an antitrust issue that the U.S. needs to get involved with:

- There must be some effect - actual or intended (direct or substantial) - on American commerce before the federal courts may legitimately exercise subject matter jurisdiction.

[16] Timberlane Lumber Co. v. Bank of America National Trust & Savings Association. 749 F.2d 1378. Also different standards have been urged by other commentators. Julian von Kalinowski, advocates a *"direct or substantial"* effect test—*"any effect that is not both insubstantial and indirect"* should support jurisdiction, a view that was adopted by the district court in Occidental Petroleum v. Buttes Gas & Oil Co.,331 F.Supp. 92, 102-03 (C.D.Cal.1971), affirmed on other grounds, 461 F.2d 1261 (9th Cir.), cert. denied, 409 U.S. 950, 93 S.Ct. 272, 34 L.Ed.2d 221 (1972). James Rahl turns away from a flat requirement of effects by concluding that the Sherman Act should reach a restraint either "(1) if it occurs in the course of foreign commerce, or (2) if it substantially affects either foreign or interstate commerce." James Rahl, *Foreign Commerce Jurisdiction of the American Antitrust Laws,* 43 Antitrust L.J. 521, 523 (1974).

- A greater showing of burden or restraint may be necessary to demonstrate that the effect is sufficiently large to present a cognizable injury to the US, and therefore, a civil violation of the antitrust laws.

- (as a matter of international comity and fairness) Whether the interests of, and links to, the U.S. -including the magnitude of the effect on American foreign commerce – are sufficiently strong, *vis-a-vis* those other nations, to justify an assertion of extraterritorial authority.

Also the court provided the balancing tests - Elements to be weighed: Looking at the totality of the circumstances;

- Degree of conflict with foreign law or policy.

- The nationality or allegiance of the parties and thelocations or principal places of business of corporation.

- The extent to which enforcement by either state can beexpected to achieve compliance.

- The relative significance of effects on the U.S. ascompared with that elsewhere.

- The extent to which there is explicit purpose to harm or affect American commerce.

- The foreseeability of such effects, and;

- The relative importance to the violations charged ofconduct with the U.S. as compared with conduct abroad.[17]

The EU:

The doctrine has been adopted by the European Commission even though the Treaty of Rome or the competition law of European Commission is silent on the extra territorial jurisdiction.Based on the principles of nationality and territoriality, the extraterritorial application of Articles 81 and 82 of EC is therefore ensured through the use of three legal constructs, namely the “economic entity” doctrine, the “implementation” doctrine and the “effects doctrine”. The former two doctrines are established doctrines of EC law, as recognized by the European Court of Justice (“ECJ”).

In the absence of formal recognition by the ECJ, however, it remains unresolved whether the “effects doctrine” enjoys the same status.[18] In the vast majority of cases, however, the fact that the “effects doctrine” has not been formally recognized by the ECJ, will have no bearing on the ability to assert subject-matter jurisdiction over non-EU undertakings located outside the EU.[19]The

[17] Restatement (Second) of Foreign Relations Law of the United States,s. 40 states that a court should act in the light of such factors as:
(a) vital national interests of each of the states,
(b) the extent and the nature of the hardship that inconsistent enforcement actions would impose upon the person,
(c) the extent to which the required conduct is to take place in the territory of the other state,
(d) the nationality of the person, and
(e) the extent to which enforcement by action of either state can reasonably be expected to achieve compliance with the rule prescribed by that state.

[18]R. Whish, *Competition Law*, Lexis Nexis, 5th Ed., 2003, p. 437. Also, Damien Geradin, Marc Reysen, et. al., Social Science Research Network available at: http://ssrn.com/abstract=1175003.

[19]Subject-matter jurisdiction is the right which States or institutions possess to make their laws applicable to the activities, relations or status of

doctrine extends subject-matter jurisdiction to all situations where the economic effects in the EU of anti-competitive actions taken abroad are immediate, reasonably foreseeable and substantial.[20]

In the *sixth report* on Competition Policy in 1977 the Commission restated its view, concluding that*"in terms of legislation, administrative practice and court rulings, the legal theory here—the 'effects' theory—is based on a broad interpretation of the principle that the authorities can act against restrictions of competition whose effects are feltwithin the territory under their jurisdiction, even if companies involved are locating anddoing business outside the territory, and of foreign nationality, have no link with thatterritory, and are acting under an agreement governed by foreign law."*[21]

The Commission and Europeancourts have evolved and acquired this jurisdiction by its own while deciding the cases having extraterritorial issues. In the *Wood Pulp Case*[22], in which a number of Finnish, American and Canadian wood pulp producers outside the EC jurisdiction formed a price cartel and EC members charged with inflated prices. The jurisdiction over these producers was justified on the ground that they were exporting and selling directly to the costumers in the EC through branches, subsidiaries or agents at a price not less than two-thirds of the total shipment, leading to 60% of the consumption of wood pulp in the EC being affected. The Commission held that the relevant pulp producers and trade associations had infringed Article 81 (1) EC all of which had their registered offices outside the Community with only few having some kind of representation, such as a subsidiary, within the EC. The Commission explicitly made reference to the effect of the agreements and practices on prices announced and/or charged to customers and on resale of pulp within the EC in order to assert jurisdiction.

On appeal, Advocate-General Darmon espoused the effects doctrine reflecting a belief among several Advocate-Generals that the doctrine should become an established concept of EC law.In particular, he opined that "there is no rule of international law which is capable of being relied upon against the criterion of the direct, substantial and foreseeable effect".[23]

Again the doctrine was discussed and affirmed in the *Gencor case*[24]concerning a

persons, and to the interests of persons in property. Such jurisdiction is exercised by the enactment of legislation, such as Articles 81 and 82 EC, or by the laying down of rules by administrative agencies or by courts. Butterworths Competition Law (Loose Leaf), *Volume 3, Issue 71, para. XII/2.*

[20]*Gencor v. Commission*, [1999] E.C.R. II-753, para. 90.

[21]Competition Policy, Sixth Report on Policy Towards Enterprises- Main Developments in Community Policy,Published in conjunction with the 'Tenth General Report on the Activities of the European Communities', Brussels, Luxembourg (April 1977). This theory is also recognized by the laws of several Member States. The German Act against Restraints of Competition of 1957, for instance, states at Section 98(2): 'This act shall apply to all restraints of competition which have effect in the area in which this act applies, even if they originate outside such area'.Also, in Competition Policy, 2nd Report, point 24, the Commission stated that it and the Court of Justice both considered that the Community had power to act against a non-Community undertaking under Article 85 wherever the effects of the restrictive practice were felt within the common market.E. Nerep, *Extraterritorial Control of Competition under International Law* 1983.

[22]*Wood pulp*, (1985) O.J. L 85/1, (Commission decision of 19 December 1984). In appeal to the ECJ, Ahlstrom v. Commission, European Court Judgment of 27 September 1988, European Court Reports 1988, 5193.

[23]Opinion of the Advocate-General Darmon of 25 May 1988 in joined cases 89, 104, 114, 116, 117 and 125-129/85 [1988] E.C.R. 5214 para.57.

[24]Judgment of the Court of First Instance, Case T-102/96, *Gencor v. Commission*, [1999] E.C.R. II-753.

merger of two South Africancompanies, in which the territorial scope of the E.E.C. Merger Regulation (RegulationNo. 4064/89) and its justification under international law was reviewed. The Court ofFirst Instance of the European Community observed that:

"*According to Wood Pulp, the criterion as to the implementation of an agreementis satisfied by mere sale within the Community, irrespective of the location of thesources of supply and the production plant. It is not disputed that Gencor andLonrho carried out sales in the Community before the concentration and would have continued to do so thereafter. Accordingly, the Commission did not err in itsassessment of the territorial scope of the Regulation by applying it in this case toa proposed concentration notified by undertakings whose registered offices andmining and production operations are outside the Community.... application of the Regulation is justified under public international law when itis foreseeable that a proposed concentration will have an immediate andsubstantial effect in the Community*"

The court applied the three criteria of the doctrine-*immediate*, *substantial*, and *foreseeable*effect held that, "*the application of the Regulation to the proposedconcentration was consistent with public international law*." It should be noted that in*Gencor Case*, although the *Wood Pulp case* was referred to and the "implementation" testwas 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 internationallaw.[25]

<u>India:</u>

In India, before the passing and implementation of the Competition Act, 2002(actual implementation after the amendment Act of 2007) the Monopoly and Restrictive Trade Practices Commission under the Monopoly and Restrictive Trade Practices Act, 1969(hereinafter referred to as the 'MRTP Act') was functioning to check monopoly of big size firms, stop restrictive trade practices and to protect the consumers. The Government of India, in April 1964, appointed the Monopolies Inquiry Commission under the Chairmanship of Justice K. C. Das Gupta, a judge of the Supreme Court, to inquire into the extent and effect of concentration of economic power into the private hands and the prevalence of monopolistic and restrictive trade practices in important sectors of economic activity other than agriculture.

The Monopolies Inquiry Commission submitted its report to the Government of India on October 31, 1965. It was observed in the report that "*there were dangers from concentrateeconomic powers and monopolistic practices and they exist in large measure atpresent or potentially*".It was felt that the recommendation of the said commission should be given effect to in order to strike a balance between the twin object of the social policy, *i.e.*, economic development and equity.

The Government of India agreed with the Monopolies Inquiry Commission that steps should be taken to ensure that the concentration of the economic power in private hands did not operate to the common detriment and that a permanent commission should be established by law to control and regulate monopolistic and restrictive trade practices.In pursuance of the recommendations of the Monopolies Inquiry Commission,theMonopolies and Restrictive Trade Practices Commission was established under theMonopolies and Restrictive Trade Practices Act, 1969 passed by the parliament which came into operation from the 1st June, 1970.

[25]See supra, footnote 13 at p. 10.

The objectives of the MRTP Act were to provide that the operation of the economic system does not result in the concentration of economic power to the common detriment for the control of monopolies, for the prohibition of monopolistic and restrictive trade practices. It was thought that the above legislation by promoting competition would prevent the traders, manufacturers or producers form indulging in restrictive trade practices and consumer would get a fair deal.

As far as the effects doctrine is concerned,Section 14 of the Monopolies and Restrictive Trade Practice Act, 1969,provided:

"***Orders where party concerned does not carry on business in India***: *Where any practice substantially falls within monopolistic, restrictive or unfair trade practice relating the production, storage, supply, distribution or control of goods of any description or the provision of any service and any party to such practice does not carry on business in India, an order may be made under this act, with respect to that part ofthe practice which is carried on in India*."

The Effect Doctrine was recognised by the Supreme Court in*Haridas Exports v. All India Float Glass Manufacturers' Association.*[26] Here,due to the Effect Doctrine, the MRTP Act gave the MRTP Commission, jurisdiction to pass appropriate orders qua the monopolistic and restrictive trade practices in India, even if an agreement is entered outside India but results in restrictive trade practices within India. In this case, Respondent No.1, All India Float Glass Manufacturers' Association is an association of float glass manufacturers in India. During March-April, 1998, complaints were made by the said respondent to the Customs Department, alleging that the Indonesian manufacturers of float glass, in association with Indian importers were allegedly indulging in heavy under-invoicing. The respondents were, however, informed by the Customs Department in Calcutta that if they had any genuine grievance, the same could be made before the Designated Authority, Ministry of Commerce dealing with anti-dumping complaints. On 10th September, 1998, the respondent No.1 filed a complaint before the MRTP Commission under Section 33(1) (j), (ja) and Section 36A read with Section 2(o) of the Monopolies and Restrictive Trade Practices Act, 1969 against three Indonesian companies alleging that they were manufacturing float glass and were selling the same at predatory prices in India, and were hence resorting to restrictive and unfair trade practices.

It was alleged that these sale prices were predatory prices as they were less than not only the cost of production for the product in Indonesia but also the variable cost of production of the product. The complainant gave figures indicating the estimated cost of float glass internationally as well as the cost of production of float glass in India with a view to demonstrate that the Indian manufacturers of float glass would not be able to compete with the price at which the Indonesian manufacturers were presently selling or intending to sell to Indian consumers. On this basis, it was contended that the sale of float glass by the Indonesian manufacturers at the said price will restrict, distort and prevent competition by pricing out Indian producers from the market. This would result in lowering the production of the Indian industry and the

[26] (2002) 6 SCC 600. Also, *M/s American Natural Soda Ash Corporation v. M/s Alkali Manufacturers Association of India* (as *ANSAC v. AMAI* case, Civil Appeal No. 3562 of 2000 decided with *Haridas Exports v. AIFGMA*).

consequent idle capacity and losses would force the industry to become sick which would lead to its closure which would have a direct impact on the employment in the industry.

The court held that, The MRTP Commission can, inter alia, take action whenever a Restrictive Trade Practice is carried out in India in respect of imported goods or otherwise.It is only in respect of the Indian leg of the restrictive trade practice, can an order under Section 12 A and/or Section 37 be passed.Under Section 33 of the Act what can be registered is only an agreement in regard to which any party to an agreement carries on business in India [Section 35 Explanation I]. But this does not mean that if an agreement is entered into outside India and which results in a Restrictive Trade Practice in India, the MRTP Commission has no jurisdiction. The "effects doctrine" will apply and Section 2(o) read with Section 2(u) and Section 37 gives jurisdiction to the MRTP Commission to pass appropriate orders qua the Restrictive Trade Practice in India. The MRTP Commission, in such a case, may not be able to stop import but there can be order imposing post import restrictions such as, for example, not to sell imported goods in India in such a manner which will be regarded as a restrictive trade practice under Section 37.

Also, the MRTP Commission held in *Director-General (investigation & Registration) v. Voltas Ltd.,*[27]that in view of section 14 of the Act notwithstanding that the business concern, which entered into agreement with the respondent in India, is carrying on business in a foreign country, the commission can take cognizance of the restrictive trade practice because the said trade practice is being carried out in India.

Post 1991, policy of liberalisation, privatisation and globalisation was introduced. The MRTP Act was found inadequate to meet the challenges of a modern globalised economy. Government of India (GOI) had appointed a committeeunder the Chairmanship of Shri S.V.S. Raghavan in October, 1999 to examine The Monopolies and Restrictive Trade Practices Act, 1969 for shifting the focus of the law from curbing monopolies to promoting competition and to suggest a modern competition law in consonance with international developments. Competition Bill, 2001 was introduced in the Lok Sabha on 6 August, 2001 and was referred to Parliamentary Standing Committee for its recommendation. It was passed in 2002 and received the assent of the President in 2003 and subsequently amended by the Competition (Amendment) Act, 2007. The preamble’s stated objectives is to establish the commission which has the duty to eliminate practices having adverse effect on competition, promote and sustain competition, protect consumers interest, ensure freedom of trade carried on by other participants in markets, in India.

Effect Doctrine &the Competition Commission of India under Competition Act, 2002:

The new competition law in India, the Competition Act, 2002 includes the extra-territorial jurisdiction clause. Section 32 of the CA ’02 provides the extra-territorial power to have jurisdiction in cases where the actions outside India have adverse effect on the competition and

[27] (1994) 79 Comp. Cases 274 (MRTPC).

markets in India. The provision is as under:

[28]Acts taking place outside India but having an effect on competition in India.
32. *The Commission shall, notwithstanding that,—*
(a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or
(c) any enterprise abusing the dominant position is outside India; or
(d) a combination has taken place outside India; or
(e) any party to combination is outside India; or
(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.

Section 32 gives unambiguous provision where power has been given to the Competition Commission to take action where any anti-competitive practices i.e. any agreement under section 3, abuse of dominance and combinations outside India, but have adverse effect in India. The Competition Commission of India have the jurisdiction to try and penalise the business arrangements acted outside India but having adverse effect on competition in India in matters connected with anti-competitive agreements, abuse of dominance and combinations outside India but having effects in India.

It has also been provided that the investigation and inquiry in such matters may be proceeded as per the provisions applicable to the firms acting in India. The provision specifically provides that any enterprise or party or any combination (acquisition, amalgamation or merger) of firms, by their actions beyond the Act's territorial jurisdiction, if having appreciable adverse effect on the businesses and markets in India, the commission can initiate process, take action and regulate the matters connected and incidental to the competition in markets. India may face difficulty in the execution of the extra territorial jurisdiction as these cartels are very strong, still the provisions of the Act enables the Commission to act to and penalise so that the competition in the economy can be sustained. Also, for the execution the government should work to give effect to the bilateral ties, so that the firms adversely affecting the economy may be restrained.

Conclusion:

The provisionsrelating to anti-competitive agreements and abuse of dominant position are for protection of consumer interest and enhancing competition in the market place. Similarly, the provisions relating to Combinations are to ensure that a Combination does not create an appreciable adverse effect on competition and it does not result in the monopoly of a particular concern or firm. It would be a necessity to understand applicability and implications of these provisions to one's business as the cost of non-compliance could be too steep and detrimental.

At present '*effects doctrine*' in India is at an initial stage. Section 32 of the Competition Act, 2002 gives the Competition Commission of India, the power to inquire into any anti-competitive practice having effect in India, even if the

[28] Section 32, the Competition Act, 2002.

same has taken place outside the territory of India. But, execution outside India is very difficult. Even, the lengthy court process, time taken in deciding the appeals by the appellate courts is something which denies the justice to the affected. The companies of the countries with whom we do not have warm relations or which are hostile to us are next to impossible to bind by the orders of the commission. India, if want to reap the fruits of this new law, then the bilateral relations with foreign countries must be very strong so that these foreign companies acting from outside can be stopped to act in such manner and to execute the orders of the commission for the adverse effect on our economy.