THE UNCHARTERED TERRITORY OF EXTRA-TERRITORIAL JURISDICTION IN INDIAN COMPETITION LAW

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CONCEPTUAL PRIMER

It all goes back to when the Monopolies and Restrictive Trade Practices Act, 1969 (MRTP Act) has become obsolete in terms of economic improvement and effective competition concerning competition laws in general. As per the recommendation provided by the high-level Committee on competition policy and law under the chairmanship of Mr. Raghavan to replace the MRTP Act with a developed competition law emerged, the Competition Act, 2002 (the "Act") as a new regulatory system to promote and sustain competition in the market instead of curbing monopolies. Moreover, the MRTP Act was framed with an idea to protect the term of the Indian economy that does not result in a highly centered economic power, to control monopolies, and to prohibit monopolistic and restrictive trade practices.

It is noteworthy that the MRTP Act was merely focused on curbing monopolies and not promoting competition at large in India. Importantly, the territorial jurisdiction power invested under Section 14 of the MRTP Act was limited to the boundaries of India, which can be observed in a verdict passed by the Supreme Court of India (SC) in the case of Haridas Exports v. All India Float Glass Manufacturers Association.[1] In this particular case, the limited jurisdiction power of the Commission acted as an apple-of-discord for establishing its extraterritorial jurisdiction to widen its scope outside in the relevant market in India. In accordance with the judgment, the monopolistic agreements formulated before the import of products into India therein were outside the ambit of the MRTP Commission. The Supreme Court held that the MRTP Act lacks in having an explicit provision providing extra-territorial jurisdiction to the commission. The paramount settled by this judgment pointed to the lack of strength of the MRTP Act in terms of extra-territorial jurisdiction, at the outset, it seems like the Act was created with the commitment to resolve the lacuna aroused in the MRTP Act.

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[1] Haridas Exports v. All India Float Glass Association, (2002) 6 SCC 600.

Provided that, Section 32 emerged as a means to extend the territorial jurisdiction power of the CCI, which authorizes the CCI to inquire, adjudicate and pass suitable orders for acts outside India having an AAEC in India. The "Effects Doctrine"[2] acted as a root to channel Section 32 of the Competition Act, 2002 (the "Act"). It was inserted by the Competition (Amendment) Act, 2007, and came into effect on 20th May 2009. In furtherance to that, the effects doctrine provided an effective backdrop to Section 32 of the Act. Having said that, the Competition Commission of India (CCI) is empowered to act as an antitrust watchdog to observe anti-competitive conduct or to take necessary action to conserve competition at large, by the means of which the Act provides jurisdictional power to the CCI to take into account cognizance of a matter taking place in India as well outside the borders of India but considering to have an appreciable adverse effect on competition (AAEC) within India.

Reading between the lines of Section 32, we understand that the CCI has power to inquire against a foreign party and it is immaterial whether the agreement was signed in India or not. In this way, this section extends the scope of Section 1(2) which states the extent of the Act to the whole of India. Similarly, it extends the scope of Section 2(b) which defines agreements, Section 2(r) which lays down the definition of the relevant market. The Commission is competent to regulate and adjudicate violations of Sections 3, 4 and 5 in case it has AAEC in India. The factors that lead to AAEC are given under Sections 19 and 20 of the Act.

In the case of Dhanraj Pillai & Ors. v. Hockey India[3], the Director-General, CCI relied upon Section 32 to include the International Hockey Federation as a party to the case. However, the Commission exonerated Hockey India and the International Hockey Federation from allegations of anti-competitive agreements and abuse of dominant position. It concluded that DG's report is based on circumstantial evidence but since the inherent potential of violation was visible, CCI ordered Hockey India to create a fair and transparent internal control system to ensure that its regulatory powers are not used in deciding its commercial activities and a transparent system for issuing NOCs to the players participating in events organized by foreign teams/clubs. This case is a good example of the usage of Section 32, albeit without the

[2] Extraterritorial Application of the Competition Act and Its Impact, Nishith Desai, <https://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Extraterritorial%20Application%20of%20the%20Competition%20Act%20and%20Its%20Impact.pdf > last accessed Feb 13, 2022.
[3] Dhanraj Pillai & Ors. v. Hockey India, 2013, <https://www.cci.gov.in/sites/default/files/732011_0.pdf> last accessed Feb 13, 2022.

imposition of penalties, but the Commission ensured that its duties are performed as enshrined in the Preamble and Section 18 of the Act.

Prior to CCI, the MRTP Commission has also used the effects doctrine. In Re Jugaldas Damodar Mody Co[4], it was alleged that the transaction took place in Oman and the law applicable should be of Oman. This brought an issue of conflict of laws. The erstwhile MRTP Commission noted that the mere fact that the contract was executed in Muscat and Sultan of Oman is the party did not preclude the Commission from exercising its extra-territorial jurisdiction with respect to that part of (anti-competitive) practice carried out in India. Further, in the case of Alkali Manufacturers Assn of India v American Natural Soda Ash Corp, (1998) 92 Com Case 206 (MRTPC), it was held that since the agreement of American Natural Soda Ash Corporation had its visible effects on Indian trade practices, mere fact that the agreement had been outside India doesn't exclude the jurisdiction of the Commission. In another case of Sub Chemic India Pvt Ltd v Haldor Topsoe AS,[(2005) 62 SCL 143 (MRTPC)], the MRTP Commission held that resident status of the respondent is immaterial and Commission has the power to adjudicate against a foreign company for unfair trade practices carried out by it in India.

PROCEDURAL IRREGULARITIES IN SECTION 32 OF THE ACT

It's crystal clear that Section 32 has the motive to provide extraterritorial jurisdiction power to the CCI, but it appears that Section 32 has its own shortcoming which is underlining the principle of effective competition in general. In the light of CCI's effective approvals for the combinations in the last decade, there have been cases where the CCI has requested for modification, reverse triangular merger, developments in the procedural aspects but mainly praised for the turn-round time approvals, but this concept of turn-round time approvals haven't been established nor tested before in the matters related to extra-territorial jurisdiction combination. Coupled with, an issue of whether the ambit of Sections 5 and 6 of the Act covers the magnitude of "combination" operating outside India, such as in cases of global mergers where foreign enterprises are not required to deliver the pre-merger notification to the CCI. This clearly indicates the shortcoming of Sections 5 and 6 of the Act.

[4] Jugaldas Damodar Mody Co, RTP Enquiry No 1/1980, order dated 14 June 1983.

Importantly, till now there have been no regulations or norms formulated to embrace the time frame by which the authority can act in procedural matters when we talk about extraterritorial jurisdiction of a combination, because of these procedural irregularities it's going to a regulatory battle for the CCI to be able to raise an objection and reverse a combination after it has been consummated in a foreign territory. Provided that, at this juncture, it will not be out of place to comment that, this power of extraterritorial jurisdiction has just become an expression invested under the chapter of books because it hasn't been practically tested before in India. All this considered, points to the uncertain side of the procedural aspect of extraterritorial jurisdiction invested under the Indian competition laws and policy. Nevertheless, it is important to note that the validity of the legislation or regulator is not in question the responsibility is in terms of extra-territorial jurisdiction.

PILLAR OF SOVEREIGNTY & WAY FORWARD

Another key thing to remember, the principle of extra-territorial jurisdiction is considered as a way to embrace the impression of sovereignty but on the other hand, acts as a means to contradict the fundamental principle of sovereignty of a state. As we know, states are sovereign in nature and they have the right to adjudicate their disputes through their ways. However, the international community is considered a very dynamic community in nature; this causes a certain amount of conflicts between different states based on human rights, land borders, maritime issues, breach of treaties, etc. These problems have been resolved by the establishment of public international law and the International Court of Justice (ICJ) to adjudicate international disputes between states peacefully.

It is important to note that a similar approach needs to be appreciated by competition authorities around the globe. The platforms such as International Competition Network (ICN) should be focused on resolving disputes and not merely maintaining social networks between the competition commissions. Even though an organization like ICN has the potential to serve as a mediator to resolve international competition law disputes, certainly in the cases involving extra-territorial jurisdiction. But we rather see it as a mode to exchange dialogues, annual conferences, and workshops. If collectively various competition authorities come together, keeping in hand the sovereignty of a state and formulate a treaty to create an international federation or commission to dissolve competition disputes between the states, this holistic approach of cooperation could lead to effective competition and economic stability at the global

level. In addition to that, if an international federation or commission has been created, its jurisdiction should encompass all over the world. With this mindset, the competition authorities shall come to terms with each other in the case of extra-territorial jurisdiction because at last, we should always give importance to the corporation over the idea to protect competition.

Significantly, in the case of Intel Corp. vs. European Commission[5], the European Court of Justice (ECJ) relied upon the effects doctrine to justify the European Commission (EC) jurisdiction under public international law regarding the adjudication of a cartel involving foreign enterprise. This particular instant sets out a tone where established competition authorities in this case EC have to comply with public international law to give effect to its competition law jurisdiction. But the competition authorities should only use the effects doctrine as an alternative option because it's not an essential principle for establishing the Commission's jurisdiction. In comparison with developing competition authorities like India where there hasn't been any reverse merger or active objection after it has been achieved in a foreign territory. There are high chances that these kinds of objections and disputes can be raised with regards to extra-territorial jurisdiction but a clear solution to this is a uniform competition law jurisdiction and rigid structure because prevention is better than cure.

Moreover, even the well-established competition watchdogs like EC and Federal Trade Commission are hustling with this kind of problem as a mode of we can see clashes between them which can turn into trade wars. In the cases of proposed mergers like General Electric Company (GE) and Honeywell or Boeing and McDonnell Douglas[6], where it has been seen that the EU and US fighting with each other to sustain competition in their countries under the overlap of extra-territorial jurisdiction. On the bright side, over the years there has been more collaboration between such authorities with the motive to sustain competition at large. The effective corporation between sovereign states like the US & the EU in the form of mutual or multi-lateral agreements has delivered a positive notion among the competition community which should be followed by developing competition authorities as well.

[5] Competition Authorities' Jurisdiction in Extraterritorial Cartel Cases.
[6] Supra note 2.

CONCLUSION

At the outset, these aforementioned solutions seem like a potential way to move forwards with due process of law but in the field, it is going to be a regulatory tussle for many competition authorities considering lack of access to multilateral institutions or implements to address large-scale competitive harm but it's a prominent option because instead of knocking down doors of public international law to dissolve competition issues, competition authorities can act in solidarity and formulate a uniform structure with proper representation of competition law in general.