AN ANALYSIS: EXTRATERRITORIAL APPLICATION OF ANTITRUST LAWS IN USA AND INDIA

Akshita Pandey¹

Abstract

In today’s global economy, there are numerous anti-competitive practices which have an international dimension and which, therefore, come under the jurisdiction of multiple competition authorities.² Businesses which were once confined to a territory, have now become a global phenomenon and business practices which were once undertaken in one nation, now have an impact on the economy of other nations. This is where the questions of jurisdiction and sovereignty arise and where the application of extraterritorial jurisdiction becomes a contentious issue.

Introduction

It is widely accepted that the jurisdiction of a state corresponds with the exclusive authority to legislate within its sovereign territory, subject to the exceptions established by International Law.³ There is a presumption that the legislation applies within the territory of a state concerned and not beyond it.⁴ The basis of extraterritorial jurisdiction, which means the application of a country’s law to acts conducted in other countries⁵, lies in the exceptions to the exclusivity of the principle of sovereign jurisdiction.⁶ One of the exceptions to the principle of sovereignty developed by the American Courts is the effects doctrine. According to the effects doctrine, a country may enforce its competition law against an anticompetitive business practice that took place completely abroad, if the conduct has a substantial effect on its territory.⁷ Like all other exceptions to the principle of territorial jurisdiction, the effects doctrine is also not free from controversy and some nations perceive it as an infringement of their sovereignty. However, its application must be seen in the light of the adverse impact of the proliferation of multinational corporations, monopolisation and cartelisation on a country, especially a developing one, despite the absence of any objectionable conduct in their territory.

This paper studies the extraterritorial application of antitrust laws in U.S. and India. Part I of the paper examines how the primary antitrust legislations of the U.S. are applied to conduct outside

¹ Student, NLIU Bhopal
⁵David J. Gerber, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 5 (2010).
its territory. Part II analyses the extraterritorial application of competition laws in India. And lastly, Part III undertakes a comparison of the laws of both nations and the problems faced by them in an attempt to figure out the best possible course of action for the competition authorities in India.

**Part I: Extraterritoriality in USA**

The beginnings of antitrust legislations or competition laws in the USA can be traced back to the Sherman Act.\(^8\) Section 1 (“hereinafter”, Sec.) of the Act prohibits “every contract, combination or conspiracy, in restraint of trade or commerce”. Supreme Court of USA has interpreted this, as prohibiting restraints (both *per se* illegal and those to be analysed under ‘rule of reason’ test)\(^9\) that unreasonably restrict competition.\(^10\) Sec. 2 of the Act makes monopolizing or an attempt to monopolize trade or commerce unlawful, violation of which leads to a hefty fine. The Sherman Act, however, does not contain a provision specifically addressing its jurisdictional reach and the Clayton Act,\(^11\) which authorizes private lawsuits based on violations of the antitrust laws, refers back to the Sherman Act for jurisdictional purposes.\(^12\)

The first case considered by the U.S. Supreme Court with regard to the extraterritorial reach of the Sherman Act was *American Banana Co. v. United Fruit Co.*,\(^13\) wherein it was held that U.S. antitrust laws did not apply to conduct outside of the United States.\(^14\) Therefore, jurisdiction of the Sherman Act was confined to the territory of U.S.\(^15\) There was a slight change in the Court’s stand in *United States v. Pacific and Arctic Railway Navigation Co.*,\(^16\) where it held that jurisdiction under Sherman Act is not confined to U.S. territory.\(^17\) It was in 1945, in the case of *United States v. Aluminium Co. of America (“Alcoa”)*,\(^18\) that Justice Learned Hand, of the Second Circuit Court, gave a two-part test to determine extraterritorial jurisdiction of the Sherman Act. It had to be proved that the defendants intended substantial effects in the United States and that the alleged anticompetitive action, in fact, had an effect on the economy.\(^19\)

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\(^10\)Standard Oil Co. v. United States, 221 U.S. 1, 56 (1911).


\(^14\)Ibid, at 357.


\(^16\)Ibid, at 105–06.


\(^18\)Ibid, at 105–06.

\(^19\)United States v. Aluminum Co. of America (“Alcoa”) 148 F.2d416 (2d Cir. 1945).

\(^20\)See supra note 17, at 444.
In 1982, the U.S. Congress passed the Foreign Trade Antitrust Improvements Act (hereinafter, “FTAIA”), which incorporates the effects test proposed by Judge Hand.\(^{20}\) It provided that for the Sherman Act to have extraterritorial application there must be a direct, substantial and reasonably foreseeable effect on trade or commerce in the United States,\(^{21}\) preventing conduct that has an ancillary effect on trade from being actionable under the antitrust laws.\(^{22}\) This Act is a way of limiting the scope of the application of the Sherman Act\(^{23}\) in light of concerns raised by other nations with respect to American Courts adjudicating cases based on the effects doctrine. However, the extraterritorial jurisdiction of the Sherman Act under the FTAIA is broader than that suggested by Judge Hand in Alcoa because the FTAIA does not take into account the intent to affect trade, but rather focuses only on the effects\(^{24}\) and the courts have interpreted the statutory terms "direct", "substantial" and "reasonably foreseeable", differently.\(^{25}\) Consequently, the courts realized the negative international implications that arose from the effects test and sought to limit Alcoa’s application\(^{26}\), and thereby the extraterritorial reach of the Sherman Act.\(^{27}\) A three-part balancing test was articulated to determine the extraterritorial application of the Sherman Act\(^{28}\) in the interest of prescriptive comity\(^{29}\) (the respect sovereign nations afford each other by limiting the reach of their law).\(^{30}\) The test is:

“Does the alleged restraint affect, or was it intended to affect, the foreign commerce of the United States? Is it such a type and magnitude so as to be cognizable as a violation of the Sherman Act? As a matter of international comity and fairness, should the extraterritorial jurisdiction of the United States be asserted to cover it?”\(^{31}\)

The objectionable conduct must have an appreciable anti-competitive effect on United States commerce.\(^{32}\) However, the comity based concerns of the Timberlane case were deemphasized and the Alcoa based effects test was accepted by the U.S. Supreme Court in Hartford Fire Ins. Co. v. California.\(^{33}\) The resultant effect being that only two factors now determine whether the Sherman


\(^{21}\)Ibid.


\(^{24}\)See supra note 14, at 455.


\(^{28}\)Timberlane Lumber Co. v. Bank of America, 549 F.2d 597, 613 (9th Cir. 1976).


\(^{31}\)See supra note 27, at 615.


\(^{33}\)See supra note 29.
Act has extraterritorial application; (i) the effects on the U.S. economy, and (ii) if there is a true conflict between U.S. antitrust law and foreign law. The extraterritorial application of Sherman Act has been extended to include foreign criminal conduct by foreign entities.

In the most recent decisions of U.S. courts there has been divergence of opinion with respect to the interpretation of the Sherman Act and the FTAIA. The Seventh Circuit adopted the narrow rule by holding that a foreign company may only be liable under U.S. laws if that company was engaged in transactions that directly affected U.S. commerce. On the contrary, the Ninth Circuit applied the broad rule by holding that foreign transactions may be subject to U.S. jurisdiction if the transactions had an effect even though indirectly on U.S commerce. There has arisen a need for the reinterpretation of the extraterritorial application of the antitrust laws of U.S. in the light of the different views of the Circuit Courts. This is also an opportunity for the U.S. Supreme Court to restrict the same as that rampant extraterritorial application of U.S. law creates a serious risk of interference with a foreign nation’s ability to regulate its own commercial affairs independently. The position as of today is that the Sherman Act can be applied outside U.S. if the conditions set out in the Hartford case are met. However, difficulties still persist due to the ambiguous language of the statutes and the inconsistencies in application by the courts. There is a need for a conclusive determination in this regard as it not only affects businesses world-over but also has a bearing on the relation of U.S.A. with other nations who feel their territorial sovereignty is affected due to the extraterritorial application of their antitrust laws.

Part II: Extraterritoriality in India

The Constitution of India declares that no law shall be deemed to be invalid on the ground that it has extraterritorial application, provided that it has a nexus with India. The Monopolies and Restrictive Trade Practices Act, 1969, which was operational prior to the passing of the Competition Act, 2002, provided that where any practice substantially falls within monopolistic, restrictive, or unfair trade practice, an order may be made under this Act with respect to that part of the practice which is carried on in India. The question as to whether the Act has extraterritorial

\[\text{Andrew C. Udin, Slaying Goliath: The Extraterritorial Application of US. Antitrust Law To OPEC, 50 Am. U. L. Rev. 1321, 1340 (2001).} \]


\[\text{See supra note 17, at 176.} \]

\[\text{Motorola Mobility LLC v. AU Optronics Corp., 775 F.3d 816, 819 (7th cir. 2015).} \]

\[\text{United States v. Hui Hsiung, 778 F.3d 738, 759 (9th cir. 2015).} \]

\[\text{See supra note 36 at 846; See supra note 22.} \]

\[\text{Art. 245, cl. 2, The Constitution of India.} \]

\[\text{GVK Industries Ltd. v. Income Tax Office (2011) 4SCC 36 (India).} \]


\[\text{Competition Act, 2002, No. 12, Acts of Parliament, 2002 (India).} \]

\[\text{See supra note 41, at sec. 14.} \]
application arose in Haridas Exports v. All India Float Glass Manufacturers Association\textsuperscript{45} where a complaint was made against three Indonesian companies for selling float glass at predatory prices in India. The allegation was that the concerned product was being sold at less than the cost price of production not only in India but also in Indonesia. Moreover they, along with Indian importers, allegedly indulged in heavy under-invoicing and were hence resorting to restrictive and unfair trade practices.\textsuperscript{46} It was in this case the Supreme Court held that the act has no extraterritorial application.\textsuperscript{47}

It is to remedy this deficiency that the Competition Act contains Sec. 32 which provides for the extraterritorial application of the Act. This exception to the principle of territoriality is triggered in the event of an agreement (sec. 3, Competition Act), or abuse of dominant position (sec. 4, Competition Act), or a combination (sec. 5, Competition Act) outside India, or any other matter or practice or action arising out of the above having an \textit{appreciable adverse effect on competition} (hereinafter, “AAEC”) in India.\textsuperscript{48} This sec. is based on what is commonly known as the “effects doctrine”, which empowers regulators to extend jurisdiction beyond its political boundaries provided that it has consequences within the state.\textsuperscript{49} Sec. 20(4) of the Competition Act contains a list (indicative and not exhaustive) of fourteen factors or circumstances in which AAEC can be inferred. The Act also empowers the CCI to enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country in order to discharge its duty under the provision of this Act.\textsuperscript{50} Further, in order to make full use of the power given to it under sec. 32 it is imperative that the CCI enters into bilateral negotiations with competition regulators across the world\textsuperscript{51} as unilateral implementation of extraterritorial laws has never been successful.\textsuperscript{52} An example of one such agreement is the US-EC Antitrust Cooperation Agreement which provides for cooperation and coordination of enforcement activities.\textsuperscript{53} Thus,

\textsuperscript{45}Haridas Exports v. All India Float Glass Manufacturers Association (2002) 6SCC 600 (India).
\textsuperscript{46}Ibid.
\textsuperscript{47}Ibid.
\textsuperscript{48}See supra note 42, at sec. 32.
\textsuperscript{50}See supra note 42, at sec. 18.
\textsuperscript{52}Ibid.
without entering into bilateral or multilateral agreements, the provision of the Act may not be given its due effect.\(^{54}\)

By providing for the extraterritorial application of the CCI, the legislature has given the quasi-judicial body powers possessed by some of the most highly evolved competition bodies of the world. The use of this power is yet to be tested as till date there has been no case and the only regulations notified with respect to sec 32 are the Competition Commission of India (General) Regulations, 2009 – providing the procedure for enforcement of extraterritorial jurisdiction in accordance with the Code of Civil Procedure, 1908 wherever applicable. Therefore, it remains to be seen how the CCI will apply the effects doctrine in the Indian context. Whether it will chart its own course or adopt the doctrine in the manner as has been done by the American Courts.

**Part III: Analysis of the Laws in India and USA**

American Courts have come a long way from completely restricting the extraterritorial application of the Sherman Act to allowing the antitrust laws to be applied in event of a substantial effect on the economy. This substantial effects test was qualified by judicial rules followed by the FTAIA which provided U.S. laws to apply outside if a conduct affected commerce. Two streams of judicial opinions emerged one providing for extraterritorial application in case of direct effect and the other in case of indirect effect. Apart from conflicting judgements, the extraterritorial application of the Sherman Act has negatively impacted foreign relations between the United States and its closest trading partners.\(^{55}\) Countries such as U.K. have enacted blocking legislation (The U.K. Protection of Trading Interest Act, 1980 empowers the Secretary of the State dealing with extraterritorial actions by a foreign state to prohibit the production of documents or information to the latter’s court or authorities\(^{56}\)). The United States aggressively pursues antitrust violations perpetrated by foreign defendants\(^{57}\) with little respect for comity. While the eagerness to stop harmful practices affecting the economy is understandable the attitude adopted by the U.S. enforcement agencies has disrupted the country’s foreign relations. At present, there is a need to not only decide upon the interpretation of the effects doctrine to be followed but also take into consideration its effect on international affairs. Thus, there exists a strong case to restrict the application of antitrust laws to territorial limits by adopting the narrow interpretation of the FTAIA.

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\(^{54}\)See supra note 48.


\(^{56}\)MALCOLM N. SHAW, *INTERNATIONAL LAW* 501 (7TH ED., 2016).

India felt a need to adopt competition laws in the wake of the liberalisation policy pursued in 1991, which resulted in the opening of economy and necessitated the regulation of business practices. Because the existing laws were inadequate a new competition regime was formulated and the effects doctrine was adopted into the Indian framework also. Although there has been no case, till date, where the CCI has exercised extraterritorial jurisdiction it is prudent to take the US experience into consideration and imbibe the lesson learnt. The two most important aspects are: [a] the scope of the extraterritorial jurisdiction, and [b] the manner in which the power is to be exercised. The former is required to enable a business to know which conduct attracts the attention of CCI and the latter ensures that there is no disruption in India’s ties with other countries. How the CCI functions is only a matter of speculation but it has abundance of experience of other jurisdictions for guidance while it strives to ensure a balance between freedom to do business and regulating anticompetitive practices.