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Anti-Competitive Agreements in India: A Comparative Analysis with the Competition Regime of the United States

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ABSTRACT

India is hailed as a green-field competition regime. However, India's competition law jurisprudence is older than many of its developing country counterparts. The (erstwhile)Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") was the first competition related legislation of India followed by the later enactment of the Competition Act, 2002 ("Act"). This Article provides for a comparative snapshot between the Indian competition law framework and that of the United States and discusses the provisions with specific reference to Anti-Competitive Agreements. It embarks on a comparative analysis of the two regimes. The Paper concludes by highlighting the similarities and differences that exist between the two jurisdictions and the lessons to be learnt therefrom.

KEYWORDS: Restrictive Trade Practices, Anti-Competitive Agreements, competition law, Sherman Act, Antitrust

INTRODUCTION

Production, growth and revenue generation essentially inter-linked with trade have varying tendencies, allurements and benefits resulting in adoption of trading policies by different States in a federal set-up. For the development of their own units/States, the governments under the guise of incentives discriminate against goods produced and manufactured in other States or impose patent or latent restrictions thereon. When freedom of trade is granted, controls removed and liberalization resorted to, competition receives a boost but in the absence of an efficient competition policy, certain practices restricting trade spring up. If these practices remain unhindered and continue unchecked, they have the tendency to annihilate the essence of free trade and hamper the entire competition framework.

Therefore, there is an ardent need to regulate and eliminate these hindrances and in order to achieve this objective, the following analysis of the two competition regimes of India and US is undertaken so as to draw inspiration from their individual strengths.

INDIAN COMPETITION LAW REGIME

There has been a growing tendency among the business community to indulge in various trade practices which restrict competition among the dealers and the manufacturers. The government has from time to time taken steps to curb such practices. Competition law of India was triggered by Articles 38 and 39 of the Constitution of India. The first Indian Competition law was enacted in 1969 and was christened the Monopolies and Restrictive Trade Practices(MRTP) Act, 1969. The Preamble to the Act says that the Statute is enacted 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 and for matters connected therewith or incidental thereto.[1]

The basic approach underlying the MRTP Act was to regulate and control trade practice so that competitive process is permitted to operate unfettered and unhindered except, in the few instances, where the restrictions on trade practices are found to be conferring very special advantages to the community.[2]

Restrictive Trade Practices

The term 'Restrictive Trade Practices' as per the erstwhile MRTP Act included refusal to deal, tie-up sales, full-line forcing, exclusive dealings, concerted practice, price discrimination, resale price maintenance, area restriction and discriminatory pricing.[3]

The Restrictive Trade Practices which are commonly prevalent in India may be broadly grouped under three heads[4]:

- Restrictive Trade Practices emanating from a collective action by a group of manufacturers or suppliers engaged in the same line of business activity. This is commonly referred to as 'horizontal arrangement'.
- Restrictive Trade Practices emanating from agreements entered into by a manufacturer with his dealers to market the product where the manufacturer either does not have its own

[1] Pradeep S. Mehta, *A Functional Competition Policy for India*, 41 (2006)

[2] S. Krishnamurthi, *Principles of Law Relating to MRTP*, 173 (1990)

[3] *Id.*, at 43

[4] S.M.Dugar, *Law of Restrictive Trade Practices*, xl (1976)

marketing organization or has a limited marketing set-up which it wishes to supplement or enlarge. This may be referred to as 'vertical arrangement'.

- Restrictive Trade Practices emanating from unilateral decision or single or isolated action of manufacturer or supplier. This may be referred to as 'unilateral practice'.

Section 37 to 40 of the Monopolies and Restrictive Trade Practices Act, 1969, provided for the control of certain restrictive trade practices. The starting point was registration, under Section 33, of an agreement relating to Restrictive Trade Practice. Section 37 dealt with investigation, by the Commission into any restrictive practice and the nature of the orders it could pass. The Commission could act independently and pass final orders itself relating to any restrictive trade practice. Section 38 declared the 'gateways' by which it could be shown that a restrictive trade practice was not prejudicial to public interest.[5]

In October 1999, the Government of India appointed a High-level Committee on Competition Policy and Law, under the chairmanship of S.V.S.Raghawan, to advise a modern competition law for the country in line with international developments and to suggest a legislative framework which may entail a new law or appropriate amendments to the MRTP Act.[6]

Anti-Competitive Agreements

The new competition law i.e. the Competition Act,2002 was enacted in January, 2003 after taking into considerations the recommendations of the Raghawan Committee. As per the statement of objects and reasons, this enactment is India's response to the opening up of its economy, removing controls and resorting to liberalization. The natural corollary of this is that the Indian market should be geared to face competition from within the country and outside. The Act seeks to ensure fair competition in India by prohibiting trade practices which cause appreciable adverse effect on the competition in markets within India and for this purpose establishment of a quasi-judicial body was considered essential.

The rubric of the new law i.e. the Competition Act, 2002 has essentially four compartments:

- Anti-competitive agreements
- Abuse of Dominance
- Combinations Regulation
- Competition Advocacy

5 T. Ramappa, *Competition Law in India: Policy, Issues and Developments*, 16 (2006)

6 Pradeep S. Mehta, *A Functional Competition Policy for India*, 50 (2006).

For the purpose of the present study, 'anti-competitive agreements' are significant. Section 3 of the Competition Act, 2002 prohibits agreements in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition in India and declares such agreements as void.

Competition Law Regime of United States

The roots of competition law in the US can be traced back to the Sherman Act of 1890. The US terminology for competition is 'antitrust' - the law enacted to curb the monopolistic activities of trusts formed to carry out various trade activities during that time. Antitrust law, in general and the Sherman Act, in particular are the *Magna Carta* of free enterprise. They are "as important to the preservation of economic freedom and free enterprise system as the Bill of Rights is to the protection of the fundamental personal freedoms".[7] The objective of the Sherman Act was to oppose the combination of entities and their activities that cause harm to competition in the market.[8] It prohibited monopolization and conspiracies which restrain trade, and prescribed imprisonment and fines for violations.[9] It also prohibited[10] every contract or conspiracy in restraint of trade between the states or with foreign countries and treated it as a felony and imposed heavy punishments on defaulters.[11]

Section 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market,[12] and (2) the wilful acquisition or maintenance of the power as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident.[13] Section 13 prohibits discrimination in prices while selling the same product to different customers with the view to lessen competition and to curb the tendency to create a monopoly in any line of commerce, to do away with injury, destruction, and to prevent competition or any person engaged in commerce, in the course of such commerce, knowingly to induce or receive discrimination in price.[14] The Act contained a

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7 *United States* v. *Topco Assocs., Inc.*, 405 US 596 (1972).

8 K.D. Raju, "Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India", 2 *Intel Prop Rights*, 115 (2014). doi:10.4172/ipr.1000115, *available at*: http://www.esciencecentral.org/journals/ interface-between-competition-law-and-intellectual-property-rights-a-comparative-study-of-the-us-eu-and-india-ipr.1000115.pdf.

9 Title 15, Chapter 1 of United States Code (Sherman Act).

10 Section 2 of the Sherman Act. This provision is in conjunction with Section 7 of the Clayton Act (15 USC S.18) which prohibits mergers or acquisitions which may tend to lessen competition.

11 The monetary punishments are of a fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments.

12 *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 597 (1985); *Intergraph Corp.* v. *Intel Corp.*, 195 F.3d 1346, 1353 (Fed. Cir. 1999).

13 *U.S.* v. *Grinnell*, 384 U.S. 563, 570-71 (1966); see also *Aspen Skiing Co.*, 472 U.S. at 595-96.

14 K.D. Raju, "Interface between Competition law and Intellectual Property Rights: A Comparative Study of the US, EU and India", 2 *Intel Prop Rights*, 115 (2014). doi:10.4172/ipr.1000115.

blanket prohibition of all contracts and combinations in the form of a trust in restraint of trade for commerce among several states or with foreign nations.[15]

Section 1 of the Sherman Act provides that every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations is hereby declared to be illegal. The U.S. Courts have consistently followed that price fixing arrangements are illegal *per se*.[16] The approach of the Courts has been to discourage such practices only when they are indulged in either to create or maintain a monopoly or conspiracy which may have an adverse effect on competition.[17] Thus, an individual refusal to deal would not be in violation of Section 1 of the Sherman Act if it is being exercised as an independent discretion as to the parties with whom he would deal.[18]

The early extension of the jurisdictional scope of the US antitrust laws was a response to the needs of the US competition authorities.[19]

In the 1930s and the 1940s, the Antitrust Division of the US Department of Justice (DoJ), under the direction of Thurmond Arnold, followed by Wendell Berger, embarked upon the active enforcement of the Sherman Act against the many international cartels that affected US trade.[20] In the *Alcoa* case,[21] the DoJ was given the legal tools required to enforce this policy.

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15 Section 1, Sherman Act, 1890

16 See, for instance, *U.S.* v. *Addyaton Pipe & Steel Co.*, 85 Fed. 271 (1890); *U.S.* v. *Trenton Potteries Co.*, 273 U.S. 392 (1927); *U.S.* v. *Socony Vaccum Oil Co.*, 310 *U.S.* 150 (1940); *U.S.* v. *Container Corporation of America*, 393 *U.S.* 333 (1969); *Sugar Institute* v. *U.S.*, 297 U.S. 553(1936).

In *U.S.* v. *Trenton Potteries Co.*, 273 U.S. 392, the prices of vitreous pottery were fixed by a trade association, namely Sanitary Pottery Association. The respondents argued that the prices were reasonable and were not prejudicial to public interest. The U.S. Supreme Court declared the practice illegal *per se* in view of the pernicious effect of such a practice on competition.

In *Sugar Institute* v. *U.S.*, 297 U.S. 553 (1936), the Supreme Court held that the dominant purposes in organising the institute were to create and maintain a uniform price structure, thereby eliminating and suppressing price competition among themselves and other competitors to maintain relatively high prices for refined sugar as compared to prices of raw sugar; to improve their own financial position by limiting and suppressing numerous contract terms and conditions; and to make as certain as possible that no secret concession should be granted. In their efforts to accomplish these purposes, defendants have ignored the interests of distributors and consumers of sugar and therefore it was unlawful *per se*.

17 *U.S.* v. *Colgate & Co.*, 250 US 300 (1919).

18 In American Jurisprudence, the practice of refusal to deal has been summarised as follows:

In the absence of any purpose to create or maintain a monopoly, the Sherman Act does not restrict the right of a trader or manufacturer, engaged in an entirely private business to freely exercise his own independent discretion as to parties with whom he will deal. Moreover, he may announce in advance the circumstances under which he will refuse to sell, consequently, an individual's refusal to sell, without more does not violate the Sherman Act. But if accompanied by unlawful conduct or agreement or conceived in monopolistic purpose or market control, even an individual's refusal to deal may violate the statute.

19 Bruno Zanettin, *Co-operation between Anti-trust Agencies at the International Level*, 9 (2002).

20 B. Dale, Furnish, "A Transnational Approach to Restrictive Business Practices", 4 *International Lawyer*, 321 (1970).

21 *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir, 1945).

Sections 1 and 2 of the Sherman Act[22] both refer to practices affecting 'trade or commerce among the several states or with foreign nations'.[23] The reference to 'trade with foreign nations' would suggest that the Sherman Act was originally intended to regulate practices taking place abroad. However, the US courts were initially wary of applying the Sherman Act extraterritorially and defined its scope very narrowly. In *American Banana* Co. v. *United Fruits*,[24] the first US antitrust case involving a foreign element, the US Supreme Court concluded that "the acts causing the damage (that is the monopolisation by United Fruits of the production and export of bananas in Costa Rica) were done outside the jurisdiction of the United States and within that of other states".[25]

This case-law, which very much reflects the isolationism that prevailed in the United States at the turn of the century, was overturned by *Alcoa*.[26] That case was mainly about the monopolisation of the US aluminium market by Aluminium Co. of America, but the DoJ also prosecuted the activities of Alcoa's Canadian subsidiary, which was taking part in an international quota fixing cartel concluded in Switzerland and involving European firms. All the firms involved in the conspiracy were incorporated in foreign countries. However, the quotas included the sales of these firms in the United States. To the question, of whether the requirement of subject matter jurisdiction was satisfied, the answer of the Court of Appeal for the Second Circuit was a definite yes. Judge Learned Hand decided that it is settled law 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 apprehends".[27] He further added that such an 'effect doctrine' did not apply to conduct that might have unintended repercussions in the United States, nor to agreements intended to affect US trade but which in fact have no such effect.[28]

This decision is notable for several reasons. First, *Alcoa* is clearly irreconcilable *with American Banana*.[29] The latter was concerned with the locus of the conduct, the former with the locus of the effect. The two cases correspond to two distinct periods. In 1945, the United States had given up its traditional isolationism to embrace the role of a world leader, both in the economic and political spheres. *Alcoa* came at a time when the United States was trying to liberalise international trade. It is clearly illustrated by Thurmond Arnold's

22 15 USC 1 (1988).

23 Bruno Zanettin, *Co-operation between Anti-trust Agencies at the International Level*, 9 (2002).

24 213 US 347 (1909).

25 *Id.*, at 347. Also see *Supra* note 100.

26 *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir, 1945).

27 *Id.*, at 443.

28 *Supra* note 23.

29 In *American Banana*, the Court would have had jurisdiction, had it chosen to apply the effects doctrine, since the foreign conduct at stake had some effect on US import trade.

ambitious international antitrust enforcement policy or by the United States initial support for the 1947 Havana Charter, which included provisions on restrictive business practices.[30]

Secondly, the 'effects doctrine' extends the scope of subject-matter jurisdiction. However, US courts must also justify personal jurisdiction over the parties to the case by defining the contacts between them and the sovereign.[31] Historically, the presence of the defendant within the boundaries of the sovereign was a prerequisite to US courts exercising jurisdiction over him,[32] and a company was considered to be present on the territory where it was established.[33] This restrictive theory of presence, even if it was interpreted broadly,[34] could have been a serious obstacle to the application of the effects doctrine.[35] But, the scope of personal jurisdiction was to be extended, and closely followed the evolution of subject matter jurisdiction.[36] Indeed, in the same year as *Alcoa*, in *International Shoe* v. *Washington*,[37] the Supreme Court rejected the approach based on the presence on the forum, and developed the 'theory of minimum contacts'. Exercise of jurisdiction over persons not found within the sovereign's borders is held to be consistent with due process if the defendant has "certain minimum contacts with it such that maintenance of the suit does not offend traditional notions of fair play and substantial justice".[38] The criteria of the existence of minimum contacts include the volume of business of defendant within the district, the presence of an agent within the district, the purchase of goods, the activities of US subsidiaries.[39] They are so broadly defined that, in cases where the effect of a foreign anti-competitive conduct is felt within the US territory and where subject-matter jurisdiction is found to exist, personal jurisdiction will almost invariably follow.[40]

The discovery of the "effects doctrine", complemented by the "minimum contacts theory", gave to the US competition authorities a very wide outreach. In fact, it is usually held that the effects doctrine in *Alcoa* fallowed for the most uninhibited extraterritorial application of the Sherman Act than has ever been the case since it only required actual

30 *Supra* note 23 at 10.

31 Evelyne Friedel Souchu, *Extraterritorialite du Droit de la Concurrence aux Etats unis et dans la Communaute Europeenne*, 146 (Paris, LGDJ, 1994). This fact is in fact a constitional requirement deriving from the Due process clause of the fifth and fourteenth Amendments.

32 *Pennover* v. *Neff*, 95 US 714 (1877).

33 *Bank of Augusta* v. *Earle*, 38 US 517 (1839).

34 For instance, a firm was deemed to be present within the national boundaries when it was doing business there. Business had to be regular, continuous and substantial enough.

35 *Supra* note 23 at 10.

36 *Ibid.*

37 326 US 310 (1945).

38 *Id.*, at 316.

39 They closely follow Section 12 of the Clayton Act, which provides that any suit under the antitrust laws against a corporation may be brought in the judicial district where in particular "it transacts business".

40 *Supra* note 23 at 10.

effect and intent.[41] Unsurprisingly, later court decisions slightly limited the scope of the effects doctrine.[42]

The first necessary evolution of the doctrine which immediately followed *Alcoa*, was the introduction of a qualified effects test.[43] In *United States* v. *Timken Roller Bearing Co.*,[44] the jurisdiction of the Court was based on the fact that the foreign conduct had 'a direct and influencing effect on US trade'.[45] Similarly, in *United States* v. *Swiss Watchmakers*, the court asserted jurisdiction over a cartel of Swiss watchmakers regulating the manufacturing and exports of watches on the ground that it had a substantial and material effect upon US foreign and domestic trade.[46] The substantial effects test, which is meant to catch only foreign practices that have more than a *de minimis* effect on US trade, has constantly been used by US Courts, and was fully endorsed by the Supreme Court, when it stated, in *Hartford Fire Insurance Co.* v. *California*,[47] that the Sherman Act applies to foreign conduct that was meant to produce and did in fact produce some effect in the United States. Furthermore, with respect to foreign commerce other than imports, the Foreign Trade Antitrust Improvement Act of 1982 (the 'FTAIA') provides that the Sherman Act and the FTC Act apply to foreign conduct that has a direct, substantial and reasonably foreseeable effect on US commerce.[48]

The role of comity in jurisdictional analysis was seriously curtailed by the Supreme Court in the much debated *Hartford Fire* case.[49] The Supreme Court ruled that the international comity analysis is applicable only if there is a true conflict between foreign and domestic laws, and such a conflict exists only if the person subject to the regulation by two states cannot comply with the laws of both, and is obliged by foreign law to behave unlawfully under domestic legislation. This decision has been the object of much criticism; it makes recourse to comity very unlikely, given that situations of true conflicts are rare, and in practice prevents US courts from taking foreign interests into account.[50]

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41 Robert C. Reuland, "Hartford Fire Insurance, Comity and the Extraterritorial Reach of the United States Antitrust Laws", 29 *Texas International Law Journal*, 159, 183(1994). 83 F. Supp 284, 309 (ND Ohio, 1949).

42 *Supra* note 23 at 11.

43 *Ibid.*

44 83 F. Supp 284, 309 (ND Ohio, 1949).

45 *Ibid.*

46 *U.S.* v. *Watchmakers of Switzerland Info. Centre, Inc*., 1963 Trade Cases (CCH), 70,600 (S.D.N.Y. 1962).

47 509 US 782 (1993).

48 15 USC Section 6a (1988) (Sherman Act) and Section 45 (a)(3) (1988) (FTC Act). Also see *Supra* note 100 at 11.

49 The litigation began when a series of State attorneys brought an antitrust challenge against a group of insurance and reinsurance companies on the ground that they had conspired to eliminate certain forms of insurance coverage in the United States. A number of defendants were located in England, and had acted in a manner which was lawful under English law.

50 *Supra* note 23 at 13.

The 1995 Antitrust Enforcement Guidelines for International Operations,[51] the DoJ and the FTC fully endorsed the *Hartford Fire* test in cases involving import commerce,[52] and the direct, substantial and reasonably foreseeable test in other cases. Furthermore, both agencies take the view that the intent requirement is satisfied if the foreign conduct directly involves imports in the Unites States.[53]

This case-law has had an impact on the international enforcement policy of the US Federal agencies, which have endorsed the international comity analysis. In fact, they have wisely opted for the *Timberlane* and *Mannington Mills* approach rather than the *Hartford Fire* principle.[54] Indeed, they do acknowledge the Supreme Court's ruling and admit to paying special attention to whether there is a genuine conflict with foreign laws or policies. They nevertheless make it clear that they also take full account of comity factors beyond whether there is a conflict with foreign law.[55] In other words, they are prepared to refrain from asserting jurisdiction even in the absence of conflict, which can be considered as an exercise of prosecutorial discretion.[56]

The next and probably most important stage in the evolution of the 'effects doctrine' was the introduction of a 'jurisdictional rule of reason'.[57] Indeed, the US courts and authorities understood that the extraterritorial application of US law was likely to, and in fact did, conflict with foreign jurisdictions. Relying on the principle of international comity, some courts held that they must undertake an analysis of foreign interests and conflicts, and balance them with US domestic interests, before deciding whether assertion of jurisdiction over foreign conducts is appropriate or not.[58] This balancing test, or jurisdictional rule of reason, was first adopted by the Court of the Ninth Circuit in the *Timberlane* case.[59] In that case, Judge Choy applied a tripartite analysis to determine whether the court should exercise jurisdiction or not. First, there must be some effect, actual or intended, on American foreign commerce. Secondly, the effect must be sufficiently large to prevent a cognizable injury to the plaintiff. Thirdly, the interests of the United States must be sufficiently strong vis-à-vis those of other nations, to justify an assertion of extraterritorial authority.[60] This line of

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51 *International Legal Materials,* 1081 (1995).

52 *Ibid.*

53 *Ibid.*

54 In fact, the adoption of the comity analysis by the US agencies seems to have been as much prompted by the lower courts' case-law as by the United States' international obligations under the recommendations of the OECD and a certain number of bilateral agreements.

55 *International Legal Materials,* 1081 (1995) at Section 3.2.

56 Kenneth W. Daw, "Extraterritoriality in an Age of Globalisation: the Hartford Fire Case", *Supreme Court Review,* 298 (1994). Also see *Supra* note 100 at 13.

57 *Supra* note 23 at 12.

58 *Ibid.*

59 *Timberline Lumber Co.* v. *Bank of America*, 549 F.2d 597 (9th Cir, 1976). The case was brought by Timberline against the bank of America for an alleged conspiracy in Honduras to preclude Timberlane from logging there and from shipping its lumber to the United States.

60 *Id.*, at 613.

reasoning has been applied in many decisions, including by the Third Circuit Court in the important *Mannington Mills*[61] case.[62]

In *Chicago Board of Trade* v. *United States*,[63] Brandies J. observed that every trade association and board of trade imposes some restraint upon the conduct of its members. He explained the rule of reason in the following words: "the true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition". This, therefore, puts a charge on the Court to determine what constitutes restraint of trade in each and every case according to the nature of the restraint and its effect on the market.

Later, the Clayton Act of 1914 was passed to supplement the Sherman Act, 1890 which prohibits certain anti-competitive activities including:[64]

- Price discrimination between different purchasers, if such discrimination tends to create a monopoly,
- Exclusive dealing agreements,
- Tying arrangements, and
- Mergers and acquisitions that substantially reduce market competition.

It is pertinent to note that in the case of *United States* v. *Trans-Missouri Freight Association*, the US Supreme Court held that price fixing agreements were illegal[65] and the US Court of Appeals of the Sixth Circuit further confirmed this position in *Addyston Pipe and Steel Co.* v. *United States*,[66] when it stated that price fixing cannot be justified in any given circumstance. The prohibition of price agreements is strongly dealt with under competition laws all over the world. Further, in *Dr. Miles Medical Co.* v. *John D. Park and Sons*, the US Supreme Court maintained that resale price maintenance between manufacturer and distributor is *per se* illegal.[67] The *Standard Oil Co.*,[68] case and *American Tobacco Company* case[69] further strengthened this position.[70]

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61 *Mannington Mills Inc.* v. *Congoleum Corp*, 595 F.2d 1287 (3rd Cir, 1979).

62 Other lower Courts, however, seriously questioned the validity of the jurisdictional rule of reason. See in particular *Laker Airways Ltd.* v. *Sabena, Belgian World Airlines*, 731 F.2d 99 (D.C. Cir, 1984).

63 (1918) 246 U.S. 231.

64 Section 4 of the Clayton Act provides for damage provisions of the antitrust laws. Further, Section 15 (a) permits "any person . . . . injured in his business or property by reason of anything forbidden in the antitrust laws to sue therefore and to recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees".

65 *United States* v. *Trans-Missouri Freight Association*, 166 U.S. 290 (1897).

66 85 F. 271 (6th Cir. 1898)

67 *Dr. Miles Medical Co.* v. *John D. Park and Sons*, 220 U.S. 373 (1911).

68 *Standard Oil Co. of New Jersey* v. *United States*, 221 U.S. 1 (1911).

69 American Tobacco Company, 221 U.S. 106 (1911).

70 *Supra* note 14.

Therefore, the US antitrust law prohibits certain business practices adversely affecting competition in the market. As discussed earlier, Section 1 of the Sherman Act prohibits concerted effort of persons entering into agreement, contracts, and combinations in restraint of trade. But, an individual person can refuse to deal with another without violating the first provision. This anti-trust principle was prevalent from 1919 with the decision of the US Supreme Court in *Colgate* case.[71] After this case, the practice is known as "Colgate doctrine". This doctrine permits a non-monopolistic manufacturer to choose the parties whom he wants to deal. But, there is a possibility of resale price maintenance (RPM) by such monopolist and ultimately refuses to deal with dealers those who refuse to follow the price maintenance. In this background, the Supreme Court revisited the "Colgate Doctrine" in *Russel Stover Candies Inc.* v. *FTC*.[72] This decision led to the "rule of reason" standard in judging RPM policies and gradually abolishing the "Colgate doctrine.[73]

The Robinson Patman Act[74] prohibits price discrimination. It stipulates that two or more purchasers of the same commodity from the same seller must be charged identical prices. Further, the Federal Trade Commission Act[75] prohibits unfair methods of competition and unfair or deceptive acts in commerce with foreign nations.[76] The unfair conduct must have a direct, substantial and reasonably foreseeable effect on the foreign commerce in question.[77] Therefore, The Federal Trade Commission Act and Robinson Patman Act also provide for prohibited economic activities that have a likely antitrust consequence.

Comparative Analysis

An analysis of the competition law regime of the United States suggests a number of observations relevant to India.

Before embarking upon a discussion on the differences in the two regimes, it is essential to consider their similarities *inter se*. The basic architecture of the legal regime pertaining to competition in the US provides some indications of similarity with the position in India. With regard to the issue of restrictive trade practices, The Indian competition regime is based largely on the jurisprudence developed in the US. The Competition Commission of India and the COMPAT have played an active role in developing the law and creating awareness among the industry players and have imposed hefty penalties by way

71 *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919).
72 718 F2.d 256 (7th Circuit, 1983).
73 *Supra* note 14.
74 15 USC Section 13.
75 *Id.*, Section 45.
76 *Id.*, Section 45(a)(1).
77 *Id.*, Section 45(a)(3).

of orders to deter anti-competitive practices and develop a stringent competition law framework in India.[78]

The law in the United States is covers a wide perspective and all that is required is that competition is impaired somewhere in the line of commerce. The Indian law, the erstwhile MRTP Act, was modelled on the United Kingdom pattern, but conceptually similar to the United States pattern.

Under US law, it is only 'hard-core' cartels that are *per se* illegal; other horizontal agreements are subject to a so-called 'rule of reason', according to which the pro and anti –competitive effects of an agreement are balanced against one another in order to determine whether it is illegal.[79]

As opposed to the Indian framework comprising single legislation and single agency, the US enforcement framework comprises multiple agencies and legislation. In the US, two federal agencies bear the major responsibility of enforcing anti-trust laws, the Antitrust Division of the US Department of Justice(DoJ) and the Federal Trade Commission (FTC). The former is part of the executive branch of the government and the latter is an independent administrative agency, similar to the Competition Commission of India. The Sherman Act is the oldest federal antitrust statute, enacted in 1890 and deals primarily with anti-competitive agreements and monopoly exercised by firms. The Clayton Act, 1914 deals with specific business practices including mergers, price discrimination and tying, exclusive supply etc. The DoJ and FTC independently enforce the Sherman Act and the Clayton Act. However, if the violation entails criminal prosecution, then the DoJ has the exclusive authority to prosecute. The EU competition law framework originates from the Treaty on the Functioning of European Union Treaty. The Treaty covers a wide variety of subjects; however the substantial legal development has come in the area of competition law covered by Articles 101 and 102. The Treaty is generally applicable to agreements and conduct between the EU member states though each member state of the EU also has their respective national competition agencies and legislations. The Treaty did not specify the institutional structure for the competition law enforcement and the same was framed by the European Council. The Council entrusted the European Commission(EC) with the duty to ensure compliance with the Treaty and enforcing, implementing and developing the European Community's competition law and policies. The Indian competition law framework is similar to the European enforcement structure and the provision of the Act as well as the powers and functions of the Competition Commission of India (CCI) have been broadly

[78] Payel Chatterjee and Shashank Gautam, *Competition in India* v. *USA And EU*, *available at*: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/New_ Competition_Law_in_India_vs_USA_and_EU.pdf.

[79] Richard Whish, "Control of Cartels and other Anti-Competitive Agreements", in Vinod Dhall (Ed.), *Competition Law Today: Concept, Issues and the Law in Practice*, 56 (2007).

fashioned on the applicable provisions of the Treaty and the powers of European Community.

Though the Indian Competition Act, 2002 has much in common with the US enforcement structures, yet the systems differ significantly in the matter of levels and quality of enforcement.[80] Section 3(1) of the Competition Act, 2002 prohibits any agreement with respect to "production, supply, distribution, storage and acquisition or control of goods or services which causes or is likely to cause an appreciable adverse effect on competition within India. The corresponding provisions are found in Section 1 of the Sherman Act[81] and Article 101 of the Treaty[82].

Section 19 (3) of the Act specifies certain factors for determining appreciable adverse effect on 'competition'.[83] The intent of legislature reflected vide the mandatory language of Section 19(1) of the Act is that the CCI is required to carry a balanced assessment of anti-competitive effect as well pro-competitive justification of the agreement.[84] This balancing approach under the Act is similar to the rule of reason analysis found in the competition law jurisprudence of the US. The Act does not characterise agreement into horizontal or vertical category however the language of Section 3 (3) and 3 (4) makes it abundantly clear that the former is aimed at horizontal agreement[85] and the latter at vertical agreements.[86]

The objective of competition law throughout the world is consumer welfare. However, the complexities of the provisions in different jurisdictions have diverse implications and approaches. The enforcement policies must have a direct connection with economic policies and developmental goals of developing countries. It may differ from economy to economy and blanket imitation of policies prevalent in other jurisdictions and their implementation in India is going to be marred by obstacles.[87]

Of all the reasons for further comparative analysis, one is particularly important from a practical point of view. India is emerging as one of the largest player in world trade today with the window of opportunity for exporters becoming ever larger and more transparent.

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80 Payel Chatterjee and Shashank Gautam, *Competition in India* v. *USA And EU*, *available at*: http://www.nishithdesai.com/fileadmin/user_upload/pdfs/New_Competition_Law_in_India_vs_USA_and_EU.pdf.

81 Section 1 of the Sherman Act provides that "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal".

82 Article 101 provides that an agreement to be competitive to be anticompetitive, its main object should be to prevent or to and one needs to prove that the effect of agreement was anti-competitive.

83 The factors under Section 19 (3) includes six factors, first three being anti-competitive remaining three being pro-competitive factors: (a) creation of entry barrier; (b) driving existing competitors out of market; (c) foreclosure of competition; (d) benefits to consumers; (e) improvements in the production or distribution of goods or the provision of services; and (f) the promotion of technical, scientific and economic development.

84 *Supra* note 80.

85 Agreement between actual or potential competitors operating at the same level of the supply chain.

86 Agreement between firms operating at different levels, i.e. agreement between a manufacturer and its distributor.

87 *Supra* note 14.

It is obviously in the interests of those traders and of India as a whole to ensure that obstructions to the competition in the market within India are kept to a minimum.