DEALING WITH EXTRATERRITORIAL ANTICOMPETITIVE THREATS IN LIGHT OF THE FDI POLICY AND THE 'MAKE-IN-INDIA' CAMPAIGN: ARE WE READY?

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The liberalization initiatives in FDI Policy and the 'Make in India' campaign are likely to result in AAEC on markets in India as a result of activities originating outside India's sovereign borders. The Note discusses numerous aspects of extraterritorial enforcement of Indian competition law, including the statutory source and scope of the powers of the CCI. The international competition/antitrust law enforcement system and the challenges of international cooperation have been discussed in an attempt to appreciate the gaps in evidentiary procedures between India's competition law regime, civil procedures and the statutory counterparts of other jurisdictions. The authors explore a plethora of options available before the CCI in attempting to regulate activities that originate and take place beyond the borders of India: in particular, the system of Letter Rogatory recognized by the CCI (General Regulations), 2009; the Hague Convention on Evidence; and bilateral/multilateral arrangements, and attempt to weigh the benefits and pitfalls of each of those options – including charting their viability and effectuality in varying situations.

I. INTRODUCTION

Briefly stated, the twin phenomena of rapid growth of global commerce and general liberalization policies of economies have led to the germination of massive corporations possessing a presence in a large number of countries and having considerable financial strength.[1] The recent changes to the FDI Policy and the promotion of the 'Make in India' campaign have accelerated this process, resulting in unprecedented investments due to sectoral liberalization,[2] and certainly leading to intense competition across various sectors in various geographical markets. Nearly all major retail sectors have been brought under the ambit of 100% FDI under the automatic route, and the same treatment has been extended to sectors that have historically witnessed anticompetitive practices – such as the aviation industry and B2B e-commerce. The CCI can expect a spate of turf wars over

[1] 'Report of High Level SVS Raghavan Committee Report on Competition Policy, 2000', available at <https://theindiancompetitionlaw.files.wordpress.com/2013/02/report_of_high_level_committee_on_competition_policy_law_svs_raghavan_committee.pdf>, last accessed on 28.07.2015.

[2] *See,* http://timesofindia.indiatimes.com/business/india-business/Modis-Make-in-India-a-success-Moodys/articleshow/51736262.cms

the Indian market, and may look to the mega-investments by foreign investors in Ola or Flipkart as a sign of changing times.

Undoubtedly, these changes have the potential to disrupt and change regional markets and small players in the market, often to the detriment of the latter. As a result, from a purely domestic perspective, it is expected that decisions (managerial or investment) taken abroad by foreign investors may certainly have *appreciable adverse effects on competition in the relevant market* (**"AAEC"**) in India,[3] thereby bringing the resulting act under the purview of the Competition Act, 2002.[4] However, unless the provisions relating to extraterritorial enforcement are given effect to, through means of bilateral and multilateral agreements with other countries or through other means, they remain grossly insufficient as a mechanism to address competition law violations abroad.[5]

This Paper argues that the introduction of the Act should definitely be seen as a progressive step towards dealing with anticompetitive practices abroad,[6] and although the exact modalities of extraterritoriality are largely undefined (either in the Act or the Rules/ Regulations functioning as complementary enactments), they are resolvable within the scope of the Act itself and existing Regulations read with different bilateral and multilateral agreements.

II. EXTRATERRITORIAL APPLICATION OF DOMESTIC LAWS EXAMINED

> *"It is axiomatic that in antitrust matters, the policy of one state may be to defend what is the policy of another to attack"*
>
> *- Lord Wilberforce*[7]

While it is reasonably expected that the extraterritorial assertion of domestic laws would more often than not be a source of friction due to the fact that two states are asserting jurisdiction over the same subject matter, conflicts or tensions relating to competition law have been extremely rare.

[3] Section 32, The Competition Act, 2002 (hereinafter referred to as **"Competition Act"** or merely, **"the Act"**).
[4] This, however, was not always the case with respect to interpretation of Competition Law statutes in India, and the present Competition Act, 2002 sought to expand the application of competition law to other states as well. For example, in *In Re: Glass Manufacturers of India* [AIR 2002 SC 2728], the Supreme Court while interpreting the possible extraterritorial application of the Monopolies and Restrictive Trade Practices Act, 1969, held that the MRTP Act, 1969, was only intended to be operational within the defined geographical boundaries of India and that it did not envisage extraterritorial application.
[5] The jurisdictional conflicts and legal uncertainties are well documented, *see* Andrew D. Mitchell, 'Broadening the Vision of Trade Liberalisation: International Competition Law and the WTO' in José Rivas (ed.), *World Competition Law and Economic Review* Vol. 24 (Issue 3, Kluwer Law International 2001) 350.
[6] Cyril Shroff and Nisha Kaur Oberoi, 'Chapter 4: India', in KATRINA GROSHINSKI AND CAITLIN DAVIES, COMPETITION LAW IN ASIA PACIFIC: A PRACTICAL GUIDE (KLUWER LAW INTERNATIONAL 2015) 235.
[7] *Westinghouse Elec. Corporation Uranium Contract Litigation* [1978] 2 WLR 81, 94.

The contours of extraterritorial operability of domestic laws[8] (including competition law that mandates extraterritorial application) in an international sphere have never truly been the beneficiaries of an accepted definition[9] - instead, there has been a steady increase in the acceptance of domestic law as being capable of functioning outside the sovereign limits of a state,[10] normally in response to evolving demands for action to be taken against conduct originating outside the defined boundaries of the country.[11]

One particular (and the most popular) manifestation of this theoretical realism was through the *Effects Doctrine* – largely singularly developed by the United States.[12] The Doctrine states that domestic competition laws are applicable to foreign firms – but also to domestic firms located outside the state's territory when their behaviour or transactions produce an *effect* within the domestic territory of a country.[13] Consequently, the nationality of parties is irrelevant and what matters is the *effect* of the alleged conduct. This Doctrine has been adopted by the European Commission progressively, with a greater reluctance generally exhibited in embracing it than at the US – the place of its origin.[14] The Effects Doctrine was given statutory recognition in the US in 1994 by the International Antitrust Enforcement Assistance Act[15] and in the UK through the

[8] On the question of the extraterritorial application of domestic laws, the Permanent Court of International Justice, somewhat unexpectedly held in the famous *Lotus* case that international law,"*[…] far from laying a general prohibition to the effect that states may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their country, leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules*" – *see* The Case of the S.S. Lotus, 7 November, 1927, Permanent Court of International Justice, Series A, N°10, <http://www.icj-cij.org/pcij/serie_A/A_10/30_Lotus_Arret.pdf>, last accessed on 21.07.2015

[9] *See,* Willis L. M. Reese and Henry Harfield, '*Extraterritorial Application of Law – General Principles'* (1970) THE AMERICAN JOURNAL OF INTERNATIONAL LAW (Vol. 64, No. 4, The United Nations: Appraisal at 25 Years, September 1970) wherein the authors point to the fact that "compression of time …accompanied by expansion of nationalism" has led to the need for lawmakers to address extraterritoriality convincingly.

[10] *Infra* n 21.

[11] BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL (HART PUBLISHING 2002) 7.

[12] Extraterritorial enforcement of the Sherman Act was permitted in *United States v. Aluminium Co. of America*, 148 F.2d 416 (2d Cir. 1945) when Judge Learned Hand held that, "*it is settled that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders that the states reprehends*" in p. 443 of the judgment. This doctrine later evolved into the 'qualified effects' test, introduced in *United States v. Timken Roller Bearing Co.* [83 F. Supp 284, 309 (ND Ohio 1949)], wherein it was stated that the jurisdiction of the court was based on the fact that the foreign conduct had 'a direct and influencing effect on [US] trade'.

[13] For a brief background of the Effects Doctrine, *see* Kartik Maheshwari and Simone Reis, 'Extraterritorial Application of the Competition Act and its Impact' (2012) Competition Law Reports 144-8, available at <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Extraterritorial%20Application%20of%20the%20Competition%20Act%20and%20Its%20Impact.pdf>, last accessed on 30.09.2016.

[14] James J. Freidberg, '*The Convergence of Law in an Era of Political Integration: The Wood Pulp Case and the Alcoa Effects Doctrine*' (1990-91) 52 U. PITT L. REV. 290.

[15] *See*, The U.S. Department of Justice and The Federal Trade Commission, '*Antitrust Enforcement Guidelines for International Operations*' (1995) available at <http://www.justice.gov/atr/antitrust-enforcement-guidelines-international-operations>, last accessed on 30.09.2016.

enactment of the Protection of Trading Interests Act, 1980, although with a few technical modifications discussed later.

When the Doctrine was first discussed in India (while an issue relating to the extraterritorial application of the MRTP Act, 1969 came up),[16] the reception was lukewarm: the Supreme Court, while conceding the glaring limitations of the MRTP Act and the fact that the MRTP Commission was vested with the power to *inter alia* take action when a restrictive trade practice is carried out in respect of imported goods, also pointed out that the Commission certainly did not have the power to stop imports, and *did not* have extraterritorial power.[17] This has been subsequently remedied by the enactment of the Competition Act, 2002.[18]

In more recent situations, the Effects Doctrine has been supplemented with additional tests that may be slightly different in scope to ensure that it is not perceived as unreasonable in the face of sovereignty of other countries and regions[19]: for example, the *implementation* test has been laid down by the Court of Justice of the European Union in the *Wood Pulp* case[20] by stating that:

> "[…] *if the applicability of prohibitions laid down under competition law were made to depend on the place where the agreement, decision or concerted practice was formed, the result would obviously be to give undertakings an easy means of evading those prohibitions. The decisive factor is therefore the place where it is implemented.*"

One may also look to the *substantial effects* test developed in the US itself, which holds that only those foreign practices that have more than a *de minimis* effect on US trade will be brought under the purview of the Sherman Act.[21] The additional qualifications to the effects test are now significant parts of the Effects Doctrine itself and are to be applied in full consideration of all the related tests as well.

In India, the Competition Act, 2002 is not the only legislation that contemplates or requires extraterritorial enforcement. Enactments such as the Foreign Exchange Management Act (FEMA),

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[16] Haridas Exports v. All India Float Glass Manufacturers Association AIR 2002 SC 2728, at p. 2742.
[17] ABIR ROY AND JAYANT KUMAR, COMPETITION LAW IN INDIA (2nd ED., EASTERN LAW HOUSE 2014) 27-28.
[18] S. 32, Competition Act, 2002.
[19] *See*, U.S. Department of Justice and the Federal Trade Commission, 'Antitrust Enforcement Guidelines for International Operations' (1995) CL/03/00077 wherein it is stated that the 'implementation test' of the EU is analogous to the 'effects doctrine' of the United States.
[20] *A. Ahlstrom Osakeyhtid v. Commission (Wood Pulp) Decision*, Cases 89/85, 114/85,116-117/85, 125-129/85, of 27 September 1988.
[21] The test was first laid down in *United States v. Timken Roller Bearing Co.* [83 F. Supp 284, 309 (ND Ohio 1949)] in the form of a 'qualified effects test' and took its later forms in several other cases, notably in the Supreme Court case of *Hartford Fire Insurance Co. v. California* [509 US 782 (1993)].

1999[22] and the Income Tax Act, 1961 also involve extraterritorial aspects, but the Competition Law is the only legislation that uses (or borrows) the Effects Doctrine to assert jurisdiction abroad.

III. DIFFERENT METHODS OF COMPETITION LAW ENFORCEMENT

A. *Looking to our Laws – the CCI (General) Regulations, 2009 and Letters of Request – More Effective than Acknowledged?*

Before the paper discusses various bilateral and multilateral treaties entered into by India and how they seemingly offer new methods of effectively pursuing evidence collection, it is important and more appropriate to appreciate the provisions present in our domestic law that provide the Commission with the powers to carry out enquiries. As discussed earlier, s. 32 of the 2002 Act states that the Commission shall have the power to inquire into *agreement or abuse of dominant position or combination if…like to have, an AAEC in the relevant market in India*.[23] It also possesses the powers to pass such orders as it *may deem fit* in relation to the findings of such inquiries.[24]

Seemingly, the specific modalities of *how* the Commission will be carrying out the same is found only in Regulation 45 of the Competition Commission of India (General Regulations), 2009.[25] Sub-regulation (2) to Regulation 45 specifies the powers of the Commission or Director General to issue commissions for examination of witnesses or documents when the witnesses are *residing at any place not within India* and if satisfied with the indispensability of such evidence for the matter at hand, may *issue a letter of request to the Indian High Commission or the Indian Embassy to facilitate the execution of the commission, under this regulation.*[26] In addition, it is entirely possible, but unrealistic, that states may resort to positive comity to facilitate evidence collection as the recent trend is to rely on codified bilateral or multilateral agreements that specifically provide for evidence collection and facilitation of adjudicatory processes for civil and commercial matters.

The obligations on the other state party to comply with the Letter of Request is a question that is answered with reference to various sources – it could be in the form of bilateral treaties between the two parties relating to judicial assistance and cooperation in antitrust and commercial matters,[27]

[22] Ss. 1(3), 6(3) are some of the provisions that expressly contemplate extraterritorial enforcement.
[23] S. 32, Competition Act, 2002.
[24] S. 32, Competition Act, 2002.
[25] The same can be found at <http://www.cci.gov.in/images/generalregulation.pdf>, last accessed on 23.09.2016.
[26] Regulation 45(2), CCI (General Regulations), 2009.
[27] In September 2012, the U.S. Department of Justice and the Federal Trade Commission and the Indian Ministry of Corporate Affairs and Competition Commission of India signed a Memorandum of Understanding on Antitrust Cooperation to promote technical cooperation and consultations on matters of competition policy and enforcement, as per 'Joint Statement on the Fourth India-US Strategic Dialogue' on June 24, 2013, available at <http://www.mea.gov.in/bilateral-

it could be in the form of large multilateral treaties that both nations have ratified – for example, the Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters (hereinafter, the **"Hague Convention on Evidence"**), or it could be simply on the basis of comity subsisting between the courts of the two nations.

Admittedly, the use of Letters of Request as a means of furthering judicial assistance is now gathering momentum in international law. The Indian Supreme Court's decision in *Union of India v. W.N. Chadha*[28] may be used as an early reference to the exact scope of a Letter of Request or a 'Letter Rogatory',[29] and to observe interpretations regarding scope of obligations to process requests of Letters of Requests[30] by another state. The SC held that a state was obliged to entertain Letters of Request purely on the basis of pre-existing principles of comity, but the authors maintain that global judicial assistance measures have come a long way since then.[31]

Some nations, like the United States for example, have even gone to the extent of stating that the scope of judicial assistance would be broad, and would *provide an avenue for judicial assistance to foreign or international tribunals whether or not reciprocal arrangements existed.*[32] It was hoped, in part, that this would lead to other nations also liberalising their own judicial assistance provisions. It is to be noted that the word 'tribunal' has been used in terms broader than the interpretation normally attributed to the analogous term 'judicial authority' used in the Hague Convention. The term 'tribunal' has been construed to include investigating magistrates, administrative tribunals, and quasi-judicial agencies.[33]

documents.htm?dtl/21872/Joint+Statement+on+the+Fourth+IndiaUS+Strategic+Dialogue>, last accessed on 29.09.2016.

[28] AIR 1993 SC 1082.

[29] A 'Letter Rogatory' was defined as "*a formal communication in writing sent by a Court in which action is pending to a foreign Court or Judge requesting the testimony of a witness residing within the jurisdiction of that foreign Court may be formally taken thereon under its direction and transmitted to the issuing Court making such request for use in a pending legal contest or action.*" 'Letter of Request' and 'Letter Rogatory' are synonymous expressions, as per BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL (HART PUBLISHING 2002).

[30] The Court held that "*this request entirely depends upon the comity of courts towards each other, that is to say, on the friendly recognition accorded by the Court of one nation to the laws and usages of the Court of another nation.*"

[31] While experts are of the opinion that letter of requests are honoured on the basis of comity between the courts addressed, *see* David Epstein and Jeffrey L. Snyder, *International Litigation: A Guide to Jurisdiction, Practice and Strategy* (Place Publisher 1995) 10-14 – principles of comity are relatively more settled than they were two decades ago, and the use of letters of request as judicial assistance mechanisms has grown in practice.

[32] *See* 28 USCS 1782, and *In Re Application of Malev Hungarian Airlines* (1992, CA2 Conn) 964 F2d 97. Contrast this to an earlier Federal case, *In Re Letters of Request to Examine Witnesses from the Court of Queen's Bench for Manitoba,* 59 F.R.D. 625, 626-7 (N.D. Cal.)., aff'd per curiam, 488 F.2d 511 (9th Cir., 1973), wherein it was held that a tribunal for the purposes of 28 USCS 1782 is also supposed to have "*the power to make a binding adjudication of facts or law as related to the rights of litigants in concrete cases.*"

[33] Walter B. Stahr, *Discovery under 28 U.S.C. 1782 for Foreign and International Proceedings*, (1990) 30 VIRGINIA JOURNAL OF INTERNATIONAL LAW 597, 617.

B. The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters – The Shortcomings and How to Address Them

The Hague Convention on the Taking of Evidence Abroad in Civil or Commercial Matters relates specifically to imposing obligations on state parties (numbering 58, as on 06.08.2014[34]) to process Letters of Requests[35] by designating a Central Authority in every Contracting State which will undertake to receive Letters of Requests coming from a judicial authority of another Contracting State.[36] In recent times, the CCI has entered into numerous Memorandums of Understanding ("MOUs") with its counterparts from other countries[37] and institutions like the World Trade Centre[38] in pursuance of the need for effective evidence collection and enforcement. While this Paper acknowledges the rise in such agreements, there are limitations to such bilateral instruments: the MOUs tend to be allow a much broader scope for rejecting a request for evidence from another nation. For example, Article IV of the mutual antitrust assistance treaty entered into by the United States and Australia lists down several grounds for rejecting a request for collection of evidence,[39] including on procedural grounds, i.e., a request is *not made in accordance with the provisions of this Agreement*, or that it would exceed the executing state's *reasonably available resources*, or that it would *not be authorized by the domestic law of the requested party*, or that the request is *contrary to public interest*.

In contrast, as per Article 12 of the Hague Convention on Evidence, the *execution of a Letter of Request* may be refused only to the extent that *firstly*, the Letter does not fall within the functions of the judiciary, and *secondly*, the state addressed feels that its sovereignty or security would be prejudiced by execution of the Letter of Request. In addition, the Article expressly mentions that execution cannot be refused solely on the ground that under its internal law the executing state claims exclusive jurisdiction over the subject-matter or that its internal law would not allow a right of action on it.[40]

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[34] The status of the *parties* to the Convention can be found at <http://www.hcch.net/index_en.php?act=conventions.status&cid=82>, last accessed on 30.09.2016.

[35] The only exceptions to the same are provided under the Convention itself, under Art. 12 on the exclusive dual grounds of: *firstly*, that the execution of the Letter does not fall within the functions of the judiciary in the executing state, or *secondly*, the executing state considers that its sovereignty or security would be prejudiced by execution.

[36] Article 2, Hague Convention on Evidence.

[37] For example, *see* Aman Malik, 'CCI seeks partnership agreements with global counterparts' *Livemint* (19 June 2012) <http://www.livemint.com/Politics/dpYF9UCUL362YGkzfmQlfP/CCI-seeks-partnership-agreements-with-global-counterparts.html>, last accessed on 26.09.2016.

[38] *See,* 'CCI signs MoU with World Trade Centre on Business Promotion' *The Tribune* (16 April 2015) available at <http://www.tribuneindia.com/news/jammu-kashmir/community/cci-signs-mou-with-world-trade-centre-on-business-promotion/67900.html>, last accessed on 30.09.2016.

[39] For Article IV of the said bilateral treaty, *see* <https://www.ftc.gov/policy/cooperation-agreements/usaaustralia-mutual-antitrust-enforcement-assistance-agreement>, last accessed on 20.09.2016.

[40] Article 12, Hague Convention on Evidence.

At first blush, it seems that it is actually advantageous for parties to simply adopt the Hague Convention, due to the wide scope of its language and operation, but to assume so would be judicially inconsiderate towards nations that have historically narrowed the scope of requests of judicial assistance. Letters Rogatory have been acknowledged as *significant* instruments in judicial assistance, with one member of the US' Department of Justice even stating that these Letters made the need for bilateral and multilateral agreements seem less urgent and necessary.[41] However, Letters of requests, despite the unusually wide meaning attributed to them under the Hague Convention (and the clear benefits as a result, thereunder), remain *"slow, expensive and unpredictable*".[42]

It is not wholly unusual for some countries to insist that requests be submitted through the diplomatic channel,[43] and sometimes only letters issued by traditional courts of law are honoured, and letters for pre-trial discovery (as allowed by the US) are not normally entertained in other countries due to the fact that such countries' civil procedures do not contemplate evidence collection at the pre-trial stage.

In addition, one of the biggest drawbacks of the Hague Convention on Evidence is that assistance is restricted in its scope to only *civil or commercial matters*.[44] Consequently, countries that apply competition law criminally are rendered as outsiders to the Convention.[45] Again, the Convention is restricted to those instances where the requests emanate from a *judicial authority*, and it is easily observable that administrative agencies – responsible for competition law enforcement in some countries, are excluded as a result.

When seen in the light of the different discovery powers that countries possess and the varying levels of openness with which they respond to requests for information, the problem is merely compounded.

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[41] Interview with Charles Stark, Former Chief, Foreign Commerce Section, Antitrust Division, Washington, (December 1998).
[42] Nina Hachigian, *'Essential Mutual Assistance in International Antitrust Enforcement'* (1995) 29 THE INTERNATIONAL LAWYER 117, 145.
[43] It is interesting to note that Sub-Regulation 45 of CCI (General) Regulations, 2009 also contemplate proceedings regarding Letter of Request to be initiated through diplomatic channels; David Epstein and Jeffrey L. Snyder, *International Litigation: A Guide to Jurisdiction, Practice and Strategy* (Place Publisher 1995) at 10-14.
[44] Article 1, Hague Convention on Evidence.
[45] These include countries like the US and Canada.

C. Bilateral and Multilateral Trade Agreements and FTAs – the way forward?

There has been a trend – slow, but unmistakeably linear, towards positioning bilateral and multilateral agreements at the core of judicial assistance and cooperation between competition law agencies of different states.[46] The substantive provisions of these agreements vary widely in a number of ways – while some agreements simply outline the general intent to adopt a domestic code on competition law without setting out the specificities, others engage in extensive detailing of coordination, rules and standards.[47]

There has been another transition from merely prescribing obligations for notification, exchange of information and consultation mechanisms to specifying *how* those processes were to be carried out, eliminating any ambiguities that may arise in giving effect to the provisions of the agreement. As a result, it is not unusual to find specific provisions relating to adoption and enforcement of competition/antitrust statutes, coordination and cooperation, the factors to be considered in determining anti-competitive behaviour, clauses on non-discrimination, due process and transparency, anti-dumping, dispute settlement and special and differential treatment (S&D) for developing countries.[48]

The steady rise in the number of such agreement augurs well for the future: not only are states precluded from exercising their rights under reservation clauses commonly found in large multilateral agreements, they are more likely to comply with provisions that they have negotiated of their own volition (as opposed to aligning of interests with certain blocs on global platforms). There is also a reduced scope for any ambiguities to arise when consensus on prohibited acts has manifested as provisions in the agreement. It is almost certain that bilateral and multilateral agreements provide the path of least resistance in securing the objective of global cooperation on account of the ease of negotiations, and must actively be embraced as stepping stones in realizing commonalities in procedure.

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[46] Sanghamitra Sahu, Neha Gupta, Competition Clauses in Bilateral Trade Treaties: Analysing the Issues in the Context of India's Future Negotiating Strategy [Report Prepared for CCI], available at http://www.cci.gov.in/sites/default/files/bilateral_trade_treaties_20080508105059.pdf, last accessed on 10.10.2016.

[47] For example, the US-Singapore Free Trade Agreement prescribes extensive cooperation and coordination mechanisms – largely unprecedented in the realm of FTAs in relation to Competition Law.

[48] *See*, for example, the EU-Mexico Free Trade Agreement (came into force on 1st July, 2000).

IV. HARMONIZATION OF PROCEDURAL MATTERS IN COMPETITION LAWS – UTOPIA?

While there may not be significant differences in powers of competition law agencies of difference jurisdictions, the same cannot be said of evidentiary procedures. Comparatively, not all countries possess the same scope with respect to discovery powers - European and American antitrust authorities are less restrained with respect to evidence collection that other jurisdictions, for example, Germany.[49] The German domestic law mandates that international law constitutionally overrules domestic law, so every request for information must be in conformation with international law, and therefore, they cannot request information without the consent of the foreign government in question.[50] On the other hand, the European Commission reserves the capacity to, and does send formal requests under certain instances for information under Art. 11(1) of Regulation 11/62, when the information is located abroad.

The discovery powers of the EC are wide enough to permit it to seek information from a subsidiary located in the EU even when the parent company is located outside. [51] Thus, the application of the use of the *economic unit theory* – that subsidiaries and parent companies are considered to be a single group is available as a means to assert jurisdiction, and the Commission has the power to require information which is under the control of the group, wherever it is located.[52]

Consequently, it is possible for a country which allows for pre-trial discovery to ask for judicial assistance from a country like Germany, whose own laws regarding letters of request are restricted. In such cases, the only solution that seems to present itself is that outside the Hague Convention and pre-existing bilateral or specific multilateral arrangements, is to resort to existing principles of comity.

India, as a state party to the Hague Convention on Evidence, can send a Letter of Request to another nation also party to the Convention under Article 1, and such a Letter will then become governed by the Articles of the Convention. While this may seem a simplistic approach to collect information, it does not take into account the fact that India has existing bilateral and multilateral

[49] BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 43 (HART PUBLISHING 2002).
[50] *Ibid.* at 43 – It is interesting to note that in practice, the German authorities have never sent any formal decision ordering information abroad.
[51] *See generally*, 'EU Competition Law - Rules Applicable to Antitrust Enforcement, Vol. II: General Block Exemption Regulations and Guidelines' available at <http://ec.europa.eu/competition/antitrust/legislation/handbook_vol_2_en.pdf>, last accessed at 21.09.2016.
[52] *Ibid.*

treaties or Mutual Legal Assistance Treaties (**"MLATs"**).[53] It may seem logical therefore, that where both states have thought it prudent to enter into a specific bilateral agreement over judicial assistance, the Letter of Request or any request for information for that matter, will be governed by the agreement in discussion rather than the Hague Convention.

While the initial bilateral antitrust treaties were *defensive*, as can be seen from the Australia-US agreement or the 1984 Canada-US MoU, and later vague with only general and abstract non-binding principles of collaboration such as the French-German agreement or the German-US agreement, present day treaties, especially post the 1990s have generally exhibited a greater willingness to cooperate in antitrust matters at the international level.[54] Recent trends therefore suggest that bilateral treaties may have a larger role to play in coming years than they have previously managed to do so. This may, in turn, reduce the dependence on resorting to pre-existing principles of comity between the two states. An estimate by the WTO in 2003 showed that there were nearly 141 trade agreements that incorporated provisions related to competition law.

The slew of actions taken by the Commission with respect to parties based predominantly abroad is definitely encouraging: in recent times, the Commission has gone after Google,[55] Ericsson, Micromax, DLF, Johnson Controls-Hitachi Appliances,[56] Hyundai,[57] Intel and several other corporations, even being termed as being '*too zealous*'.[58] Most of these companies are based abroad, although they have sizeable investments in India. As a result, CCI will have to increasingly utilize Letters to obtain information. Keeping in mind that the norm seems to be progressive use of bilateral channels to establish antitrust cooperation, it may just be the case that the next decade will increasingly see broader competition law assistance agreements with specific procedural

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[53] For illustrative purposes, see the list of countries India currently has Mutual Legal Assistance Treaties with, at <http://cbi.nic.in/interpol/mlats.php>, last accessed on 30.09.2016.

[54] BRUNO ZANETTIN, COOPERATION BETWEEN ANTITRUST AGENCIES AT THE INTERNATIONAL LEVEL 57 (HART PUBLISHING, 2002).

[55] *See,* 'CCI orders probe in Google's AdWords programme' *The Economic Times* (6 May 2012) available at <http://articles.economictimes.indiatimes.com/2012-05-06/news/31597590_1_google-s-adwords-google-spokesperson-bharatmatrimony>, last accessed on 30.09.2016.

[56] *See,* 'CCI clears Johnson Controls-Hitachi Appliances Deal' *NDTV* (20 May 20015) available at <http://profit.ndtv.com/news/corporates/article-cci-clears-johnson-controls-hitachi-appliances-deal-764466>, last accessed on 30.09.2016.

[57] *See,* 'Competition Commission of India finds Hyundai, Reva and Premier to be in contravention of the competition law' *Business Standard* (28 July 2015) available at <http://www.business-standard.com/article/government-press-release/competition-commission-of-india-finds-hyundai-reva-and-premier-to-be-115072801321_1.html>, last accessed on 30.09.2016.

[58] *See* Surabhi Agarwal & Sushmi Dey, 'Tech firms find CCI a bit too zealous', *Business Standard*, New Delhi, (4 May 2014), available at <http://www.business-standard.com/article/companies/tech-firms-find-cci-a-bit-too-zealous-114040500862_1.html>, last accessed on 30.09.2016.

standards to be employed, rather than reliance on large multilateral treaties such as the Hague Convention.

And as the CCI begins to assert jurisdiction in matters of collection of evidence, as well as enforcement of awards, it will shed greater light on extraterritoriality of laws in general and competition laws in specific. However, as can be seen from the contents of this paper, there is no shortage of legal options available to the authorities to pursue the matter: each mode has its own flaws and advantages, and the CCI may do well to resort to different sources for each varying circumstance. Meanwhile, the increasing acceptance and maturity with which domestic competition laws have been viewed augurs well for India and economies and markets in general.