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TRADE, DEVELOPMENT AND COMPETITION LAW: INDIA AND CANADA COMPARED

ADITYA BHATTACHARJEA

This article compares the competition/antitrust laws of India and Canada, with special reference to issues concerning international trade, foreign investment, and economic development. It highlights similarities in the structure of corporate ownership and the changing nature of state intervention in the two countries. It then outlines the historical evolution of their competition laws, revealing several similarities and differences. The article concludes with a case study of a Canadian export cartel, which is exempted from Canadian competition law but has harmful effects on development priorities in India and poses a challenge for the extra-territorial application of India's Competition Act.

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I. INTRODUCTION

A comparison between the competition laws of countries as dissimilar as India and Canada might appear to be an exercise in futility. However, a closer study reveals several similarities in their development strategies, business structures and government policies, including the evolution of competition laws. It also highlights important economic and institutional factors that influence the enactment and implementation of trade and competition policies.

At least three earlier published papers by economists have compared Indian and Canadian competition laws, offering various reasons for why such a comparison might be useful. The first, by Ramaswamy, gave a brief review of the evolution of Canada's competition laws, a detailed overview of its 1986 Competition Act, and a few comparisons with India's Competition Act of 2002. He gave two justifications for this exercise: both countries have a federal structure, and both are small markets in terms of purchasing power, which implies that only a few producers can co-exist in industries subject to economies of scale.¹ However, India made extensive amendments to its Act the following year, making some of his comparisons redundant. Two years later, Ghosh and Ross undertook a more direct comparison of the amended Act for Canadian readers.² Their motivation for it was the rapid growth of the Indian economy in recent years and its integration into global markets, the even more rapid growth of foreign direct investment (FDI) by Indian firms in Canada and to a lesser extent Canadian FDI in India, and growth of India-Canada trade. They also highlighted the importance of studying the experience of another country with "some important similarities in law, government and language, thanks to our common historical connections to Britain", as well as a federal structure of governance.³ In another paper published later in the same year, Ghosh and Ross commented on the strengths and weaknesses of India's recently amended Competition Act, drawing on Canadian experiences to suggest improvements.⁴

My justification and approach for undertaking an India-Canada comparison is, however, rather different. In the five years since Ghosh and Ross wrote their twin papers, their first reason has diminished in importance. The magnitude of both trade and FDI flows between India and Canada is actually fairly limited, as noted

¹ K.V. Ramaswamy, *Competition Policy and Practice in Canada: Salient Features and Some Perspectives for India*, 41 *ECON. & POL. WEEKLY* 1903 (2006) [hereinafter Ramaswamy].

² S. Ghosh & T. Ross, *India's New Competition Law: A Canadian Perspective*, 23 *CANADIAN COMPETITION REC.* 23 (2008).

³ *Id.* at 24.

⁴ S. Ghosh & T. Ross, *The Competition (Amendment) Bill 2007: A Review and Critique*, 43 *ECON. & POL. WEEKLY* 35 (2008).

by a background paper on negotiations that commenced in 2010 towards a Common Economic Partnership Agreement (CEPA) between the two countries.⁵ The stock of FDI in both directions has actually declined since 2008.⁶ Although bilateral trade expanded rapidly in 2011-12 after declining in the preceding two years, Canada's share of India's exports (0.67%) and imports (0.59%) is still minuscule.⁷ Taking into account the number of producers as well as competitors from other countries, the industries that produce the major Indian exports to Canada (textiles, garments, precious stones and organic chemicals) are unlikely to generate competition concerns in the Canadian market. Similarly, Canada's major exports to India (agricultural products, fertilizer, pulp and paper) are unlikely to raise competition concerns in India. One major exception is potash, which is a major item of export to India, and of which India has been a major buyer.⁸ A high degree of seller concentration in Canada, an export cartel exempted under Canadian competition law, support from the Canadian government, and coordination with producers in other countries which collectively dominate the world market make this cartel an obvious but difficult target for India's competition authorities. I deal with this issue as a case study at the end of this article.

Ghosh and Ross's second justification for a comparative analysis — to draw out what India and Canada can learn from each other's competition laws — is still valid, perhaps more so than in 2008 when they wrote their twin articles. In 2009, India started enforcing its Competition Act and Canada enacted significant amendments to its own Competition Act. So we now have nearly four years of relevant experience in both countries, which could yield additional insights. This would, however, require a systematic comparison not only of the two Acts (as undertaken by Ghosh and Ross), but also of representative cases in the two countries. Unfortunately, fundamental differences in the enforcement mechanisms make it difficult to carry out such an exercise. In Canada, very few cases in recent

⁵ Wendy Dobson, *Does Canada Have an India Strategy? Why it Should and What Both Sides Can Gain from Comprehensive Trade Talks*, (138) C.D. HOWE INST. BACKGROUNDER, June 2011.

⁶ See GOVERNMENT OF CANADA, CANADA-INDIA RELATIONS, available at: http://www.canadainternational.gc.ca/india-inde/bilateral_relations_bilaterales/canada_india-inde.aspx?lang=eng&menu_id=9&view=d.

⁷ DEPARTMENT OF COMMERCE, GOVERNMENT OF INDIA, EXPORT-IMPORT DATA BANK, available at: <http://commerce.nic.in/eidb/iecntq.asp> [hereinafter EXPORT-IMPORT DATA BANK, INDIA].

⁸ INDUSTRY CANADA, GOVERNMENT OF CANADA, TRADE DATA ONLINE, available at: <https://www.ic.gc.ca/eic/site/tdo-dcd.nsf/eng/home>. In both 2008 and 2009, India was Canada's second largest market (after the United States), taking over ten per cent of Canadian exports of potassium chloride (HS Code 310420). Its share has fallen to barely 2.5 per cent in 2012, but it is still the sixth largest importer.

years have been decided on the basis of adjudication of economic and legal arguments. The Commissioner of Competition has almost complete discretion on whether to proceed with a case and can negotiate a settlement or consent order. Participation in certain types of collusive agreements⁹ is a criminal offence per se, which means that the Crown must only establish evidence of a cartel agreement, without going into its anti-competitive effect, or (after the 2009 amendments of the Competition Act) whether the parties intended such an effect. Cartel cases have increasingly been uncontested because the accused parties plead guilty after being confronted with evidence which has been acquired in 'dawn raids' on their premises, or provided by other cartel participants in exchange for leniency. Although both these tools are available to the Competition Commission of India, neither have been used so far, and all cartel cases have been contested on various grounds.

Similarly, there is very little recent case law in Canada for mergers and other 'civil reviewable' matters. Cases usually end with consent agreements stipulating that: (a) the Commissioner has concluded that a particular transaction is likely to result in a substantial prevention or lessening of competition, and certain remedies are therefore necessary, and also (b) the respondent does not admit to these conclusions but agrees not to contest them. For all these reasons, recent Canadian jurisprudence is thin. In contrast, the Competition Commission of India (CCI) must give reasoned orders at every stage, and its final orders can be appealed to the Competition Appellate Tribunal and then the Supreme Court.¹⁰

Therefore, I take a different approach to the Canada-India comparison, based on history, institutions and common law evolution. A recurring motif is the interaction of trade and competition policy with different perspectives on

⁹ These are agreements between competitors to fix prices, allocate customers or markets, restrict supplies, or rig bids in an auction. Collectively, these are colloquially known as 'hard-core' cartels.

¹⁰ To illustrate, for each of the years 2011 and 2012, the Canadian Competition Tribunal website lists only five decisions. Almost all of these were consent orders; one was a merger decision, which was the first in several years that blocked a merger. In contrast, in the same two years, the CCI gave over a hundred final orders in cases related to anti-competitive agreements and abuse of dominance, plus nearly a hundred decisions on 'combinations' (mergers and acquisitions). See COMPETITION TRIBUNAL, CASES BY DATE DECIDED, *available at*: <http://www.ct-tc.gc.ca/CasesAffaires/CasesDateDecided-eng.asp>. See COMPETITION COMMISSION OF INDIA, <http://www.cci.gov.in>. Reasons were given in all cases, including those that were dismissed because there was no prima facie case for investigation. Note that Canada's Competition Tribunal is the first-level adjudicatory body for civil reviewable matters, while cartel cases are decided as criminal matters in regular courts. In contrast, the CCI combines investigative, inquisitorial and adjudicatory functions for the entire range of competition cases.

development. I conclude with a case study of a Canadian export cartel which has had serious effects on India, highlighting an important issue concerning the conflicting interests involved in the extraterritorial application of national competition laws.

II. THE ORIGINS OF COMPETITION LAWS AND THEIR RELATIONSHIP WITH TRADE PROTECTION

The relationship between trade and antitrust/competition policies is a matter of considerable academic debate amongst economists.¹¹ Some believe that liberalization of restrictions on trade and foreign investment exposes domestic producers to international competition, and thus serves as an effective substitute for competition law for the purpose of curbing anti-competitive business practices such as cartels and abuse of market dominance.¹² Others, however, believe that many of these practices are shielded from foreign competition because they involve locally-provided non-traded services, whether in the distribution chain for tradable goods, or ‘natural monopolies’ such as power, transport and telecommunication services. Many of these infrastructural services were earlier under public ownership, when at least their prices were restrained. But after privatization, the new owners can use their inherited control of supply and distribution networks to retain a dominant position, raising prices to ensure a satisfactory return to investors.

Moreover, foreign competition may itself be limited by the monopoly power of global corporations, or collusive behaviour in the form of international cartels, which have been prevalent in various industries since the late 19th century and have been found to be operating even in recent years.¹³ It is also pointed out that, in

¹¹ In this paper, I follow the convention of using antitrust and competition policy as interchangeable, although the latter is actually a broader category that includes the former as well as trade policy and other policies affecting competition. For an overview of the debate on trade and competition policy. See Aditya Bhattacharjea, *Trade and Competition Policy*, (Indian Council for Research on Intern'l Econ. Relations, Working Paper No.146, 2004), available at: <http://icrier.org/pdf/wp146.pdf>.

¹² “Abuse of a dominant position” is the term used in European and Indian competition law to describe illegitimate means of acquiring and retaining a dominant position in the market (“exclusionary abuse”), and also exploiting it to impose unfair terms of contract or high prices (“exploitative abuse”).

¹³ For a review of the evidence and an estimate of the impact of international cartels on developing countries, see Margaret Levenstein & Valerie Y. Suslow, *Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy*, 71 ANTITRUST L.J. 801 (2004). For a more recent review and a theoretical model that questions some of the estimates of the harm to developing countries, see Aditya Bhattacharjea, *International Cartels and Spheres of Influence*, in DIMENSIONS OF ECONOMIC

order to generate confidence in foreigners to do business, countries with a legacy of arbitrary state intervention which are opening up their markets to competition from imports or foreign investment need to signal that they now have a stable and predictable law-governed domestic regulatory regime. A modern competition law is thus regarded as complementary to liberalizing economic reforms.

A comparison of the evolution of Canadian and Indian competition laws provides a case study for this debate. Both countries' earlier competition laws were legislated against a backdrop of rising concern about the growth of industrial concentration in small domestic markets that had been insulated from foreign competition for just over a decade. In Canada, the National Policy of 1879 had nurtured domestic manufactures protected by tariffs, and a parliamentary committee found that "combines" in several industries had conspired to raise prices. It was against this backdrop that in 1889 (a year before the United States Congress passed the better-known Sherman Antitrust Act), Canada's Parliament enacted the modern world's first antitrust statute, the Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade (or the "Wallace Act", after the Member of Parliament who sponsored it). In India's case, a much more far reaching strategy of import-substituting industrialization was adopted in the late 1950s, with the express objective of attaining self-sufficiency in a range of manufacturing industries. Very high tariffs, averaging 125% in 1990-91, with peak tariffs of 355% on some items,¹⁴ were reinforced by pervasive foreign exchange and import licensing policies, with permission for imports being granted only if government agencies could certify their "essentiality" and "indigenous non-availability". In the mid-1960s, several official inquiry committees provided detailed evidence of growing concentration of economic power in the hands of a few family-controlled business groups, and of monopolistic and restrictive trade practices. This led to the enactment of the Monopolies and Restrictive Trade Practices Act in 1969 (MRTP Act). Unlike in Canada, where the Wallace Act was a private member's bill pushed by a conservative member of parliament, the MRTP Act was sponsored by the 'socialist' Indira Gandhi government.

In neither Canada nor India was protection significantly reduced for several

THEORY AND POLICY: ESSAYS FOR ANJAN MUKHERJI (K. G. Dastidar, H. Mukhopadhyay & U.B. Sinha eds., 2011)

¹⁴ VIJAY JOSHI & I.M.D. LITTLE, INDIA'S ECONOMIC REFORMS 1991-2001, 70,(1996).. The average Canadian tariff during the period of high protection was about 35%. See Randall K. Morck *et al.*, *The Rise and Fall of the Widely Held Firm: A History of Corporate Ownership in Canada*, in A GLOBAL HISTORY OF CORPORATE GOVERNANCE 95 (Morck ed., 2005) [hereinafter Morck]. This may seem trivial in comparison to India's much higher tariffs. But it should be borne in mind that transport costs in the 1880s would have been much higher than in the 1960s, affording a greater degree of 'natural' protection from imports.

decades. In India, it remained high until the liberalizing reforms of the 1990s. In Canada, after declining in the 1920s, tariffs rose again during the Great Depression of the 1930s and did not fall until well after the Second World War, when they were brought down in successive rounds of negotiations under the auspices of the General Agreement on Tariffs and Trade. In both countries, it was industrial concentration that became a political issue, not the protection that had contributed to it. This might suggest that trade restrictions at least indirectly created the political conditions for enacting a competition law, so in terms of the debate that was mentioned at the beginning of this section, competition policy was a substitute for trade liberalization. But more recently, as I show in sections 4 and 5 below, in both India and Canada, trade liberalization has created an impetus for modernizing and giving more teeth to the competition laws, so they can also be regarded as complementary. Before reviewing these recent developments, however, it is instructive to explore similarities in corporate structures and government policies other than trade and antitrust.

III. INDUSTRIAL STRUCTURE, GOVERNMENT REGULATION, AND REFORM: CANADA AND INDIA COMPARED

For the four decades prior to the introduction of sweeping economic reforms in 1991, India was a highly regulated economy, with a large public sector and widespread state controls over private firms' investment, production, technology acquisition, and financing decisions. But so was Canada until recently, at least by the standards of advanced industrial economies. As Morck et al. show in their detailed historical review, extensive state intervention in the economy has a long history in Canada, going back to French colonial times in the seventeenth century and recurring in different forms since then.¹⁵ Especially relevant to our discussion is its most recent manifestation under the Trudeau government (1968-84, with a short break), which involved nationalization of several private firms, expansion of state-owned enterprises, detailed regulation of the private sector, and complex tax and subsidy schemes affecting industry. In 1974, the Canadian Parliament passed the Foreign Investment Review Act (FIRA), which required screening of foreign investment proposals (both fresh investments and takeovers of Canadian firms) above certain thresholds to ensure that they would benefit Canada. It also empowered a government agency to impose conditions on foreign investors.

Much of the regulatory framework and subsidies (explicit as well as implicit, in the complicated corporate tax rules) survived even during the Mulroney government (1984-93), which otherwise undertook extensive privatization and trade liberalization. This was in the form of the Free Trade Agreement with the United States and the early steps towards the Marrakesh Agreements of 1994 that

¹⁵ *See id.*

created the WTO. In 1985, FIRA was replaced by the Investment Canada Act, which was designed to be much more welcoming in its procedures but still required a test of net benefits for Canadians before approving foreign investments exceeding prescribed thresholds. Although very few investment proposals have actually been rejected, critics believe that foreign investors have been discouraged by the cumbersome notification procedures and the possibility that unacceptable conditions will be imposed on them. We shall see below that one of the proposals that have been blocked may have had an indirect effect on a competition policy issue for India.

These developments uncannily mirror those in India. Under Indira Gandhi, an almost exact contemporary of Trudeau (her Prime Ministership lasted from 1966 to 1984, with a short break), the pervasive industrial controls (especially pre-authorization of industrial investments) that had first been introduced during the Second World War and tightened during the 1950s, were further reinforced. So were controls on foreign exchange utilization. The major banks, the coal industry and several ailing private firms in other industries were nationalized. The MRTP Act was passed, as was the Foreign Exchange Regulation Act in 1973, severely restricting foreign investment.¹⁶ Although successor governments since 1991 have virtually abolished licensing of industrial capacities and foreign exchange, and undertaken substantial trade liberalization, foreign investment in certain sectors is still restricted and remains a sensitive issue. This was recently evidenced in the government's initial backtracking and procrastination for almost a year on its decision to allow foreign multi-brand retail chains to enter the Indian market.

The policy and institutional environment influenced the form taken by business organizations in both countries, and hence the role of competition policy.¹⁷ According to the influential hypothesis of Khanna and Palepu, in the early stages of industrialization, family-run business groups that control a large number of firms in different sectors have an advantage over stand-alone firms, because intra-group allocations and transactions can compensate for the "institutional voids" created by the absence of well-functioning markets for capital, labour, management, knowledge and products. Although their hypothesis is primarily concerned with emerging economies like India, Morck et al. find it applicable to Canada's early industrialization at the beginning of the twentieth century.

¹⁶ India's FERA was thus an exact contemporary of Canada's FIRA. Both laws led to multinationals wholly or partly divesting equity to local shareholders, although India's Act was far more hostile and restrictive towards foreign investment.

¹⁷ This paragraph compares Randall K. Morck *et al.*, *The Rise and Fall of the Widely Held Firm: A History of Corporate Ownership in Canada*, and Tarun Khanna and Krishna G. Palepu, *The Evolution of Concentrated Ownership in India: Broad Patterns and a History of the Indian Software Industry*, both in Morck, *supra* note 14.

Developments in Canada over the next several decades favoured free-standing and widely-held firms. But they argue that family-controlled groups once again became important in the last third of the century because of another advantage - the proliferation of complicated regulations as well as tax and subsidy schemes led to the growth of corporate lobbying, for which family-controlled business groups were better suited than widely-held independent firms. Khanna and Palepu draw attention to the change in the ranking and composition of India's top business groups to argue that a similar "rent-seeking" explanation for their success is less convincing than one based on entrepreneurship in the presence of institutional voids.

Canada's interventionist policies were much less extensive than India's, and the subsequent liberalization much more so. But the basic issues arising from the introduction of market competition into economies that had grown unused to it would appear to be somewhat similar, as would be the continuing importance of family-controlled business groups, most (but not all) of which have adapted successfully to greater competition, in both Canada and India. Another common feature that earlier comparative studies have not recognized is that both countries have common law systems. In neither country were the early competition laws effective in meeting their objectives largely due to flaws in design and execution, which invited reversals by superior courts. This led in due course to sweeping amendments and ultimately new legislation in both countries. The similarities and differences in the trajectories of the two countries' competition legislation are worth exploring.

IV. THE EVOLUTION OF COMPETITION LAW IN CANADA

Canada's Wallace Act proscribed combinations or agreements that "unlawfully" and "unduly" restricted production, prevented or lessened competition in any commodity, or "unreasonably" increased its price.¹⁸ All three terms were problematic. The first ("unlawfully") made the law vacuous in the absence of any definition of what was unlawful. In effect, it merely re-affirmed the common law of restraint of trade,¹⁹ which allowed most combinations. This

¹⁸ The following discussion is based on PAUL K. GORECKI & W.T. STANBURY, THE OBJECTIVES OF CANADIAN COMPETITION POLICY 1888-1983(1984) [hereinafter GORECKI & STANBURY]; Thomas W. Ross, *Introduction: The Evolution of Competition Law in Canada*, 13 REV. INDUS. ORG. section II (1998); MICHAEL TREBILCOCK ET AL., THE LAW AND ECONOMICS OF CANADIAN COMPETITION POLICY (2002) [hereinafter TREBILCOCK ET AL.]; Thomas W. Ross, *Canadian Competition Policy: Progress and Prospects*, 37 CANADIAN J. ECON. (2004), and JAMES A. BRANDER, GOVERNMENT POLICY TOWARDS BUSINESS, 304-08 (3rd ed., 2000) [hereinafter BRANDER].

¹⁹ On the basis of legislative intent, as expressed in Parliamentary speeches, Gorecki and Stanbury (see GORECKI & STANBURY, *supra* note 18, at 13-21, 108-16) conclude that

problematic word was removed in 1900, but “unduly” and “unreasonably” survived for over a century, carrying over into successor legislations. The problem with these terms is that they left too much to judicial interpretation, which tended to be conservative. This was recognized early on, and unsuccessful attempts were made to get rid of them in the first two years after the Act was passed (including a proposal by Mr Wallace, the architect of the original Act).²⁰ These problems were reinforced by incorporation of the Wallace Act into Canada’s Criminal Code, which entailed a much higher standard of proof; that of “beyond a reasonable doubt”. This combination of nebulous standards for judging anti-competitive behaviour and the high bar set by the criminalization of offences continued to create problems in later legislations.

The Wallace Act was replaced successively by three other competition laws. The Combines Investigations Act of 1910 brought monopolization and merger activities within its ambit, but was used only once. The Combines and Fair Prices Act of 1919 created an enforcement machinery but was held by the Privy Council to be *ultra vires* the Canadian Constitution because it infringed on the rights of provincial governments. Finally, the second Combines Investigation Act was passed in 1923. It remained in force (with brief interludes) with its basic approach intact for more than half a century, with periodic amendments gradually broadening its scope to cover additional offences: price discrimination and predatory pricing in 1935, resale price maintenance in 1952, and misleading advertising in 1960; each being made criminal offences. Like the contemporaneous Robinson-Patman Act in the United States, the new provisions on price discrimination were intended to protect small businesses in the depths of the Great Depression. However, unlike in the United States, they were rarely used.

Another, and more serious, Depression-era measure was the National Product Marketing Act in 1934, which enforced cartelization via industry associations in order to stabilize prices in any industry whose producers requested it. Although the scope of the federal law was scaled back the following year, it was replaced by similar provincial laws for sectors other than agriculture and banking, while

this was the primary objective of the Act. Others are less charitable: Brander (*see* BRANDER, *supra* note 18 at 305) believes that the “complete emasculation of the original law by the insertion of a single word [“unlawfully”] seems too elegant to have arisen by chance. One suspects that at least one drafter of the original law was not sympathetic to the concept of competition policy.” Another scholar directly blames Wallace himself for deliberately watering down his own bill, which he had sponsored in an act of “fraudulent political posturing”, partly to enhance his own reputation and partly to “deflect criticism from the combine-creating effects of the protective tariff”. *See* Michael Bliss, *Another Anti-Trust Tradition: Canadian Anti-Combines Policy 1889-1910*, 47 BUS. HIST. REV. (1973), as cited in TREBILCOCK *ET AL.*, *supra* note 18, at 10.

²⁰ *See* GORECKI & STANBURY, *supra* note 18, at 17-18.

“federally-enforced cartelization remained in place until the 1990s for most agricultural sectors, and it still (as of 2005) endures for wheat, eggs and dairy products”.²¹

Even in respect of those sectors in which the state did not promote cartels, the Combines Investigations Act continued to be crippled by its phraseology in terms of undue/unreasonable conduct, and its criminalization of behaviour. Although Crown prosecutions were increasingly successful to begin with, they received severe setbacks in the 1960s and 1970s when superior courts insisted that virtual elimination of all competition was required to block a merger or penalize a price-fixing conspiracy, that direct rather than circumstantial evidence of conspiracy was required, and that the prosecution had to prove that the accused had intended not only to enter into a conspiracy, but also that they had intended to lessen competition unduly. Services and the activities of Crown corporations were not covered by the Act.

Wide-ranging legislative changes were necessary to deal with this accumulation of problems. Also, in the 1970s, new economic thinking emanating from Chicago was encouraging the competition policy community to look more benignly at certain business practices that hitherto had been condemned *per se*. In particular, mergers and vertical restrictions such as exclusive dealing, exclusive territories, and resale price maintenance (RPM) may reduce competition, but could have offsetting benefits for society in terms of efficiency of production or provision of retail services. Such cases required careful case-by-case application of the “rule of reason” rather than *per se* condemnation. After a Bill that would have resulted in a more powerful Competition Act was withdrawn in the face of business opposition in 1971, modifications to the legal framework were introduced in stages. The following compressed account deals only with those changes that addressed the issues highlighted above. First, extensive Stage I amendments of the Combines Investigations Act that took effect from 1976 explicitly did away with the requirement that the prosecution establish a complete elimination of competition in conspiracy cases. The Restrictive Trade Practices Commission (RTPC), which had been set up in 1952 to undertake enquiries and submit reports, was now given civil law powers to adjudicate on a range of non-price vertical restraints. Criminal convictions or failure to comply with RTPC orders in civil matters could now be the basis for follow-on private claims for compensation. Bid-rigging was made an offence *per se*, obviating the need to establish any anti-competitive effects, and the Act’s coverage was now extended to services.

In the second stage of reforms, the new Competition Act of 1986 decriminalized merger and monopoly offences, replacing them with new civil

²¹ See Morck, *supra* note 14 at 116.

provisions on anti-competitive abuse of dominance and merger clauses that provided for an efficiency defence and also allowed for a proposed merger to be restructured so as to address competition concerns. The new Act eliminated the requirement that the prosecution had to prove the “second intent” to lessen competition in conspiracy cases. The Act also covered Crown corporations. But much unfinished business remained.

The third stage of reforms saw extensive amendments of the Competition Act in 2009. The amendments finally buried the long-lived term “unduly” in the conspiracy section, 120 years after its birth, and made the remaining types of ‘hard-core’ cartel agreement (those that fix prices, restrict output, or allocate territories amongst the participating firms) illegal per se, sharply increasing the fines and jail terms that could be imposed in such cases. These amendments also deleted the criminal provisions on price discrimination, predatory pricing, and RPM, all of which could still be raised as civil reviewable matters under abuse of dominance, for which substantial monetary penalties could now be imposed.

V. THE EVOLUTION OF COMPETITION LAW IN INDIA

As I have recounted the evolution of India’s competition regime at length in several earlier articles,²² I shall be brief here and concentrate on those aspects most relevant to an India-Canada comparison. Unlike Canada, India’s MRTP Act did not have to get around the problem posed by devolution of lawmaking in India’s federal structure. There was no constitutional challenge similar to the one that resulted in Canada’s 1919 Act being held *ultra vires* because it infringed provinces’ rights. Thanks to the wisdom of the framers of the Indian Constitution, Item 21 in List III (concurrent list) of the Seventh Schedule of the Constitution of India covers “Commercial and industrial monopolies, combines and trusts”, providing for concurrent legislative competence between Parliament and the state legislatures. States did not attempt to amend the MRTP Act, or to pass conflicting legislation.

The MRTP Act was passed in a context of growing evidence of concentration in Indian industry, manifested in the absolute size and dominance of family-owned business groups. It drew its inspiration directly from the Directive Principles of

²² Details of many of the arguments made below, references to earlier studies and to more cases, can be found in Aditya Bhattacharjea, *India’s New Competition Law: A Comparative Assessment*, 4 J. COMPETITION L. & ECON. 609 (2008); Aditya Bhattacharjea, *Of Omissions and Commissions: India’s Competition Laws*, 47 ECON. & POL. WEEKLY (Aug. 2010), available at: <http://www.epw.in/epw/uploads/articles/15116.pdf>; Aditya Bhattacharjea, *India’s New Antitrust Regime: The First Two Years of Enforcement*, 57 ANTITRUST BULL. 449 (2012)[hereinafter Bhattacharjea, *India’s New Antitrust Regime*].

State Policy in Articles 38 and 39 of the Constitution, which mandate that the State shall direct its policy towards securing “that the ownership and control of material resources of the community are so distributed as best to subserve the common good,” and “that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment”. The second phrase featured almost verbatim in the Statement of Objects of the Act. Its core chapter on concentration of economic power singled out “large” undertakings (those whose assets, together with those of their ‘interconnected undertakings’ exceeded a certain size) and ‘dominant’ undertakings (those whose market share exceeded one-third). Such undertakings were supposed to register as “MRTP companies” and obtain government permission for substantial expansion, establishment of new undertakings, and mergers. Apart from the merger review powers, this reflected the desire of the then prevailing License Raj to “command and control” the economy, rather than a competition law perspective. However, many large or dominant firms did not register themselves; the government did not have to refer applications to the MRTP Commission, and most merger cases were approved without referral. The domination of the large industrial houses was never seriously challenged.

Like the licensing policy implemented under the Industries (Development and Regulation) Act, 1951, these MRTP restrictions were actually anti-competitive because they constrained the more dynamic large businesses from expanding at the expense of less capable ones. They may also have induced large business houses to expand by diversifying into areas beyond their core competence or by creating nominally independent companies, thus sacrificing economies of scale. Therefore, the chapter on control of concentration failed in its objective, and also adversely affected competition and efficiency. These provisions came to be seen as preventing the growth of firms to optimal scales and their entry into new activities, and were deleted as part of the sweeping economic reforms introduced by the government in 1991. This was followed by a wave of mergers, many of which involved large business groups spinning off their non-core activities or amalgamating the independent companies that they had created to avoid MRTP restrictions.²³

The MRTP Act also contained chapters on “monopolistic” and “restrictive” trade practices, corresponding roughly to abuse of dominance and anti-competitive agreements, respectively, in the competition laws of other countries. But again, implementation was ineffective. The chapter on monopolistic practices required the MRTP Commission to recommend action to the Central Government, and was seldom enforced. The Commission started out on a promising note with the

²³ Manish Agarwal & Aditya Bhattacharjea, *Mergers in India: A Response to Regulatory Shocks*, 42 EMERGING MKT. FIN. & TRADE 46 (2006).

chapter on restrictive trade practices (RTPs), and succeeded in uncovering cartels in several Indian industries.

However, the messy drafting of the RTP sections soon created problems. Section 2(o) gave a general definition of RTP as “a trade practice which has, or may have, the effect of preventing, distorting or restricting competition in any manner”. Section 33 listed several types of agreements, both horizontal and vertical, that had to be registered with the Commission. Section 38 declared that an RTP would be “deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more” of several specified conditions. Section 37 empowered the Commission to inquire into any RTP (whether registered or not), and to pass orders if it came to the conclusion that the practice was “prejudicial to the public interest”. The question arose as to whether the agreements listed in Section 33 could be held to be restrictive per se or had to be tested on the touchstone of the definition in 2(o). In *Telco v. Registrar of Restrictive Trade Agreements*,²⁴ the Supreme Court upheld the latter interpretation. It further held that certain types of restrictive vertical agreements (exclusive dealerships and exclusive territories) between a manufacturer and its distributors could actually promote competition by assuring good quality after-sales service for commercial vehicles. This amounted to a “rule of reason” analysis, in which the social benefits flowing from a restrictive business practice are weighed against its anti-competitive effect. This was quite remarkable considering that such agreements were still considered illegal per se in the United States, with its much greater experience with antitrust. It was only a few months later that the U.S. Supreme Court handed down its landmark judgment that applied similar reasoning and changed the way in which territorial restraints would be treated.²⁵ Canada’s Combines Investigation Act had been amended just a few months earlier, to give the Restrictive Trade Practices Court civil law powers to adjudicate on such restraints, which until then had been viewed through the lens of criminal jurisprudence, making charges hard to prove. The 1980 *Bombardier* case,²⁶ upholding exclusive dealing, was the first to be based on modern economic reasoning.

Returning to the Indian scenario, the MRTP Commission’s early activism on RTPs began to falter because of its very limited resources. Even in cases that it managed to pursue to a successful verdict, it could only issue “cease and desist” orders. It did not have the power to impose deterrent fines or jail sentences, so the problem was the very opposite of Canada’s. Consequently, many industries that were hauled up resumed the same practices after some time. In 1984, the MRTP

²⁴ (1977) 2 SCC 55.

²⁵ *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977).

²⁶ *Canada (Director of Investigation and Research) v. Bombardier Limited*, (1980) 53 C.P.R. 2d 4728, as discussed in *TREBILCOCK ET AL.*, *supra* note 18, at 477-99

Act was amended to make all the agreements listed under Section 33 deemed to be restrictive and therefore subject to registration, undoing the effects of the *Telco* judgment. They no longer required competition analysis and could henceforth only be defended on the basis of one of the public interest ‘gateways’ under Section 38. The same amendment inserted a chapter on ‘Unfair Trade Practices’ (UTPs) such as misrepresentation of the nature of goods and services, and gave the Commission power to award compensation.

During the 1990s, the Commission made things worse by misinterpreting the statutory definition of RTPs in Section 2(o) of the Act. It repeatedly misread a particular example which mentioned “manipulation of prices, or conditions of delivery ... in such manner as to impose on the consumers unjustified cost or restrictions” to condemn instances of ‘unfair’ pricing or delayed delivery. In conjunction with the rapid increase in the number of UTP cases and the prospect of monetary compensation, these interpretations attracted hundreds of complaints from consumers and dealers complaining about misrepresentation, deceptive marketing, defective goods, deficient services, and ‘unfair’ or discriminatory treatment by suppliers. Most of these cases were essentially contractual disputes, with no allegation of injury to competition, yet they came to dominate the Commission’s workload. The phrases “prejudice to the public interest” and “unjustified cost or restrictions” thus came to play a diversionary role similar to undue/unreasonable restriction of competition in Canada. Investigations often dragged on for years, diverting the Commission’s limited resources from real competition cases, until the Supreme Court, in a series of judgments from 1999 onwards, overturned these orders. The Supreme Court held that the Commission had wrongly interpreted the definition of RTPs by ignoring the main clause of Section 2(o), which required it to examine their anti-competitive effects.²⁷ But by then the Commission was severely understaffed and swamped by UTP cases.

After the adoption of economic reforms in 1991, several official committees in the late 1990s suggested that India needed a new competition law to replace the MRTP Act.²⁸ Although a draft Bill was drawn up in 1999, the Competition Act was

²⁷ For details of the relevant cases, see *supra* note 22.

²⁸ Strangely, India was at the same time leading developing countries in opposing the proposal by the European Union to adopt a competition policy agreement under the aegis of the WTO, which would have required nothing more than WTO members to enact non-discriminatory anti-cartel laws, with guarantees of transparency and procedural fairness. Even as the Indian government was opposing this proposal in Geneva, it went ahead and passed a far more comprehensive competition law in Delhi. Canada took a balanced view, appreciating developing countries’ inexperience with competition law and suggested a non-binding agreement that would encourage peer review and a consultation mechanism for sharing members’ experiences. Along with developing countries, Canada opposed obligations that would be subject to the WTO’s dispute settlement procedures. *See* WTO,

passed only at the end of 2002. Then the appointment of the chairman and members of the Competition Commission of India (CCI) was stalled for several years due to a writ petition challenging the appointment procedures and criteria. The case ultimately reached the Supreme Court, which expressed its disapproval but did not give specific directions in view of the government's undertaking to introduce suitable amendments.²⁹ The government took its own time, introducing and then withdrawing a Bill and then introducing another one which (due to the frequent disruptions in Parliament) was only passed in 2007. The government delayed further in making appointments to the CCI until 2009, and some Sections of the Act were enforced from May of that year. However, the sections on merger review remained controversial, and domestic and foreign business and legal circles lobbied for extensive changes. Although no further amendments were made in the Act itself, the implementing Regulations were repeatedly revised, and merger review powers were brought into force only in June 2011. Another amendment Bill was tabled in December 2012 to take care of some practical problems that have arisen in the light of experience in the last few years. Thus, the slow and incremental process of reforming Canadian law outlined above was witnessed here as well.

VI. POINTS OF COMPARISON

Having delineated the historical and institutional background, some notable points of comparison and contrast between the Indian and Canadian experiences can now be briefly discussed.³⁰ We have seen that distributional concerns triggered by protection of industry were paramount in the early competition laws of both India and Canada, rather than notions of "efficiency" that have been privileged by economists since the 1970s. But given this focus on distribution, we do observe a significant difference. In India, the issue was the domination of many sectors by a few firms, and the overall concentration of industrial control in the hands of a few family-run conglomerates. In Canada, the objective was rather to prevent the abuse of economic power, particularly at the expense of consumers, with no apparent

Working Group on Trade and Competition Policy, Report of the Meeting of 26-27 May 2003 (WT/WGTCP/M/22), ¶¶ 82-83. As a result of such widespread opposition, further discussion of the issue was dropped from the work programme of the Doha Round in 2004. For a review of the debate at the WTO, see Aditya Bhattacharjea, *The Case for a Multilateral Agreement on Competition Policy: A Developing-Country Perspective*, 9 J. INT'L ECON. L. 293 (2006).

²⁹ *Brahm Dutt v. Union of India* (2005) 2 SCC 431.

³⁰ One interesting similarity can be flagged without further comment: Section 20(4) of India's Competition Act lists 14 factors that the CCI is required to have "due regard to" in reviewing a merger. Half of them seem to have been taken from Section 93 of Canada's Competition Act, with minor changes in wording.

concern for the aggregate concentration of economic power as such.³¹ Another contrast is that in India, there does not seem to have been a similar concern for protecting small businesses through the competition law. This could have been because more direct measures were used: tax concessions, ‘reservation’ of a large number of products for small-scale producers, purchase preference mandated for state-owned enterprises, and exemption from most labour laws.

It could also be the case that the proximate cause for the laws against price discrimination and resale price maintenance (RPM) that were introduced in both Canada and the US—the growth of large retail chain stores that threaten “mom and pop” retailers—is a very recent phenomenon in India, and so has so far been limited to Indian-owned chains. The Indian government’s authorization of foreign retail chains in 2011 became a burning political issue and had to be held in abeyance for nearly a year because of widespread criticism by both the opposition and its own coalition allies. The threat to neighbourhood stores was one of the reasons advanced by critics, but none of them suggested that the competition law could be used.

I showed in the preceding section that after the 1984 amendments of the MRTP Act, the workload of the MRTP Commission was dominated by consumer protection cases. Canada also incorporated consumer protection clauses into its Combines Investigations Act. After the inclusion of clauses on misleading advertising in 1960 and deceptive marketing practices in 1976, criminal prosecutions under these heads came to far outnumber those under the competition related sections, by a ratio of more than eight to one in the 1970s and 1980s. The number of criminal prosecutions under both heads fell sharply in the 1990s, due to the decriminalization of monopoly and merger cases in the Competition Act.³² But enforcing the consumer protection clauses of the Competition Act remains a major preoccupation of the Competition Bureau, which is also responsible for enforcing the Consumer Packaging and Labelling Act and the Textile Labelling Act. As of April 1, 2011, 32 out of the 62 inquiries in progress were under the Fair Business Practices Branch, which handles such cases.³³ Unlike India’s post-1984 experience with the MRTP Act, the case load of consumer-related matters does not seem to have weakened enforcement on the competition side, perhaps because the Bureau’s resources were much larger than that of the MRTP Commission.

³¹ See GORECKI & STANBURY, *supra* note 18, at 132-33; TREBILCOCK *ET AL.*, *supra* note 18, at 7-8.

³² See BRANDER, *supra* note 20, at 324-25.

³³ COMPETITION BUREAU, GOVERNMENT OF CANADA, ANNUAL REPORT OF THE COMMISSIONER OF COMPETITION FOR THE YEAR ENDING MARCH 31, 2011, at 40, *available at*: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng//03505.html> [hereinafter COMPETITION BUREAU REPORT, CANADA].

I showed above that with the 1977 *Telco* judgment, Indian competition law moved ahead of its American and Canadian counterparts by applying the “rule of reason” to two key vertical restraints. A more recent example is the treatment of RPM, which was made an offence under the Sherman Act in the U.S. by a Supreme Court judgment in 1911, and by an amendment to Canada’s Combines Investigation Act in 1951. Similarly, there were special provisions outlawing RPM in the MRTP Act (Sections 39-41). But under Section 3(4) of the 2002 Competition Act, *all* vertical agreements (including RPM) are subject to the “rule of reason”, in line with modern economic thought. In the U.S., minimum RPM came under the rule of reason only in 2007 with the Supreme Court’s judgment in *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*³⁴. Canada decriminalised RPM only when it amended the Competition Act in 2009, making it a civil reviewable offence subject to the rule of reason. While India’s 2002 law was more in tune with economic thinking ab initio, the analytical requirements of the rule of reason, in balancing the positive and negative effects of vertical agreements, place a huge burden on a new competition agency like the CCI.

The situation is made worse by two deviations from international practice in the Indian Competition Act. First, Section 3(3) of the Act singles out the so-called hard-core cartel agreements³⁵ for special treatment, but stops short of making them offences per se. It only makes them presumptively anti-competitive, with the presumption being rebuttable if specific beneficial effects listed in Section 19(3) can be proved. Although this provision has not exonerated any party involved in a cartel case so far, it creates an unnecessary distraction. In Canada, as mentioned above, hard-core cartels are illegal per se, so the Crown prosecution need not establish anti-competitive effect or intent. Second, as pointed out by Ghosh and Ross in their comparison of the two Competition Acts,³⁶ India’s is deficient in its treatment of abuse of dominance because it does not require a test for anti-competitive effects. It covers both “exploitative” as well as “exclusionary” abuses;³⁷ but the former category is dangerously open-ended. In American antitrust law, exclusionary abuse is described as “monopolization”, and exploitation of a monopoly position to earn high profits is not frowned upon unless it involves exclusion. In Canada’s Competition Act, abuse is explicitly confined to a practice that “has had, is having or is likely to have the effect of preventing or lessening competition substantially in the market”, with no mention of exploitative abuse. The broader coverage of India’s Act has already resulted in several unnecessary inquiries and some unfortunate orders.³⁸

³⁴ 551 U.S. 877 (2007).

³⁵ See *supra* note 9.

³⁶ See *supra* notes 2, 4.

³⁷ See *supra* note 12.

³⁸ See *India’s New Antitrust Regime*, *supra* note 17. In particular, with its orders in Case

An interesting divergence between the two countries is with respect to civil versus criminal procedures and sanctions for competition offences. In order to strengthen deterrence, many jurisdictions have criminalized at least cartel offences that were previously treated as civil matters. In Canada, participation in a cartel was always treated as a criminal offence, and the 2009 amendments of the Competition Act raised the maximum sentence from five to fourteen years. But because of the legacy of its earlier laws, Canada had to decriminalize other forms of business conduct that may have redeeming social benefits even if they lessen competition. To compensate for the consequent weakening of disincentives, it had to stiffen monetary penalties when such conduct was found on balance to be a violation. In India, all competition offences are civil; only failure to comply with orders of the Commission can attract prison terms. It is doubtful whether India can follow the international trend to make participation in a cartel a criminal offence. Almost all the cartel cases decided so far have been based on circumstantial evidence, which would not have met the standard of proof of “beyond reasonable doubt”. In a few cases, there was ample documentary evidence, but the Competition Commission imposed only nominal fines.³⁹

A final point of comparison is the relationship between trade and competition policy, discussed above. As shown above, the Indian Supreme Court often showed greater understanding of competition issues than the supposedly specialized competition agency, the MRTP Commission, or the Canadian Supreme Court up to the 1990s. However, a Supreme Court judgment of 2002 was potentially devastating.⁴⁰ It set aside orders of the MRTP Commission that had imposed an interim injunction on imports of soda ash from an alleged cartel of American manufacturers whose low prices were adversely affecting the Indian soda ash industry. The Commission’s decision was no doubt reprehensible: a competition agency actually ordered the foreclosure of competition from cheap imports because it was prejudicial to “the public interest”, which it identified with the interests of shareholders and employees in the Indian industry. The Supreme Court, while recognizing the role of imports in promoting competition and the interests of consumers, set aside the Commission’s order on jurisdictional grounds, holding that the MRTP Act could not be applied to firms outside India even if their conduct had an effect in India, unless the agreement involved an Indian party. Unfortunately, this removed from the purview of the MRTP Act all anti-

No. 19/2010, *Belaire Owner’s Ass’n v. DLF Ltd. and HUDA*, the CCI has ventured into the terrain of adjudicating the fairness of a contract and its enforcement, which is the kind of non-competition issue that had diverted the MRTP Commission.

³⁹ See Aditya Bhattacharjea & Oindrila De, *Cartels and the Competition Commission*, 47 *ECON. & POL. WEEKLY* (Sept. 1, 2012).

⁴⁰ *Haridas Exports v. All India Float Glass Manufacturers’ Association*, 6 SCC 600 (2002).

competitive foreign conduct, including international cartels which have been increasingly targeted by antitrust authorities in several jurisdictions, including Canada.⁴¹ It amounted to repudiating the ‘effects doctrine’ of competition law, whereby jurisdiction is exercised by the country where the anti-competitive effects of foreign business practices are felt. The new Competition Act passed the same year remedied the situation by explicitly embodying the effects doctrine in Section 32.

In another judgment involving trade and competition policy, the Supreme Court overlooked the distinction between dumping and predatory pricing, holding that artificially low import prices would eliminate domestic production and allow the foreign producer to acquire a monopoly and jack up the price again.⁴² This line of thinking has long been discredited by economists. Establishing a charge of predatory pricing requires evidence that: (a) the alleged predatory price lies below an appropriate measure of the producer’s costs, and (b) an assessment of conditions in the industry to establish whether the target will actually be eliminated and whether the alleged predator can then raise prices and recover its lost profits without attracting new entrants. Most anti-dumping petitions would fail under these antitrust standards, but succeed because of the much laxer standards allowed by the WTO Anti-dumping Agreement.⁴³ These require a domestic industry that wants anti-dumping measures imposed on imports to demonstrate that: (a) the imported product is priced below ‘normal value’ (usually the price charged in the exporter’s own market), not below costs, and (b) the imports caused ‘injury’ to the domestic industry, not the likelihood that it would have to close down. Succinctly put, anti-dumping laws protect competitors, while competition laws should protect competition.

It is therefore much easier to prove dumping as compared to predatory pricing, and industries which are hurt by foreign competition almost always resort to seeking anti-dumping measures. India is no exception. Cheap imports had not been successfully targeted by predatory pricing accusations under the MRTP Act (or have been so far under the Competition Act), but India has become the world’s

⁴¹ See RAMASWAMY, *supra* note 1. Ramaswamy has an informative table listing several cases during 2000-2005 in which the Canadian authorities fined foreign multinational firms for cartels adversely affected Canadian consumers. More recent cases involve the collusive fixation of air cargo surcharges, in which many international airlines including Air France, British Airways and Qantas have pleaded guilty and paid substantial fines. See COMPETITION BUREAU REPORT, CANADA, *supra* note 33.

⁴² Reliance Industries Ltd. v. Designated Authority, 10 SCC 368 (2006), ¶¶ 10-12.

⁴³ Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Marrakesh Agreement establishing the World Trade Organization, 15 April, 1994, Annex 1A, Legal Instruments-Results of the Uruguay Round, 33 I.L.M. 1125 (1994).

biggest user of anti-dumping remedies, with 677 investigations being initiated from 1995 to 2012. The United States and the European Union were far behind in second and third place, with 469 and 451 initiations, respectively. Canada, which passed the world's first anti-dumping law in 1904 and which was as active as the EU and US until the 1980s in using anti-dumping remedies, is now only ninth in place with 166 initiations. Five of India's initiations were directed against exports from Canada, while six of Canada's were directed against Indian exporters, so this is not a major bilateral issue—exports from China are the prime target for both.⁴⁴

There have been very few predatory pricing cases in Canada. Until the 2009 amendments, predatory pricing could be treated as a criminal matter and was therefore hard to prove “beyond reasonable doubt”. Concurrently, the 1986 Act provided for it to be challenged as a civil reviewable matter, but the Competition Bureau employed guidelines that reflected economists' concerns about market structure and the alleged predator's recoupment of lost profits. There was only one partially successful case in 2003, in which Air Canada was found to have engaged in predation under clauses of the Competition Act specific to the airlines industry. But the finding did not lead to a penalty, because the firm declared bankruptcy, and the much-criticised airline-specific clauses were deleted by the 2009 amendment Act. In fact, Canada has shown considerable sophistication in recognizing the anti-competitive role of anti-dumping and the ability of import competition to discipline the monopoly power of domestic firms. In a 1989 decision, it approved a merger which would have led to a monopoly of high voltage transformers but imposed a condition that the applicant should seek approval for accelerated tariff reductions on imports and also undertake not to initiate any anti-dumping cases for five years.⁴⁵

VII. THE POTASH CARTEL: A CASE STUDY

As discussed above, Section 32 of India's Competition Act provides for jurisdiction over parties located outside India and actions taking place outside India that have an “appreciable adverse effect on competition in the relevant market in India”. This is an explicit assertion of the “effects doctrine” which is now almost universal in national competition laws. On the other hand, section 3(5)(ii) exempts anti-competitive agreements to the extent they relate exclusively to exports. This, too, is an almost universal feature of national competition laws.⁴⁶ The corresponding export exemption in sub-section 45(5) in Canada's Competition Act

⁴⁴ See WTO, *Anti-Dumping*, available at: http://www.wto.org/english/tratop_e/adp_e/adp_e.htm.

⁴⁵ See TREBILCOCK *ET AL.*, *supra* note 18 at 263.

⁴⁶ See Aditya Bhattacharjya, *Export Cartels: A Developing Country Perspective*, 38(2) J. WORLD TRADE 331 (2004).

is confined to the offences listed under sub-section 45(1): the so-called 'hard core' cartel agreements between competitors to fix prices, restrict supply, or allocate customers or territories. Sub-section 45(5) also specifies some exceptions to the exemption, so it is worth quoting in full:

45(5) No person shall be convicted of an offence under sub-section (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement

- (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;
- (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
- (c) is in respect only of the supply of services that facilitate the export of products from Canada.

India would do well to add similar qualifications to the blanket exemption in its Act, consistent with its underlying objective of encouraging exports. But my focus here is the application of the main clause of sub-section 45(5) to immunize Canadian export cartels. In particular, I discuss Canpotex, a company owned by three potash producers, with mining operations in the Canadian province of Saskatchewan. Canpotex manages the entire export sales of the three member companies (except their sales to the United States, where it would attract the hostile gaze of the Sherman Act), and is the world's largest potash exporter. Although legally a joint venture, in effect it is an export cartel, fixing prices and supplies collectively on behalf of the member firms, who would otherwise compete against each other. Along with the Belarusian Potash Company, Canpotex controls nearly 70 per cent of the world's potash exports.

India imports its entire requirement of potash, which is a vital fertilizer, and provides substantial subsidies to keep it affordable for farmers. As pointed out above,⁴⁷ India is one of Canada's largest markets, and according to Indian official figures, in the last five years Canada has provided between 15 and 25 per cent of India's potash imports.⁴⁸ In an article in a leading Indian business newspaper, Dr Frederic Jenny, a former Vice-Chairman of the French competition authority, pointed out that global potash prices had risen sharply since 2005, and India was

⁴⁷ See *supra* note 8.

⁴⁸ See EXPORT-IMPORT DATA BANK, *supra* note 7. Figures are for imports of potassium chloride (HS code 310420). Belarus and Russia also had large shares of India's potash imports in recent years, so coordination with the producers of these countries could limit competition and sustain high prices.

over-paying for imports of potash due to the market being controlled by these cartels.⁴⁹ Effectively, a large proportion of the Indian government's fertilizer subsidy is going to the foreign producers. Jenny also drew attention to the Canadian government's blocking of a bid by the Australian mining giant BHP Billiton, which had tried to take over PotashCorp, the largest constituent of Canpotex. Billiton had indicated that it would take PotashCorp out of Canpotex, and the Canadian government feared that this would bring about the collapse of the cartel and adversely affect Canadian tax revenues.⁵⁰ In a more recent article, Jenny has drawn attention to a bid by PotashCorp to buy the Israeli firm ICL, one of the world's few remaining independent potash producers. This would certainly strengthen the cartel's grip on the world markets.⁵¹

Jenny posed these developments as endangering India's food security through the high price of fertilizers. Faced with a growing budget deficit, the government cut the subsidy on potash by ten per cent in 2012-13.⁵² But my own reading of the situation is that the continuing subsidy also involves a transfer from Indian to Canadian taxpayers, in particular those of Saskatchewan, who would have to pay more taxes to compensate for any loss of tax revenues from Canpotex. As both governments are under fiscal stress and trying to reduce budget deficits, another way of looking at this issue is as follows: if the loss of tax revenues from Canpotex would force the Canadian government to cut back on its provision of social services, and if India has to curtail such services to finance its fertilizer subsidies to offset the high cartel price, then allowing the cartel to continue would require Indians rather than Canadians to sacrifice social services. Either interpretation starkly reveals the connections between trade, competition and development.

Canpotex poses a difficult challenge for India's competition authorities. Should the CCI use its extra-territorial reach under section 32 of the Competition Act to strike at a foreign cartel and block a purely foreign merger that could have an appreciable adverse effect on competition in India? This would certainly provoke an international furore. Instead, India's large importers have used their market power to delay shipments and negotiate lower prices. In February this year, Canpotex finally signed a contract with unspecified Indian buyers at much lower

⁴⁹ Frederic Jenny, *Global Potash Trade and Competition*, ECON. TIMES, Nov. 25, 2010.

⁵⁰ *Id.*

⁵¹ Frederic Jenny, *Does Potash Corp's Merger with ICL Pose Great Threat to India's Food Security?*, ECON. TIMES, Jan. 4, 2013. In recent years, India has imported more potash from Israel than Canada (source as in n 48 supra), so this merger would have a significant effect on competition in India.

⁵² C.K. Nayak & Rajendra Jadhav, *Govt Cuts Subsidy on Most Fertilizers*, REUTERS, available at: <http://in.reuters.com/article/2012/03/01/india-fertiliser-subsidy-idINDEE8200AD20120301>.

prices than in the previous year, although still much higher than in earlier years.⁵³ Presumably, now the Indian parties will not approach the CCI. But the case still remains an interesting illustration of how in an increasingly globalized world, foreign business practices and merger decisions pose a challenge to national competition laws and authorities that are based on territorial jurisdiction.

VIII. CONCLUSIONS

The comparison of India and Canada undertaken in this article revealed some striking similarities. In both countries, competition laws were first enacted against the backdrop of growing concern about the role of large family owned business groups which had flourished in an era of protection from imports. Both India and Canada later had governments that created complex systems of taxes and subsidies (and in India, licensing regulations) and almost simultaneously enacted laws restricting foreign investment. In neither country were the competition laws effective for many years, due to poor drafting, unhelpful interpretations by superior courts, business opposition and a lack of political will. In both countries, the modernization of competition laws followed economic reforms in other areas. Notable in both countries was the persistence with which dysfunctional legal provisions—even single words—survived despite widespread recognition of their detrimental effects on the enforceability of the legislation.

When change ultimately came, it happened in stages. If anything, desirable changes came about rather quicker in India, as witnessed by the Supreme Court's overturning of blatantly erroneous orders of the MRTP Commission, and the legislature's amending of the Competition Act far more frequently to correct potentially damaging Supreme Court judgments as well as weaknesses in the original Act that became evident in the course of implementation. In its early "rule of reason" treatment of vertical restraints, India's Competition Act was a few years ahead of its Canadian counterpart, although delayed enforcement neutralised this head start. On the other hand, as first pointed out by Canadian scholars, India's treatment of abuse of dominance is highly problematic. These features put a tremendous burden on the analytical abilities of the Competition Commission of India.⁵⁴ My case study of the Canpotex export cartel flagged a possible conflict

⁵³ *Canpotex Sells Potash to India at Discount*, REUTERS, available at: <http://www.reuters.com/article/2013/02/07/potash-canada-india-idUSL1N0B7CLK20130207>.

⁵⁴ Given the similarities in the economic environment and its much longer experience of competition law enforcement, capacity building initiatives by the Canadian Competition Bureau might be more helpful than the assistance that has already been provided to the CCI by the U.S. and EU authorities. However, my impression after visiting the Bureau is that after an abortive attempt to assist Vietnam to set up a competition agency some years ago, Canada would like to confine itself to multilateral forums like the International

between the countries and showed how the CCI may have to take up sensitive cases involving foreign business practices with anti-competitive effects that impinge on vital development priorities in India.

Competition Network (a consultative body of national competition agencies), where it is playing an active role.