

Competition Law & Anti-Dumping Duty: An Indian Perspective

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Abstract- This paper examines the use of anti-dumping and competition laws in promoting and maintaining competition in the market. The recent increase in the use of anti-dumping mechanism to restrict competition and debate on anti-dumping versus competition is highlighted. The paper discusses mechanism whereby antidumping provisions are not abused by domestic importers and the market is left open for effective competition.

Keywords-Anti-dumping, competition, MRTP, GATT

I. INTRODUCTION

The process of economic liberalization and institutional reforms which formally began in 1991 has significantly shaped India's transition from a planned economy to a market economy. The substitution of the erstwhile Monopolies and Restrictive Trade Practices Act (MRTP), 1969 by the Competition Act, 2002 is an exercise to facilitate India's transition towards a market economy. The new Competition policy is aimed at promoting and sustaining competition in Indian market and ensuring overall economic efficiency in the wake of a liberalized economy. The process of opening up of markets may pose threat to domestic industries, which may wilt in the wake of increased foreign competition. Such threats from foreign competition may not always be 'fair'. In order to allay these fears, the multilateral framework for trade liberalization under the General Agreement on Tariffs and Trade (GATT) provided for certain contingency measures such as 'antidumping' to protect the domestic industry from 'unfair trade practices' such as 'dumping'. India enacted its framework of antidumping laws and rules in 1995 in order to give effect to India's commitments under the World Trade Organisation (WTO). Since then, India has emerged as one of the most prolific users of antidumping measures in the world. The use of antidumping law as a viable trade policy measure to protect domestic industry together with the enactment of the Competition Act, 2002 to promote and sustain competition in markets presents a unique policy challenge and is one of the more important policy concerns facing India. Prima-facie competition law and antidumping law may be at crossroads. While competition law is focused on the larger goal of protecting and promoting competition in markets, antidumping law has a much narrower focus, i.e. protecting the domestic industry. Given the divergence in the objectives of the two sets of laws, it is important to analyse the possible ways in which the two may interact and determine whether they are in conflict with each other. Particularly in light of the fact that the competition law regime in India is still evolving, it is imperative to understand the manner in which the Competition Act, 2002 may interact with the existing antidumping law.

The General Agreement on Tariffs and Trade lays down the principle to be followed by the member countries for imposition of Anti-Dumping duties, Countervailing duty

and Safeguard measures. It stipulates that 'in order to offset or prevent dumping a contracting party may levy on any dumped product an antidumping duty not greater in amount than the margin of dumping in respect of such countries.'

Pursuant to these detailed guidelines have been prescribed under the "Agreement on implementation of Article VI of the General Agreements on Tariffs and Trade, 1994" which have also been incorporated in the national legislation of the member countries of the WTO. Indian laws were amended with effect from 1.1.95 to bring them in line with the provisions of the said agreement. In India, the investigations for a product allegedly being dumped is carried out under Sections 9A of the Customs Tariff Act, 1975 read with Section 9B and the rules made there under.

II. ANTI-DUMPING LAW IN INDIA

Meaning of Dumping: According to the "Agreement on implementation of Article VI of the General Agreements on Tariffs and Trade, 1994", a product is to be considered as being dumped, i.e. introduced into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. If there are no sales of a like product in the ordinary course of trade in the domestic market or if, due to a particular market situation or low volume of sales in the domestic country, a fair comparison between the export price and the domestic price cannot be made, other pricing options given in the agreement could be explored to determine the margin of dumping.

To put it simply, dumping is said to have taken place when an exporter sells a product in the market of another country at a price less than the price prevailing in the domestic market of the exporter's own country which causes or threatens to cause material injury to an established industry in the importer country. Dumping of goods in the most common economic sense, means to send goods unsalable at a high price in the home market to a foreign market for sale at a low price, to keep up the price at home and to capture a new market.

Thus the practice of dumping is detrimental to the domestic producers since their products are unable to compete with the artificially low prices imposed by the

imported goods and after such destruction takes place, prices are then raised.

result of misuse of these provisions by various nations to provide protection to their domestic firms.

III. RATIONALE OF ANTI-DUMPING MEASURES

In free trade, firms are allowed to charge different rates in different markets. The result would be that firms would charge lower prices in foreign markets and higher prices in domestic markets, leading to material injury to the domestic producers. Had price discrimination taken place by a monopoly firm within one economy, the government would have intervened to stop consumer exploitation by enforcing an Act similar to the MRTP Act, in India. Hence, in the international context, it is the antidumping duty that protects the domestic producers initially and consumers' in

the long run. The duty is justified because in case of many industries the startup period is long and start-up costs are also high. Once these firms are forced out of the market as a result of dumping by exporters, it is very difficult for them to restart when the same exporters raise prices.

Usually, the intentions of charging such low prices to foreign consumers is to be able to wipe out the domestic industries and eventually acquiring monopoly power in the foreign market (i.e. using predatory pricing). Thus it is on this ground that the anti-dumping duties have been justified. The main intention is to protect the domestic industries.

Dumping is the most subtle form of entering into a new market since the exporters sell their goods to a foreign market at prices lower than the comparable prices of the same goods in the domestic market. Therefore, the most frequently offered economic justification for antidumping laws is that these laws protect the competitive process and the consumer from monopoly power of the foreign exporters.

The purpose of Section 9A was that our industries which had been built up after independence with great difficulties must not be allowed to be destroyed by unfair competition of some foreign companies. The purpose is not protectionism in the classic sense but to prevent unfair trade practices. Consequently, amendment to Section 9A was made in pursuance to Article VI of GATT, 1994.

However, it should be noted that Dumping per se is not illegal. It is not uncommon for prices to vary from time to time owing to demand and supply conditions in the market. It is also not unusual that the export prices are lower than the domestic prices and what is to be protected by Anti-Dumping duties is that such a practice should not cause or threaten to cause material injury to the domestic producers. Hence, Anti-dumping action can be taken in case of (a) actual material injury, (b) threat of material injury¹⁰ and (c) retardation of the establishment of a domestic industry. The determination of injury is based on the volume of the dumped imports and its effect on the prices in the domestic market. The burden of proof for proving injury is on the domestic producers and certain factors like decline in sales, profits, output, market share, productivity, etc. can be put forth by the domestic industry. However, despite the requirement being stringent, experiences worldwide show that a large number of investigations result in affirmative findings which is a

IV. INTERFACE BETWEEN COMPETITION LAW AND ANTI-DUMPING

The basic objective of the Competition Act, 2002 is to prevent practices having an appreciable adverse effect on Competition, to promote and sustain Competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in the Indian markets. The touchstone of Competition law in India is to avoid an appreciable adverse effect on the relevant market. On the other hand, the object of Anti-Dumping duty is to protect the domestic industry from any material injury resulting from the Dumped goods. It is true that theoretically the inherent objective of both the phenomenon is to promote free and fair competition in the market; however, there is a vast gap between the two in actual practice. While Competition law is focused on larger aim of promoting and protecting competition in markets, anti-dumping legislation has a slightly tapered focus, i.e. protecting the domestic industry alone without appreciating the effects on the end users.

Concept of Predatory Pricing and Normal Value

Theoretically, the Competition Laws and Anti-Dumping Laws converge on one important point i.e. the concept of predatory pricing. Predatory pricing occurs when a firm prices a good below its cost with the objective of driving away competitors and capturing a dominant market position from which it can then extract supernormal profits. The consequences of predatory pricing are such that the producers would have a de facto monopoly which would give them an opportunity to dictate the market at its own terms which is in fact prohibited under Competition Law.

The anti-dumping duties are meant to act against 'unfair dumping' of goods in another market and hence are economically justifiable when a foreign producer charges unfair predatory prices therefore, while Competition Law basically deals with domestic trade, anti-dumping laws are effective for International Trade. However, if anti-dumping laws were enacted with the goal of combating predatory pricing, any situation where a foreign import's price fell below its average variable cost, would be a case of dumping hence, to make the imposition of these duties easier, the agreement introduced the concept of "normal value."

Normal Value in simple term means the price charged by a foreign producer in its home market. In other words, any firm that charges less for its product overseas than it does at home can be found guilty of dumping. It is not necessary that a firm adopting for predatory pricing may necessarily be 'unfair' in its approach. It is already stated that it is not unusual for prices to vary from time to time in the light of supply and demand conditions or the competitive structure of the firm's home and export markets are different. In fact, the net effect for the importing country is often positive since consumers' experience welfare gains from lower prices; therefore, it is not advisable to impose anti-dumping duties without having an economic justification for doing so since it only

results in benefiting domestic producers at the expense of consumers and foreign producers.

Therefore, while the Competition Law encourages free and healthy competition and supports the growth of a dynamic and open market for competitors, the anti-dumping law is seeming more like a shield protecting the domestic producers from the challenges which they might face from foreign competitors.

Issue of Price Discrimination

Under the Competition Law 'price discrimination' which adversely affects competition in the market is prohibited, therefore if it can be shown that the price adopted does not hamper consumer welfare neither does it create an unfair discrimination to other sellers, it may be permitted. Under Anti-Dumping provisions, 'price discrimination' is synonymous with dumping and the effect of the instance of 'price discrimination' under antidumping is examined with the narrow parameters of 'injury' only to the 'domestic industry' and once dumping and injury have been established, then the examination does not take into account broader economic concerns, such as consumer's interest, the interests of other users of the product and the like whilst imposing an antidumping duty.

Thus under competition law the definition of 'price-discrimination' is much broader and extends to 'unfair or discriminatory' price in purchase or sale of goods or provision of services whereas Anti-dumping law on the other hand is concerned with only one type of price discrimination, i.e. 'dumping'. It only seeks to address the issue of price discrimination between two different geographic markets, evidenced by a higher 'normal value' as compared with 'export price'.

V. THE EFFECT OF ANTI-DUMPING MEASURES ON COMPETITION IN INDIA

There is widespread debate across circles on whether imposition of anti-dumping duties promotes fair competition or restricts competition in a relevant market and as this debate progresses, we draw the analogy that since favouring either side is not possible at present, there can be no doubt that excessive use of antidumping duty is bound to be harmful to fair competition in the long run. The Anti-Dumping duties are seen by certain sections as a protectionist measure that has the effect of artificially reducing fair competition between competitors and thereby strengthening monopolistic positions for certain producers in the market. In this regard, an instance would substantiate the argument, which is the initiation of Anti-Dumping investigation against clear glass imports from Pakistan, UAE and Saudi Arabia where the domestic manufacturers have alleged material injury by dumping the goods in the market. It has to be noted that the Competition Commission of India held a detailed inquiry into a possible cartelization by the same producers who had filed a complaint for the alleged dumping of clear float glass into India. In that case the Glass Manufacturers held about 80% of the total market share and hence there was a high possibility of cartelization and abuse of dominant position by them. There can be various such examples where the dumping measures have, instead of creating a level playing field for different producers have in fact facilitated the domestic producers to continue to

enjoy their dominant position in the market which ultimately leads to high prices for the average Indian consumers.

The trend for reaching out to Anti-Dumping authorities for creating trade barriers and restricting Competition is ever increasing. Over the last decade, India has been an aggressive user of antidumping laws as an offensive weapon against their trading partners. Measured by the number of antidumping measures implemented between 2003 and 2010, India ranks first (at 217) ahead of all other countries, developed or developing, therefore Indian companies have been among the top users of anti-dumping measures albeit many of those are initiated not for bona fide protection but to sustain their dominant position in the market. Let us take an example where there are 2 main manufacturers of 'X' good in the market accounting for more than half of the total production of 'X'. They are entitled to file a petition for the initiation of Anti-Dumping duties against the foreign imports of 'X' as being representative of the domestic industry. The investigations would now determine whether there has been a material injury or a threat of material injury to the domestic producers. The investigation would not bother to delve into the effects of the possible imposition of the duties on the ultimate consumers. Repeatedly hapless consumers of the product have vigorously protested against the imposition of anti-dumping duties on the basis that the same constitutes handing over complete control of the market to a few big domestic players who, according to them, then proceed to carefully control production volumes, manipulate market prices, refuse to deal and indulge in whole slew of practices that are blatantly anti-competitive under the Competition Law. The most plausible justification of imposing anti-dumping duties was to formulate a trade policy which curbs anti-competitive practices by foreign firms by deterring predatory pricing. However, the antidumping agreement lost sight of this objective. Now, it is used essentially sought by industries that enjoy near monopoly conditions in the domestic market for safeguarding their position in the market.

While both competition and anti-dumping laws originated with the same objective, the modern antidumping practice has come to actually facilitate the kind of unfair and anticompetitive behaviour which it originally intended to prevent.

The mere presence of increasingly protectionist antidumping laws has resulted in a change in the economic behaviour of firm wherein instead of profit maximization through healthy price competition, firms choose to seek protection or undertake steps that are more likely to lead to the imposition of an antidumping duty on imports. On the other hand, Competition policies stimulates investment in research and development and leads to the production of higher value added goods and services along with maximizing consumer welfare and protecting the conditions of competition. Whilst there are of course instances of firms failing as a result of increased competition, that nevertheless helps drive more efficient deployment of capital. Overall the welfare of society as a whole is improved by competition and harmed by the irrational imposition of antidumping duties.

VI. CONCLUSION

The misuse of anti-dumping provision and imposition of high duty using questionable interpretations of rule and quality of data is becoming a serious concern. The misuse is becoming rampant and rather than the economic motives, it is the political, strategic and retaliatory motives that are affecting the anti-dumping investigations and outcomes the most.

It is impossible to ignore that the disregard to the welfare of the ultimate consumer is hurting these provisions the most.

The costs of imposing anti-dumping measures clearly outweigh the benefit accorded to the protected domestic industry. The rampant use of such duties can be said to be protectionist since it protects the producers at the expense of the consumers resulting in higher prices, less consumer choice and lower quality of goods thereby making a mockery of the Competition laws in force.

Thus the existence of anti-dumping law hurts competition both ways, one by forcing exporters to sell at higher prices and other by providing the domestic producers the freedom to charge higher prices than what would be otherwise possible.

Under Competition Law, consumer welfare is one of the main concerns and in order to remedy the above mentioned shortcomings of the Anti-Dumping laws regarding ignorance of consumer interests, the concept of 'public interest' test should be incorporated in the existing framework such as used by European Commission in its anti-dumping laws. This would reintroduce competitive considerations into the antidumping process and change the general mode of practice of the national antidumping authorities. This would also resolve the other issue of "protectionist" approach of domestic authorities since the "public interest" clause would include the consumer's interest in the long run thereby supplementing the primary approach of protecting domestic producers.

In fact, the WTO Anti-Dumping Agreement provides for inclusion of such a test in determining anti-dumping duties. It states that "the authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury and causality." Further, in *Haridas Exports v. Float Glass Manufacturers Association*, the Supreme Court has held that "the import of material at prices lower than prevailing in India cannot per se be regarded as being prejudicial to the public interest. The availability of goods outside India at prices lower than those which are indigenously produced would encourage competition amongst the Indian industry and would not per se result in eliminating the competitor." Therefore, in hindsight the Competition

Commission of India should take up the issue of public interest and other related concerns with the lawmakers for effective use of the anti-dumping duties.

To conclude it can be sufficiently stated that the Anti-Dumping measures have deviated from its ultimate motive and has now evolved into a counterproductive legal claim in the hands of monopolistic domestic industry. This has to be remedied at the earliest otherwise it would not be an exaggeration to say that these duties can lead to the collapse of our Competition policy.

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