INTERNATIONAL TRADE:
DUMPING AND ITS IMPACT ON COMPETITION

RESEARCH PAPER

SUBMITTED TO:
Dr. Sanjay Kumar Pandey
Joint Director (Law)

SUBMITTED BY:
Mansi Bahal
NALSAR University of Law, Hyderabad
(Masters in Business Laws and Administration 2011-13)

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Chapter 1

Introduction

1.1 The new economic policies 1991(LPG) progressively widened the space for market forces and reduced the role for government in business. It was recognised that a new competition law was also called for because the existing Monopolies & Restrictive Trade Practices Act, 1969 (MRTP Act) had become obsolete in certain respects and there was a need to shift the focus from curbing monopolies to promoting competition. A high level committee was appointed in 1999 to suggest a modern competition law in line with international developments to suit Indian conditions. The committee recommended enactment of a new competition law, called the Competition Act, and the establishment of a competition authority, the Competition Commission of India, along with the repealing of the MRTP Act and the winding up of the MRTP Commission. It also recommended further reforms in government policies as the foundation over which the edifice of the competition policy and law would be built.

The Competition Act, 2002 came into existence in January 2003 and the Competition Commission of India was established in October 2003. The Act states that "it shall be the duty of the Commission to eliminate practices having adverse effect on competition, to promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India." Thus, it gives the Commission a heavy mandate. ¹

Dumping, is a pricing practice where a firm charges a lower price for exporting goods than it does for the same goods sold domestically. It is said to be the most common form of price discrimination in international trade. Dumping can only occur at places where imperfect competition and where the markets are segmented in a way such that domestic residents cannot easily purchase goods intended for export. It is a subtle measure of protection which comes under the non-tariff barriers and is product and source specific. Antidumping duties were initiated with the intention of nullifying the effect of the market distortions created due to unfair trade practices adopted by aggressive exports. They are meant to be remedial and not punitive in nature. A harmful to the domestic producers as their products are unable to compete with the artificially low prices imposed by the imported goods. As a method of protection to the domestic industries, antidumping duties are thus levied on the exporting country which has been accused of dumping goods in another country. As the antidumping duty is only meant to provide protection to the

¹Essay on Competition Law and Policy by Vinod Dhall, 2007
domestic firms in the initial stages, as per the international laws, the antidumping legislations may last for a maximum period of five years.

The General Agreement on Tariffs and Trade lays down the principles to be followed by the member countries for imposition of anti-dumping duties, countervailing duties and safeguard measures. Pursuant to the GATT, 1994, detailed guidelines have been prescribed under the specific agreements 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 respective GATT agreements.

The Sections 9A, 9B and 9C of the Customs Tariff Act, 1975 as amended in 1995 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 framed thereunder form the legal basis for anti-dumping investigations and for the levy of anti-dumping duties. These laws are based on the Agreement on Anti-Dumping which is in pursuance of Article VI of GATT 1994.

1.2 Research Objectives

The project topic attempts to explore the linkages between Competition Law and Anti-Dumping Policies and how are they related and do these anti-dumping duties affect competition or not?

1.3 Research Methodology

The research methodology adopted is mainly Non-doctrinal and descriptive. The sources of data include secondary sources like Articles, books and Journals.

1.4 Limitations of the Research

The research paper suffers from certain limitations, for e.g. the limited access to sources of data and materials, limitations with respect to time and also with respect to the limited space in which the researcher has restricted his research work. However, the researcher has ensured that only standard text books, commentaries and materials are being resorted to while carrying on his research.
Chapter 2
International Trade

2.1 What is International Trade why it is needed?

Trading globally gives consumers and countries the opportunity to be exposed to goods and services not available in their own countries. Almost every kind of product can be found on the international market: food, clothes, spare parts, oil, jewellery, wine, stocks, currencies and water. Services are also traded: tourism, banking, consulting and transportation. A product that is sold to the global market is an export, and a product that is bought from the global market is an import. Imports and exports are accounted for in a country's current account in the balance of payments.2

Global trade allows wealthy countries to use their resources - whether labour, technology or capital - more efficiently. Because countries are endowed with different assets and natural resources (land, labour, capital and technology), some countries may produce the same good more efficiently and therefore sell it more cheaply than other countries. If a country cannot efficiently produce an item, it can obtain the item by trading with another country that can. This is known as specialization in international trade.

Let's take a simple example. Country A and Country B both produce cotton sweaters and wine. Country A produces 10 sweaters and six bottles of wine a year while Country B produces six sweaters and 10 bottles of wine a year. Both can produce a total of 16 units. Country A, however, takes three hours to produce the 10 sweaters and two hours to produce the six bottles of wine (total of five hours). Country B, on the other hand, takes one hour to produce 10 sweaters and three hours to produce six bottles of wine (total of four hours).

But these two countries realize that they could produce more by focusing on those products with which they have a comparative advantage. Country A then begins to produce only wine and Country B produces only cotton sweaters. Each country can now create a specialized output of 20 units per year and trade equal proportions of both products. As such, each country now has access to 20 units of both products.

We can see then that for both countries, the opportunity cost of producing both products is greater than the cost of specializing. More specifically, for each country, the opportunity cost of producing 16 units of both sweaters and wine is 20 units of both products (after trading).

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2 http://www.investopedia.com/articles/03/112503.asp#ixzz28gQ4cOr6 (visited on 15th October 2012).
Specialization reduces their opportunity cost and therefore maximizes their efficiency in acquiring the goods they need. With the greater supply, the price of each product would decrease, thus giving an advantage to the end consumer as well.

Note that, in the example above, Country B could produce both wine and cotton more efficiently than Country A (less time). This is called an absolute advantage, and Country B may have it because of a higher level of technology. However, according to the international trade theory, even if a country has an absolute advantage over another, it can still benefit from specialization. ³

2.2 Other Possible Benefits of Trading Globally ⁴

a) FDI: International trade not only results in increased efficiency but also allows countries to participate in a global economy, encouraging the opportunity of foreign direct investment (FDI), which is the amount of money that individuals invest into foreign companies and other assets. In theory, economies can therefore grow more efficiently and can more easily become competitive economic participants. For the receiving government, FDI is a means by which foreign currency and expertise can enter the country. These raise employment levels, and, theoretically, lead to a growth in the gross domestic product. For the investor, FDI offers company expansion and growth, which means higher revenues.

b) Relative Profitability: The rate of profit to be earned from export business may be higher than the corresponding rate on the domestic sales.

c) Insufficiency of Domestic Demand: The level of domestic demand may be insufficient for utilizing the installed capacity in full. Export business offers a suitable mechanism for utilizing the unused capacity. This will reduce costs and improve the overall profitability of the firm. Recession in the domestic market often serves as a stimulus to export ventures.

d) Reducing Business Risks: When a firm is selling in a number of markets, the downward fluctuations in sales in one market, which may be the domestic market, may be fully or partly counter balanced by a rise in the sales in other markets. Secondly, geographic diversification also provides the momentum to growth in as much as a single or few markets will have only limited absorptive capacity.

e) Legal Restrictions: Governments may impose certain restrictions on further growth and capacity expansion of some firms within the domestic market in order to achieve

certain social objectives. But there may not be any such restrictions, if the additional capacity is utilized for exports. Then the firm may be tempted to export its products abroad.

f) **Technological Improvement**: Entry to export market may enable a firm to pick up new produce ideas and to add to product line, improve its product, reduce costs and discover new applications for its product.

### 2.3 Free Trade vs. Protectionism

As with other theories, there are opposing views. International trade has two contrasting views regarding the level of control placed on trade: free trade and protectionism. Free trade is the simpler of the two theories: a laissez-faire approach, with no restrictions on trade. The main idea is that supply and demand factors, operating on a global scale, will ensure that production happens efficiently. Therefore, nothing needs to be done to protect or promote trade and growth, because market forces will do so automatically.

In contrast, protectionism holds that regulation of international trade is important to ensure that markets function properly. Advocates of this theory believe that market inefficiencies may hamper the benefits of international trade and they aim to guide the market accordingly.

Protectionism exists in many different forms, but the most common are tariffs, subsidies and quotas. These strategies attempt to correct any inefficiency in the international market.

### 2.4 Distortion in International Trade: Anti Dumping Duties

![Diagram of International Trade Barriers]

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5 *Supra 4.*
One of the main reasons behind distortion of international trade and fair competition is that though increasing returns in a monopolistic market promote international trade this situation ignores many of the detrimental effects that can arise due to imperfect competition, such as a disparity in the prices a firm charges for its goods that are exported and the ones that are sold in their respective domestic markets, constituting price discrimination. The most common form of price discrimination is dumping, defined as a situation where, “the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country.”

The definition of dumping according to GATT is: “The sale of products for export at a price less than the ‘normal value’ where normal value means roughly the price for which those same products are sold on the ‘home’ or exporting market.”

2.5 International Trade- With respect to India

For decades after independence in 1947, India embarked on a program of autarky (national economic self-sufficiency) which included import substitution policies. By 1991, however, a sluggish economy combined with the forces of globalization led to a more open Indian economy. There was simultaneously a gradual rise in exports, imports, foreign direct investment (FDI), and overall economic growth. In the 1990s, exports of goods and services rose from 6.2 percent to 8.2 percent of total output. By the end of the decade, however, growth in exports began to level off due to reduced international demand, especially with India's main economic partners, the United States and the European Union (EU). Indian exports were further hit by serious competition from East Asian countries, which had recently experienced depreciated domestic currencies, which led to a decline in global prices for their manufactured goods. As a result, exports of Indian textiles, chemicals, machinery, electronic goods, and automotive parts all began to decline.

As compared to a couple of decades earlier, however, the size of India's foreign trade has noticeably expanded, both in absolute terms and relative to the country's GDP. Exports have again picked up since 1999, when they showed a 13 percent growth. Imports have also ballooned, showing an average of 20 percent growth per year during 1992-2000. Total exports in 2001 are expected to be near US$46 billion and total imports at US$51 billion. Petroleum constitutes the largest import item at more than US$6 billion and accounts for 14 percent of total imports in 1999. Petroleum imports may be as high as US$17 billion in 2001. Gems and jewellery constitute the

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single largest export item, accounting for 16 percent of exports and earning about US$4.5 billion in 1999. The top 3 export destinations of Indian goods were the United States, Britain, and Germany, which together constituted one-third of total Indian exports in 1999. In turn, the top 3 import sources were the United States, Britain, and Belgium, together constituting 21 percent of total imported items.
Chapter 3

Dumping

3.1 Dumping- Evolution of the term

It has long been customary to speak of one market as a ‘dumping ground’ for the “surplus” products of another market when the producers of the latter for any reason sell their commodities in the former at unusually low prices.

From this usage it was a natural outcome to speak of selling in a distant market at reduced prices as “dumping”, but the word used in this sense appeared not to have entered into the literature of economics until the first years of the twentieth century. In 1903 and 1904, the tariff question was the dominant political issue in Great Britain, and in a huge output of polemical literature which marked the tariff controversy. The term became well established and appeared with or without apologetic quotation marks in book after book.

The term “dumping” has since found its way into the economic terminology of the French, German, Italian and probably other languages. Initially, it had a vague and uncertain meaning, and is still used indiscriminately for such diverse price-practices such as severe competition, customs undervaluation, “bargain”, “sacrifice” or “slaughter sales”, local price-cutting and selling in one national market at a lower price than in another.

In recent years, however, the increased use of the term by academic economists with their creditable tendency towards the exact establishment of terminology and of the development of legislation dealing with dumping and allied price-practices, which made necessary some measure of precision in the differentiation between various price practices, have both contributed to the consistency of the usage. Extensive variations in the use of the term both as to gist and implication are nevertheless still present.

According to Dale, the origin of the word “dump” is uncertain. Its usage by the early nineteenth century had come to mean the act of throwing down in a lump or mass, as with a load from a cart, and it was then a natural extension to apply the word to the disposal of refuse and to describe as a dumping ground, a market for the disposal of surplus stock. During this time, “dumping” was used in English language trade literature to illustrate loosely a situation in which goods were sold cheaply in foreign markets. Today, however, the term is used intentionally to signify the practice of price discrimination in international trade. The term was applied

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persuasively to describe almost any situation in which goods were sold abroad at cheap prices, irrespective of the cause of the cheapness, the insinuation being that the goods were unwanted in their country of derivation and were exported only to get rid of them.

Economists have always defined dumping as transnational price discrimination where prices vary between national markets. Although economists still object in principle, they now accept that dumping may also be defined as transnational sale below costs. Deardoff admits this new “definition”: “The definition has broadened over the years; some now consider dumping including ‘sales below costs’, at least presumptively….this alternative criteria for dumping have gradually acquired elevated status of an alternative definition”.

However, there is no correlation between price discrimination and sales below cost. Sales below cost may occur with or without discrimination and yet, on the other hand discrimination may take place without selling below costs. The term dumping is employed most often, even in careless business language to signify selling the same commodities at different prices in different markets. Commercially, the term is often uncritically extended to cover various types of sales at prices lower than those generally current, even if the prices are uniform to all purchasers.

3.2 Types of Dumping

1. Sporadic Dumping: Occasional sale of a commodity at below cost in order to unload an unforeseen and temporary surplus of the commodity such as cheese, milk, wheat etc. in the international market without reducing domestic prices.

2. Predatory Dumping: Temporary sale of a commodity at below its average cost or a lower price abroad in order to derive foreign producers out of business, after which prices are raised to take advantage of the monopoly power abroad.

3. Persistent Dumping: Continuous tendency of a domestic monopolist to maximize total profits by selling the commodity at a higher price in the domestic market than internationally (to meet the competition of foreign rivals).

http://books.google.co.in/books?id=bgLXTW2oq2cC&pg=PA459&lpg=PA459&dq=types+of+dumping+in+international+trade&source=bl&ots=7ulTPCuI0&sig=jT_54ZXWIsElfKXzZJPEBHk-5t&hl=en&sa=X&ei=MDKFUPXGFImSrgrf82oHwDw&ved=0CCwQ6AEwAg#v=onepage&q=types%20of%20dumping%20in%20international%20trade&f=false (visited on 18th October, 2012).
3.3 Causes of Dumping

Dumping usually occurs because of the following reasons:

(1) Producers in one country are trying to stay competitive with producers in another country,

(2) Producers in one country are trying to eliminate the producers in another country and gain a larger share of the world market,

(3) Producers are trying to get rid of excess stuff that they can't sell in their own country,

(4) Producers can make more profit by dividing sales into domestic and foreign markets, then charging each market whatever price the buyers are willing to pay.

3.4 Dumping: According to GATT and WTO Anti-Dumping Agreement

Dumping occurs when the export price of goods imported into India is less than the Normal Value of ‘like articles’ sold in the domestic market of the exporter. Imports at cheap or low prices do not per se indicate dumping. The price at which like articles are sold in the domestic market of the exporter is referred to as the “Normal Value” of those articles.

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10 http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm (visited on 18th October 2012).
The normal value is the comparable price at which the goods under complaint are sold, in the ordinary course of trade, in the domestic market of the exporting country or territory. If the normal value cannot be determined by means of domestic sales, the Act provides for the following two alternative methods:

- Comparable representative export price to an appropriate third country.
- Cost of production in the country of origin with reasonable addition for administrative, selling and general costs and for profits.

The export price of goods imported into India is the price paid or payable for the goods by the first independent buyer.
Chapter 4

Anti-Dumping Law

4.1 Meaning of Anti Dumping

Anti-dumping can be fined as a protective device available to the states against vicissitudes associated with the free trade. In the recent years a large number countries have become frequent users of anti-dumping. Many of the heaviest anti-dumping users are countries who did not even have an anti-dumping statute a decade ago.

The traditional users continue to make use of these measures with more vigour by targeting new users. Anti-Dumping duties were introduced by the developed countries to protect their industries against the low priced imports. Developing countries supported the inclusion of the provision relating to anti-dumping duties under GATT because they wanted to levy of anti-dumping duties to be under international regulation. Anti-dumping measures are not only legal but they are also flexible in usage. Further, anti-dumping duties can be presented not only as protection but also as an encounter against “unfair” competition\(^\text{12}\).

4.2 WTO and Anti-Dumping Agreement:

Though the WTO rules normally discourage protectionist policies, they do permit and accommodate anti-dumping measures to provide temporary relief to domestic industry against “dumping” by foreign firms. Many trade economists view anti-dumping as the most pernicious WTO-sanctioned instrument of protection available to countries currently. The best explanation for its existence is that developed countries have chosen not to give it up. Lately, however, developing countries have also become frequent users of this instrument\(^\text{13}\).

The WTO provisions on anti-dumping are contained in GATT Article VI and the Uruguay Round Agreement on Anti-dumping (formally, Agreement on Implementation of Article VI). The latter builds on the Tokyo Round Anti-dumping Agreement, which had been signed by developed countries only. The UR Agreement revises the Tokyo Agreement in some areas while adding precision in others.

The Agreement on Anti-dumping introduces specific provisions relating to the methodology of establishing the existence of dumping and injury. For example, the United States and European Community had for years compared the prices charged in individual export


\(^{13}\) Article by Arvind Panagariya: Core WTO Agreements: Trade in Goods and Services and Intellectual Property p16.
transactions with the *average* home market price to establish dumping. This practice biased the outcome in favour of a positive finding. The Agreement on Anti-dumping now requires that export prices be compared on either "average-to-average" or "transaction-to-transaction" basis. As a result, the US has adopted the average-to-average comparisons in majority of the cases.\textsuperscript{14}

GATT Article VI requires an injury test for the "industry" but does not define industry. As a result, in practice, in the past, when individual firms or trade associations filed anti-dumping petitions, it was presumed that they were acting on behalf of an "industry." Under the Agreement, a determination must now be made though the test is relatively lax. The test requires that the petition must be "supported" by producers (a) accounting for 25% of total production of "like products" and (b) representing more than 50% of the production of those firms expressing a position, pro or con, on the petition.\textsuperscript{15}

4.3 Anti-Dumping in India: Legal Framework\textsuperscript{16}

1. The principle of imposition of anti-dumping duties was propounded by the Article VI of General Agreement on Tariffs & Trade (GATT) 1994 – Uruguay Round

2. Indian legislation in this regard is contained in Section 9A and 9B (as amended in 1995) of the Customs Tariff Act, 1975

3. Further regulations are contained in the Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]

4. The Designated Authority for conducting investigations pertaining to Anti-Dumping issues and on basis thereof, for forwarding its recommendations is the Ministry of Commerce, Government of India.

5. The responsibility for Imposition and Collection of duties as imposed /recommended by the Adjudicating authority is imposed upon the Ministry of Finance, Government of India.

Section 9A of the Customs Tariff Act, 1975 (hereinafter referred to as “the Act”) as amended in 1995 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on

\textsuperscript{14} Ibid, p17.
\textsuperscript{15} Ibid, p19.
Dumped Articles and for Determination of Injury) Rules, 1995 (hereinafter referred to as “the Rules”) framed thereunder form the legal basis for anti-dumping investigations and for the levy of anti-dumping duties. These are in consonance with the WTO Agreement on anti-dumping measures. These rules form the legislative framework for all matters relating to dumping of products, which include the substantive rules, rules relating to practice, procedure, regulatory mechanism and administration.

4.4 Anti-Dumping in India: Regulatory Framework

Anti-dumping, anti-subsidies & countervailing measures in India are administered by the Directorate General of Anti-dumping and Allied Duties (“DGAD”) functioning in the Department of Commerce in the Ministry of Commerce and Industry and the same is headed by the “Designated Authority”. The Central Government may, by notification in the Official Gazette, appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the Designated Authority. In India, there is a single authority — DGAD designated to initiate necessary action for investigations and subsequent imposition of anti-dumping duties.

The Designated Authority is a quasi-judicial authority notified under the Customs Act, 1962. A senior level Joint Secretary and Director, four investigating officers and four costing officers assist the DGAD. Besides, there is a section under the DGAD headed by the Section-Officer to deal with the monitoring and coordination of die functioning of the DGAD.

The Designated Authority’s function, however, is only to conduct die anti-dumping/anti subsidy & countervailing duty investigation and make recommendation to the Government for imposition of anti-dumping or anti subsidy measures. Such duty is finally imposed/levied by a Notification of the Ministry of Finance. Thus, while the Department of Commerce recommends the Anti-dumping duty, it is the Ministry of Finance, which levies such duty.

The law provides that an order of determination of existence, degree and effect of dumping is appealable before the Customs, Excise and Gold (Control) Appellate Tribunal (CEGAT) — a judicial tribunal. It reviews final measures and is independent of administrative authorities.

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17 Section 3(1) of “The Custom Tariff Act, 1975”.

This is consistent with the WTO provision of independent tribunals for appeal against final determination and reviews. No appeal will lie against the preliminary findings of the Authority and the provisional duty imposed on the basis thereof. The appeal to the CEGAT should be filed within 90 days.
Chapter 5

Competition Act, 2002: Overview

Competition is now universally acknowledged as the best means of ensuring that consumers, even more so the “aam aadmi” or “common man”, have access to the broadest range of services at the most competitive prices. Producers will have maximum incentive to innovate, reduce their costs and meet the consumers demand. Competition thus promotes allocative and productive efficiency. But all this requires healthy market conditions and governments across the globe are increasingly trying to remove market imperfections through appropriate regulations to promote competition.  

5.1 The Preamble of the Competition Act, 2002:

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having 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 markets, in India, and for matters connected therewith or incidental thereto.

The Act provides a very wide mandate for the Competition Commission of India to enforce. Apart from it rather broad objective, the Act contains provisions which have rather become standard in the competition jurisdictions all across the globe. These are the provisions relating to anti-competitive agreements, abuse of dominant position and regulation of combinations. In the respect of anti-dumping law the provisions relating to abuse of dominant position and anti-competitive agreements assume importance. In respect of dominant position it is pertinent to note that whereas dominance is not frowned upon by the Competition Act, 2002 abuse of dominance is certainly frowned upon by the legislation. Another significant feature in the context of these provisions of the Act is that anti-competitive agreements and abuse of dominance are to be prohibited by the orders of the Commission whereas the mergers are to be regulated by the orders of the e of Commission. This difference in law is of immense significance. Whereas the former two prevent enhancement of consumer welfare the latter drives economic growth. Hence, the distinction has been maintained.

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5.2 Section 4 of Competition Act

In respect of abuse of dominant position, Section 4(2) enlists the circumstances when an enterprise shall be considered to be abusing its dominant position. It states:

(2) There shall be an abuse of dominant position under sub-section (1), if an enterprise,-
   (a) directly or indirectly, imposes unfair or discriminatory-
       (i) condition in purchase or sale of goods or service; or
       (ii) price in purchase or sale (including predatory price) of goods or service; or
   (b) limits or restricts-
       (i) production of goods or provision of services or market therefor; or
       (ii) technical or scientific development relating to goods or services to the prejudice of consumers; or
   (c) indulges in practice or practices resulting in denial of market access; or
   (d) makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts; or
   (e) uses its dominant position in one relevant market to enter into, or protect, other relevant market.

5.3 Abuse of Dominant Position

One of the most vigorous users of the predominant international trade defence measure, i.e. antidumping duty, India has an unenviable and unfortunate reputation for extreme protectionism being afforded to its domestic industries through the use of anti-dumping investigations and duties. Anti-dumping as an international trade defence measure is by definition protectionist of the Indian market and is based on the following three touchstones:

(i) that there is a significant difference between the normal value of a commodity or product and the price at which it is exported to India;
(ii) that the difference between the normal value and the export price to India greater than certain tolerances is per se evidence of dumping;
(iii) if this dumping causes or is likely to cause injury to the domestic industry, antidumping duties would be levied.

The effect of anti-dumping duty usually renders the export of the product to India economically unviable. Now, the touchstone of competition law is to avoid an appreciable adverse effect on a relevant market. Quite naturally, the availability of competing products, whatever their
source provides wider and more economic options to consumers in the relevant market for a product.

Let us consider a practical example. Two dominant Indian manufacturers of a product jointly have in excess of half of the domestic production of the product. Under the rules, a petition for imposition of antidumping duties can be filed by the two as being representative of the domestic industry in India. Let us assume that a few smaller domestic players and exports to India by foreign entities constitute the rest of the supply of the product to the market in India.

An overwhelming majority of the recommendations of the antidumping authority are to impose antidumping duties, and thus, knock exporters out of the Indian market. There is no substantive ideological divergence between anti-dumping law and competition law on the acceptability of the dominant nature of these petitioners. Nothing in competition law disapproves dominance itself.

But now to the anti-dumping investigation, this investigation will determine as to whether the users of the product manufactured by the two dominant companies in the market will be left with a reduced choice and constrain them to purchase willy-nilly from the two dominant companies.

5.4 Section 18: Duties of the Commission

As stated in Section 18 of the Competition Act, 2002:

It shall be the duty of the Commission to eliminate practices having adverse effect on competition, promote and sustain competition, protect the interests of consumers and ensure freedom of trade carried on by other participants, in markets in India: Provided that the Commission may, for the purpose of discharging its duties or performing its functions under this Act, enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

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19 Article by Farhad Sorabjee “Competition and Trade Defence: A case for dumping something?”
Chapter 6

Divergence between Competition and Anti-dumping Laws

6.1 Price Discrimination with respect to domestic and foreign suppliers

It is clear that competition and antidumping laws determine the legitimacy of a given conduct using different standards. Under competition law, conduct is prohibited only if it lessens competition or otherwise leads to a loss of consumer welfare. Under antidumping law, conduct (specifically, dumping) is prohibited only if it injures domestic producers. The problem with having different standards for competition and antidumping law becomes apparent when one realizes that the conduct described as dumping is identical to the conduct reviewed by the competition authority known as “price discrimination”. Specifically, price discrimination entails charging a higher price to customers who are willing and able to pay the higher price and a lower price to customers who are either unable or unwilling. Under some conditions, without price discrimination some customers would not otherwise have access to the product. Price discrimination is practiced in many industries such as the airline industry whereby passengers travelling in the first class section of the aircraft are required to pay a significantly higher fare than passengers travelling in the economy class section; further, the difference in fares does not reflect only the difference in the cost of providing the service to these groups of passengers. The effects doctrine is a guiding principle in competition law enforcement which dictates that conduct which have similar effect on the market should be treated similarly. Based on this principle, therefore, we can say that price discrimination on the part of domestic suppliers is regulated differently from price discrimination on the part of foreign suppliers. Dumping\(^{20}\) is also a type of Price Discrimination under which the foreign supplier charges less in our market than his home country’s market which is treated differently (anti-dumping duties) from domestic supplier’s price discrimination.

6.2 Need and Reasons for Harmonization of the Legislation

Price discrimination on the part of domestic suppliers is regulated differently from price discrimination on the part of foreign suppliers derives a need to synchronize competition and antidumping law, at least to the extent that it relates to scrutinising price discrimination.

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\(^{20}\) Dumping occurs when the export price of goods imported into India is less than the Normal Value of ‘like articles’ sold in the domestic market of the exporter.
The pricing behaviour of a foreign supplier which technically meets the dumping definition is per se questionable if analyzed from a competition policy perspective. Therefore, so far as amending antidumping law to conform to competition law is concerned, it may be pertinent for the policy makers to bear in mind that government policy should serve the interests of the governed. Thereby implying that, harmonisation of antidumping law to confirm with competition law ought to promote the welfare of many consumers, rather than the welfare of the few domestic producers (who may be dominant players in the market) in order to be more consistent with serving the interests of the public.

6.3 Ways to Harmonize the Legislation

There are three alternative ways to harmonize the legislation: (i) amend antidumping law to conform to competition law; (ii) amend competition law to conform to antidumping laws; (iii) develop new standards and amend both competition and antidumping laws accordingly. A discussion on the merits of the third option is beyond the scope of this paper. We will restrict the discussion therefore, to the merits of the first two alternatives.21

Antidumping law has the effect of promoting the welfare of domestic producers whereas competition law has the effect of promoting the welfare of consumers. A decision of how to harmonize the treatment of price discrimination is essentially a determination of which legislation produces the more desirable effect. One useful means of making such a determination is to identify the overarching purpose of any government policy.

This is to say that government policy should serve the interests of the governed. To the extent that promoting the welfare of the many consumers, rather than the welfare of the few domestic producers, is more consistent with serving the interests of the public, harmonization should involve amending antidumping law to conform with competition law. Such harmonization will involve a redefinition of two key concepts in antidumping law: (i) market definition and (ii) dumping.

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6.3(i) Redefining “Markets”

Antidumping legislation implicitly identifies the domestic market to comprise only of domestic producers- to the exclusion of current and future importers which are presumably seen to operate outside of the domestic market. This view is inconsistent with how markets are identified in competition law.

For the purpose of evaluating the competitive effects of any challenged conduct (including dumping), a market is defined to identify the set of products which could be affected by the conduct. Market definition is a fundamental concept in competition law because if the market is not correctly identified, one is unlikely to accurately identify the competitive effect of the challenged conduct.

A formal definition of this concept was first advanced by the competition authorities in the United States of America (U.S. Department of Justice and the Federal Trade Commission 1997):

“…A market is defined as a product or group of products and a geographic area in which it is produced or sold such that a hypothetical profit-maximizing firm, not subject to price regulation, that was the only present and future producer or seller of those products in that area likely would impose at least a ‘small but significant and non transitory’ increase in price, assuming the terms of sale of all other products are held constant. A relevant market is a group of products and a geographic area that is no bigger than necessary to satisfy this test...”

This definition and the test is used to identify the market, has been used by competition authorities in most, if not all, jurisdictions in which competition legislation is enforced. An important observation arising from this definition is that both importers (existing and potential) and producers are equally legitimate participants in defining the market; and neither party is given prominence over the other. In this manner, the definition of the market is consumer-oriented in that it seeks to identify the set of products which consumers perceive to be substitutable in satisfying a specific desire or need. What matters to the consumer is that the product is capable of satisfying her need. All other things being equal, the technology used to make the product is of little significance. For example, consider someone deciding on whether to purchase mangoes grown by Farm K or by Farm L. It is of little value to the consumer that the operations on Farm K use mainly machinery; and that the operations on Farm L use mainly labourers. What matters to the consumer is the value for money (based on factors such as taste, price, etc.) offered by each farm? By similar reasoning, one should understand that the only difference between producers and importers is that they utilize different technologies. In this sense, importation should be viewed as
an alternative method (i.e. technology) of making the product available to consumers rather than as a necessarily inferior method.

To convey to one group of suppliers, a greater right to participate in the market would be to distort the market incentives for suppliers to become efficient; which would ultimately deprive consumers of the potential surplus which could be realized.

If importation is more efficient than production, with respect to supplying the product to consumers, then the competitive market would favour importation; otherwise it would favour production. In so doing, each competitively organised market would meet the needs of consumers using fewer productive resources and thus allow more resources to be available for use in other markets.

6.3(ii) Redefining “Dumping”

In antidumping law, “dumping” is said to occur whenever the export price of a product is less than the price of the product in the home market. Further, dumping is prohibited only if it injures the domestic market. This conduct, as described, is referred to in competition law as price discrimination and known to be beneficial to consumers under some conditions, and detrimental to consumers under other conditions. This means that it is appropriate to challenge the conduct as it has the potential to have adverse effects on the industry. Presumably, the test used to prohibit the conduct should be sufficient to identify the conditions under which the conduct would be beneficial; unfortunately, this is not the case under existing antidumping law. Specifically, the current application of antidumping law will successfully challenge conduct which is unlikely to harm the domestic market. This over-deterrence will ultimately discourage legitimate competitive conduct, to the detriment of consumers. To harmonise antidumping law with the principles of competition law, one would have to improve the tool used by antidumping law to filter conduct which is potentially harmful from that which is unlikely to be harmful. To show that the existing tool is inadequate, we use competition law analysis to expose the fundamental flaw in the conceptual framework on which antidumping law is predicated. As mentioned earlier, dumping occurs when the foreign producer price discriminates between customers in the home market and customers in the export market. Based on received research into price discrimination, we know that the price will be lower for the customer group whose demand is more sensitive to price increases.

To determine which customers are likely to be more sensitive to price increases, we need only compare the characteristics of customers in the home market with the characteristics of
customers in the export market. One important distinguishing characteristic between the two groups is the difference in transaction costs associated with the acquisition of the product. Specifically, the transaction cost for customers in the export market (i.e. the ‘importers’) is considerably higher than the transportation cost for customers in the home market. The transaction cost for importers comprise shipping (insurance and freight) the product to, and clearing (tariff, duties and fees) the borders of, the importing country. Importers have what is said to be a derived demand for the product; that is, the product is desirable only to the extent which it could be profitably resold to consumers in the domestic market. If importers which face significant transaction costs compete with domestic producers which do not incur said cost, then in most circumstances foreign producers must offer discounts to stimulate the (derived) demand from importers.

Accordingly, importers are likely to be more sensitive to price increases, than domestic customers. It is reasonable, therefore, to expect that the price in the export market will be less than the price in the home market. This is the first of two important arguments used to support the convergence of competition and antidumping law: dumping is necessary, in most cases, to stimulate demand in the export market and consequently facilitates competition in the domestic market.22

Chapter 7
Dumping and its impact on Competition

7.1 How unfair is dumping?

Dumping is actually fair. The thing is this question was put wrong at the beginning and the beginning was long time ago. Looking back through time, the first antidumping law was meant to remedy unfair trade, namely dumping, but it has become clearer over time that there is nothing wrong with dumping. It benefits people in poor countries by offering lower prices and new varieties of merchandises. Despite its evil name, dumping does a good job. 23

"If the other fellow sells cheaper than you, it is called dumping. Course, if you sell cheaper than him, that's mass production."

.... William Roger

Antidumping duties work like import tariffs. But antidumping is a trickier issue because it is always discriminatory. This implies that the domestic industry can strategically use this instrument to target only foreign firms it views as competitive rivals. And, being selective, antidumping measures also generate more negative effects than tariffs do. Consumers are clearly worse off because they have to bear the cost of duty. Imports become more expensive. Furthermore, there is no guarantee that the domestic producers will keep their prices at the initial levels. Depending on price elasticity, they can obtain higher profits by setting a new price higher than before but lower than those of dumped products.

Things become worse when dumped imports are intermediate goods. One may think about steel for example. It is certain that consumers who purchase steel as a final good are worse off. Controlling for other factors, the downstream productions are deteriorated by the duties imposed on upstream products. This is due to higher prices of their intermediate inputs.

The imposition of antidumping measure seems to benefit no one but the domestic producers whose foreign rivals face an antidumping action. To evaluate if antidumping is an appropriate policy or not, we need to know whether the increase in profits of the domestic firms is large enough to offset the decrease in welfare of all others in the country. Both common sense and formal estimation say no.

23 Article by Sarut Wittayarunruangsri on the topic “Antidumping: A Villain in International Trade”.
The concept of dumping seems fair because it is recognized that producers may sell their goods in different markets at different prices and that prices of goods are influenced by several market forces and may vary at different times. It may be a perfectly legitimised business activity like discounts offered by airlines to students or senior citizens etc. There may not seem anything intrinsically unethical or illegal about dumping.

7.2 Dumping and Economics

Adam Smith has famously quoted:

“If a foreign country can supply us with commodity cheaper than we ourselves can make it, better buy it of them with some part of the produce of our own industry, employed in a way in which we have some advantage.”

Economists have emphasized that economic law and policy should only be about economic efficiency. They rebut any legal doctrine that entrenches any economic rights at all on grounds of fairness, rather than efficiency. According to them the whole purpose of competition is for consumer welfare. However, dumping is regarded as an “unfair” trade practice as it may cause or threaten to cause material injury to the importing markets and hence, anti-dumping measures are initiated.

These measures include imposition of anti-dumping duties that are imposed at the time of imports in addition to other custom duties that are intended to off-set the supposed injury and price undertaking, wherein the exporter himself undertakes to raise the price of the product and then sell it in the importing country to avoid the anti-dumping duties.

The credibility of these measures has been debated upon since on one side anti-dumping measures aim at providing speedy relief to the domestic industry against the trade-distorting phenomenon of dumping and on the other hand, it is argued that countries take advantage of anti-dumping laws because of their economic and political manipulability and prove to be a threat to the free market access that the GATT/WTO have strived to achieve in the past 50 years.

7.3 Dumping and Law

The agreement on Anti-dumping had been made in the Uruguay round Agreement on Anti-dumping, formally called the Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, that allows GATT contracting parties to offset the margin of dumping of dumped goods if it can be shown that such dumping causes, or threatens to cause material injury to competing domestic industries.
Most lawyers defend anti-dumping as a trade remedy that is necessary for ensuring fair trade. According to them, international price discrimination is objectionable. If left uncontested and unchallenged, it confers a comparative advantage on exporters. Exporters exploit the market, with considerable negative effects on domestic industry.

The use of anti-dumping actions therefore enables the domestic producers to offset, quantitatively the artificial advantages received by the exporting country’s producers so that they are able to compete on an equal footing with the exporting country’s producers. Anti-dumping measures largely provide this level playing field.

Dumping has two differing effects in the importing country. The low prices of the imported products may harm the domestic industry which is producing like products. At the same time, consumers and other industrial users of the importing country may benefit from such low prices. However, these users and consumers are not well organized and their voice is not as strong as the producer industries which are normally backed by trade unions. Hence, pressure for acting against dumping is usually much stronger than that of dumping.\(^{24}\)

Chapter 8

Conclusion and Suggestion

The main objective of Anti-Dumping Law is to protect domestic industries. Does it mean that less efficient industries must be protected? In fact according to Competition Act, 2002 less efficient industries should shut-down and exit market if they cannot compete. Anti-Dumping Law has a protectionist flavour which Competition Law has not. These both contradict, they cannot exist together; they are oxymoron.

Over the past years it has been suggested that anti-dumping measures and competition measures are mirror images, complementary mechanisms, and that one should take place of the other. Anti-Dumping measures are, therefore not normally a means of restoring fair trade (although sometimes may be). Rather they are protective mechanism. It would be very optimistic to assume that the elimination of Anti-Dumping measures would easily follow from the widespread institutionalisation of competitive measures. Being a part of a developing nation if I would have to choose between elimination of anti-dumping measures in exchange of implementing competition rules it will be a wonderful bargain.

From the point of view of economics, there is no reason to support any anti-dumping law, since price differentiation across markets is a legitimate and a perfectly rational, sensible and legitimate profit-maximization action. Under this line of argument, there is no justification for condemning certain export prices simply because they happen to be lower than prices in other markets. Domestic price discrimination i.e., differences in pricing between one country’s domestic regional markets, normally is not penalized. There arguably is no economic reason for treating “international” price discrimination any more harshly by imposing dumping duties. Of the different categories of dumping, only predatory pricing dumping and most instances of strategic dumping raise overall welfare concerns. Yet, these two forms of dumping pertain largely to the theoretical realm, as most anti-dumping cases in the real world do not involve dumping as defined by these two categories and even Competition Act is there to look after such predatory pricing.

Above all, if antidumping were to be a tool against unfair trade as it was initially meant to be, it would be essential to reconsider the definition of dumping and think carefully what is fair and what is not. Is it fair enough to accuse and penalise someone just because prices are not equalised?

But before the things got worse reform is necessary. These rules and policies are needed to be amended and a lot can be done. More transparent process of investigation is desirable: one
needs to know in details how a constructed price is calculated. Material injury requires more careful scrutiny: is injury caused by dumping or just by higher competition? Consumers' welfare also has to be taken into account, not only in text but also in practice.

One of the major proposals could be replacement of anti-dumping with competition principles. One of the major concerns of dumping is predatory dumping i.e. a type of anti-competitive event in which foreign companies or governments price their products below market values in an attempt to drive out domestic competition. This may lead to conditions where one company has a monopoly in a certain product or industry. The function of Competition Commission of India is to take necessary action to address such an issue instead of levying anti-dumping duties.

There is a need to review Anti-Dumping Law. Also there is a need to bring this issue in competition policy because draft competition policy does not directly resolve this issue.

In order to give protection to domestic infant industries there is a need to make provision for such reform in Competition Act or there is a need to interpret or expand the phrase “ensure freedom of trade carried on by other participants” as stated in Section 18 of Competition Act, 2002. Ideally these duties should be abandoned but no country will do so till it is being implemented in other countries. Thus the problem is needed to be solved at multilateral level.

It is difficult to create a new framework altogether for this issue. Therefore it will be better to do some changes in existing framework so that it is beneficial for the whole economy. There should be working group meetings on matters of concern (dumping and competition). The change should maximize the welfare of Indian economy.
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