

Issues Relating to Antidumping and Competition: Consumer's Perspective

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<p>Author Affiliation ¹Assistant Professor ²Research Scholar, of Law, P.G, Department of Law and University Law College, Bangalore University, Bengaluru, Karnataka 560056, India.</p> <p>Corresponding Author Seema. V. Malaghan, Research Scholar, P.G. Department of Law and University Law College, Bangalore University, Bengaluru, Karnataka 560056, India. E-mail: seemamii@gmail.com Received on 18.12.2018 Accepted on 14.01.2019</p>	<p>Abstract</p> <p>Liberalization of trade or integration of world economy is nothing but removal of trade barriers that may be tariff or non tariff. It ensures to free flow of capital, goods and services across the world. WTO strives to eliminate all trade barriers; it recognizes that nations required be flexible to adjust economic as multilateral agreements. Thus, as result of liberalizations, any person can invest in any market, anybody can sell their goods, provide service in corner of world. The developed countries have started dumping of their goods into the foreign market in order to grab competition. Subsequently it leads to monopoly, which is the worst situation of the market. That ultimately affects the consumer at the large. The importing country may adopt protective measures to temporarily protect their domestic industry and economy, like Anti-dumping. This paper focuses on the aspects like Antidumping and competition. Researcher desires to highlight the issues and challenges between these two legislations. Most prominently researcher will through light on pros and cons of Antidumping and competition upon consumer rights.</p> <p>Keywords: Anti-dumping, Competition, Consumer, Trade, Liberalisation</p>
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Introduction

The World Trade Organization propagated to L.P.G, it means Liberalization Privatization and Globalization. This has lead to removal of trade barriers across world, in simple word that has consequently resulted to unrestricted International trade, and we are witnessing the free flow of goods, services and capital. With the emergence of L.P.G statics of export and import has been increased. Due to the wake of globalization any person can manufacture goods & sale anywhere in the world. Free trade has benefited to the economy of country and world also. But there are many issues of free trade which are not ignorable. One of such issue is 'Dumping of goods' on foreign market. It is one of

unfair trade practice targeted by the GATT [1].

Opening up of the economies has both challenges and opportunities before producers, traders, importers and exporters. While integration of world markets has widened the horizon of trading at the same time it has also led to tough competition. Everyone desires to capture market share by any means fair or foul [2].

Before birth of WTO this free trade was propounded by the father of classical economics & philosopher called Adam Smith. He said in the wealth of the nations (1776) that Britain's goal should have been the promotion of the welfare of individuals, rather than centering on national power and prestige [3]. That was called as laissez faire, which supported to the idea that market should essentially be free



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and there should be no interference in trade by the government [4]. Further, economist has contended that a decentralized market system that allows producers and consumers freedom to choose according to market prices will provide the most efficient allocation of the scarce resources, and this will result in gain in real national income. Under free trade concept, comparative advantage dictates that a country should exchange what it can produce most efficiently [5] for what others can produce more efficiently. Even if a country could produce every commodity, it would still gain by specializing in its better products. An economist does not admit of many exceptions to free trade, they rise only when domestic markets fail to allocate resources efficiently or non-economic objective receive priority. Equal application of market economic principles to all firms considered the backbone of free trade; However, Free trade is contrasted with unfair trade like Subsidy and Dumping of imports which distort the competition in market [6]. One of the practices adopted by traders to capture foreign markets is to dump their goods, in simple words means to sell goods in the foreign markets at prices lower than that in the home or domestic market main [7]. The GATT does not condemn all acts of dumping. It also recognized that antidumping measures can be used by an importing country as an anti-competitive protectionist device [8]. The main aim of this agreement is to allow member countries for imposition of antidumping duty, if they have been materially injured by dumping from any particular country [9].

It is necessary to discuss about Dumping before elaborating to Anti-Dumping. Dumping is a pricing practice, where a product is exported from one country to another country at a price which is less than the comparable price, in the ordinary course of trade for like product when destined for consumption in the home market [10]. It is said to be most common form of price discrimination in International trade. Dumping is defined as the introduction of product into the commerce of another country at less than its normal value. Thus Dumping implies low priced imports only in the relative sense and not in absolute sense. According to Article VI, GATT 1994, a product is said to be dumped when its export price is less than its normal value, which is less than the sale of a like product in the domestic market. Viner identified three types of dumping situations [11];

- Sporadic dumping
- Strategic dumping
- Predatory dumping

In the case of sporadic dumping the motivation is to dispose of goods for a short- run to get rid of surplus stocks. Short-run or intermittent dumping is not continuous and is motivated by entering into a new market, retaining the market share or driving away the competitors from the market. Long term dumping is motivated by the intent to reach or maintain full production in large scale economies. Sporadic dumping is likely to result only in damage to the exporting or the importing country. Thus, there are two fundamental parameters used for determination of dumping, namely, the normal value and the export price. Both these elements have to be compared at the same level of trade, generally at ex-factory level.

Strategic dumping: Firms can deliberately dump their products in order to gain or increase market share in the market of the importing country. In some cases firms deliberately produce at artificially high capacity in order to dump the excess product in a foreign country. This can be distinguished from sporadic dumping by the fact that in the first case the dumper deliberately operates at excess capacity in order to dump excess products [12]. This is possible only if the domestic demand for that commodity is less elastic and the foreign demand is highly elastic [13].

Predatory dumping: The term predatory dumping refers to price discrimination aimed at driving competitors out of the market or bringing them to terms in other words, forcing competitors to share the market concerned with the predator on specified terms [14]. A closed home market or government subsidies can be used to finance the low priced exports. When competition in the home market is destroyed, the predator then controls the market of importing country and reaps monopoly profits [15].

Antidumping Law

At the end of the nineteenth century, global industrialization raised concerns about effects of international trade. General and Permanent tariff walls were ill-equipped to handle the special and temporary cases of dumping. Thus a new instrument was needed that could be applied to specific products at specific times. It was Canada who first developed this instrument-antidumping regulation [16]. Antidumping laws represents as the "Trade remedy laws" that have the effect of restricting imports, if imports of low price cause or threaten injury to importing market. These trade remedies are allowed by the WTO Agreements provided

certain condition are observed [17]. Anti dumping duty is a duty imposed on imported goods which are sold by another country's industry. Antidumping can be defined as tariffs in addition to ordinary customs duties that are imposed to counteract certain "unfair" pricing practices by private firms that injure or threaten to cause "material injury" to a competing industry in importing nation [18].

Object for Imposition Antidumping

The Government is to designate the anti dumping authority in each country. Affected local producer is expected to file for AD action against foreign imports in specific forms with the proper statistics proving dumping [19]. The foreign exporters are given a chance to state their position in the anti dumping investigation and the dumping authority determines the dumping margin if the export price is less than the normal value. WTO provides three methods to calculate a product's "normal value". They are based on

- Price in the exporter's domestic market
- The price charged by the exporter in another country
- A calculation based on the combination of the exporter's production costs, other expenses and normal profit margins [20].

The Antidumping Dumping duty usually imposed on products, but to protect the industry from unfair competition. One in turn protects those employed. However, any benefits need to be measured against those which both domestic consumers and secondary producers would gain as result of access to cheaper goods. But if it can be assumed that anti dumping measures are used in order to prevent international predation. In short run, domestic consumer and secondary industries would enjoy economic benefits as a result of lower prices; in the long run however, dumping will lead to the failure of domestic producers resulting in higher overall price as price as consumers become victims of monopolistic price setting. It is important to note that the Antidumping Agreement under the WTO doesn't qualify dumping as an unfair trade practice per se. The Antidumping duty can be imposed only when it causes injury or threatens to cause injury to the domestic industry.

The Competition Act, 2002

The new economic policies 1991 (LPG) progress-

ively widened the space for market forces and reduced the role for government in business. It was recognized 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 [21]. 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 [22]. 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 [23].

Interfaces between Antidumping and Competition

Competition law and antidumping law are considered as law for the protection of domestic market and consumer interest from unfair trade practice like price discriminations, anti competitive agreement restrictive trade practice etc. The ideal goal of the competition and trade law is to improve the consumer welfare. However, problems between these policies arise from the deviation from their original purpose in actual practice. There are divergent opinions regarding the relationship of these two terms, some economic scholars opined that both are co-relative to each other, because both policies are working for the common objects like protection of consumer and market. These policies include the liberalization of trade through the removal of trade barriers, the liberalization of financial markets, the privatization of state-owned assets, the removal of price controls, the reduction of subsidies, and the liberalization of exchange controls to encourage investments.

The underlying assumption of these reforms is that economic development and living standards

will be enhanced when decisions are largely left to individual businesses and consumers in as much as they respond to market forces that are shaped by competition [24]. Competition should then be seen as a process of rivalry between firms as they strive over time to win business from their competitors through producing higher quality products, selling at lower prices or developing improved or new products. For the benefit of market-oriented policies to be realized, a competition law is required to ensure that private restrictions on competition do not occur when state control regulatory constraints on the competitive process are reduced. The aim is to create new and sustainable job and business opportunities that would bring benefit to all. The critical problem is balancing the needs of business and those of consumers.

Contradictions between Antidumping and Competition

The anti-dumping versus competition policy debate has flourished all over the world for a long time. The main question that stands out in this debate is whether the competition policy criteria are substituted for anti dumping rules [25]. Further whether imposition of anti-dumping

duties promotes fair competition or restricts competition in a relevant market and as this debate progresses, the analogy that since favoring 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 [26]. Dumping has risen to the debate on relationship of Antidumping and competition policy and whether antidumping policy should be replaced by competition policy. Antidumping and competition policy are considered as instrument of protection of domestic market and consumers interest from unfair trade practices like price discrimination, anti-competitive agreements, cartels etc, even though object of both competition and Antidumping is to promote competition is to promote competition policy attaches sanctions only such price discrimination which adversely affect competition in the market on other hand, antidumping policy does not take competition concerns but only protection of domestic industry. The same question was considered by Supreme Court of India .in appeals were filed by Haridas Exports against the order passed by the monopoly and Restrictive trade Practices commission (MRTP Commission), and listed out differences between these two concepts [27].

Competition Law	Anti-dumping Action
<p>1. Objectives The basic object of the Competition Act is to prevent practices having an appreciable adverse effect on competition, to protect the interest of consumers and to ensure freedom of trade carried on by participants [28].</p>	<p>The basic aim of the Antidumping Laws is to protect the domestic industry from any material injury resulting from the dumping of goods [29].</p>
<p>2. Scope Competition law deals with domestic trade.</p>	<p>Antidumping Laws deals with international trade</p>
<p>3. Competition law is concerned with the regulation of Competition in a particular market within the territory of a country. Thus, it takes within its sweep host of anti Competitive practices, includes 1) monopolistic trade practices, as defined in section 2 (i) of MRTP Act 2) restrictive trade practices, as defined in section 2 (o) 3) unfair trade practices as defined in section 36A</p>	<p>This Law is concerned with addressing just one type of unfair, International trade practice, which causes injury to domestic industry. This is the Dumping of goods by an exporting country.</p>
<p>4. Predatory pricing and normal value [30] Competition Law encourages free and healthy competition and supports the growth of dynamic and open market for competitors.</p>	<p>Antidumping law seems more like a shield protecting the domestic producers from challenges which they might face from foreign competitors [32].</p>
<p>5. Price discrimination Under the competition Act price discrimination which adversely affects competition in the market is prohibited</p>	<p>price discrimination under Antidumping is an examined with the narrow parameters of injury only to the domestic industry</p>
<p>6. Who can file complaint? A complaint under the Competition Act can be filed by a trade association or any consumers association, or a reference can be made by the central government or the state government, or even by the Director General, upon its own Knowledge or information [31].</p>	<p>An Antidumping petition can be filed by the domestic Industry as defined under the Anti-dumping Rules or suo moto by designated authority [33].</p>

7. Competition Law procedures allow and require consideration of interest groups such as manufactures importers exporters, consumer and general public. Commercial actors can have their interest assessed through the determination of the market, causation or injury. Interests of consumers are taken into consideration when assessing the impact of a business practices on Competition
8. In predatory pricing on enquiries, the complainant has to establish that the predator acted with the intent to eliminate competition and competitors. Actual injury is not required.
9. In most countries, competition cases are dealt with by a court of law, where parties are entitled to full discovery rights and due process.

No interest group other than domestic industry has full legal standing in anti- dumping cases. The predominant interest group is domestic producers. Industrial users and consumers do not have legal standing to maintain a complaint.

In antidumping complaints, intent is irrelevant, but actual injury has to be shown. Further, a causal link has to be established between the dumping and the injury suffered.

Anti-dumping enquiries are always conducted by Government agencies through administrative process and law

Consumer welfare argument

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 payment [34]. The market liberalizations and the supposed existing competition have had the effects of enlarging the consumer's choice and lowering prices of goods and services [35]. Economic integration is considered as a process by which inter-dependence is established between national economies through the increase in the exchanges of goods and services, capital, labor; an inter-dependence also established in the form of harmonized economic policies, of projects commonly conducted, and finally in the form of standardized laws within the common space [36].

The consumer welfare argument suggests that the economic rationale of antidumping laws is to prevent predatory pricing. The concept of predatory pricing is borrowed from the domestic competition policy since competition policies are designed to prevent anti-competitive practices primarily by domestic firms, such policies define predatory pricing as the situation where a domestic firm prices below cost so as to drive competitors out of the market and acquire or maintain a position of dominance [37].

Predation involves efforts to achieve or exploit monopoly power, restricts competition in domestic markets and injures consumers through monopoly pricing in the long run. Competition policies deter predatory pricing by domestic firms to preserve the

process of competition and protect the interests of the consumer. An open trade policy also aims at achieving these goals. In that context, antidumping policy is suggested to be a trade policy instrument that, if used appropriately, curbs anti-competitive practices by foreign firms by deterring predatory pricing. In international trade, predatory pricing is a strategy by which an exporter attempts to drive competitors from export markets and obtain monopoly power by cutting its export price below its home market price. Predation involves short-term gains to the consumers but leads ultimately to the failure of domestic producers and exposes the consumers to monopolistic prices. This argument therefore, suggests that antitrust and antidumping both seek to prevent similar harms and are based on the same premise i.e. monopoly power is inimical to the proper operation of a market economy, and companies tend to restrict competition and create monopolies through predatory pricing. By looking into the origins of antitrust and antidumping rules, finds that the justification for both sets of laws was to protect the competitive process and the consumer from monopoly power [38].

The Consumer's Perspective

From the consumer's perspective, market liberalizations and the supposed existing competition have had the effects of enlarging the consumer's choice and lowering prices of goods and services. However, these apparent gains have given way to new concerns such as the inability of Indian standard bodies to control and monitor the quality of the goods and services circulating in the markets at regional and at sub-regional levels. In other words, where regional economic integration and markets liberalization have increased consumer choices, they have probably also created opportunities for dubious businessmen to swamp Indian markets with substandard and dumped products to maximize their profits.

It is recognized fact that consumers as buyers have poor bargaining power. In early years when welfare legislations like the Consumer Protection Act, 1986 did not exist, it is the maxim *caveat emptor* (let the buyer beware) which governed the market and relations between consumers and traders. Now with the opening of global markets, economies and progressive removal of restrictions on international trade, there is increasing competition among manufacturers which has, though benefited the consumers in the form of improvement in quality of goods and services but as well as given the way to many unfair methods or practices of trade to promote sale of the commodities and it has widely affected the interests of the consumers. Therefore, we may say that it's an era when it can be propounded that the maxim *caveat emptor* is to be replaced by 'let the seller beware' [39]. Opponents of Antidumping opined that dumping benefits an importing country because it gives consumers and user industries access to low-priced products. Therefore the economy as a whole the low-priced imported products [40]. Because dumping serves the consumers interest in obtaining cheaper goods, it should be allowed. Some even argue that an importing country should welcome the cheaper goods because they enhance overall welfare and release resources for more productive uses in the global economy.

Suggestions

1. There should be strict '*predatory standard*' in investigating of antidumping cases. It needs the revision of the definition of the dumping and limiting the concept of antidumping to predatory pricing.
2. To introduce the '*public interest*' test the appropriate authority should consider whether the imposition of antidumping duty serves the public interest. Public interest here includes many factors such as the interests of domestic producers that are affected by dumped imports, importers of the products, domestic consumers.
3. *Provision to impose fine* The critics of anti dumping law have also pointed out the enormous legal costs involved in the proceedings which deter the exporters in many cases when the producers are small enterprises and have small markets. The domestic producers virtually do not face any penalty even if the case is rejected or it turned out to be frivolous. This encourages them to take multiple courses of actions [41].

Conclusion

Finger (1993) is of the view "anti dumping is a threat to the liberal trading system that post world war western leadership struggled courageously and effectively to create. It offers a legal means to destroy GATT system [42]. However, Holme supported the view that anti dumping measures should be used wherever necessary. He looked at it not only from the point of view of efficiency but also fairness [43]. According to this view point a domestic producer has a right to be protected against a foreign seller who may not be restricted by the competition rules in his home market which restricts the domestic producers. Homes (1997) justified the use of anti dumping measures under certain conditions, in the absence of other tools. He classified dumping into 5 categories [44]:

1. Monopolistic predatory pricing
2. Strategic behaviour falling short of monopolistic predatory pricing
3. Price discrimination aimed at market entry
4. Cyclical price cutting
5. Behaviour of state trading enterprises not based on commercial consideration⁴⁵

Bhagwati justifies countervailing duties and AD actions as a remedy against price distortions, and attributes the growth of protectionist measures including AD actions to changes in the general economic conditions and the pressures on political economy [46].

Both concepts, antidumping and competition have been enacted to maintain healthy environment in trade. Both have task of protecting consumers' interest. But they should work hand in hand. There need to maintain sustainable balance between these two concepts, Otherwise there will be two consequences. One may overlap another or may act contrary to each other. If more stress given to Antidumping, it will lead to constraint of free trade, if more emphasis is given to competition that may lead to production of substandard goods and dumping also. Another important issue is antidumping may not directly affect consumer's rights which recognized under consumer rights but it will affect indirectly when more prominence is given to this than competition. The court opined that 'the era of protection is now coming to an end. The Indian industries are making profit, and then it will be the interest of the general body of the consumers in India to prevent the import of such goods'. The remedy is to take recourse to the provisions under

the CT Act and levy of anti-dumping duties [47]. It seems that the Court followed the well known maxim of *ut res magis valeat quam pareat* [48]."

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