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India -Rethinking Anti-Dumping Duties: A Competition Law Perspective

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Prior to the enactment of the Indian Competition Act, 2002 ('Competition Act'), the Supreme Court of India delivered a decision that has been consigned to irrelevance, yet poses interesting questions for the future of competition law in India.

In *Haridas Exports v. All India Float Glass Association*,^[1] ('*Haridas Exports*') the Supreme Court opined that the Customs Tariff Act, 1975 (under which **anti-dumping duties** are imposed) and the MRTP Act (the predecessor to the Competition Act) operate in *different and independent fields*.^[2] In rejecting this premise, this paper argues that anti-dumping duties must be imposed in consonance with principles of competition law, and that the Competition Act should extend to cases of dumping.

Goals of the Legislation

In *Haridas Exports*, the Supreme Court distinguishes the two fields by stating that while competition law is concerned with the competitive conditions in a particular market *within* the territory of the country, an anti-dumping measure is concerned with an international trade practice that causes injury to a domestic industry. At first blush, this distinction seems to be superficial and purely geographical. However, one method of assessing the Supreme Court's premise is to look at the goals and objectives behind the enactment of these laws.

The Preamble of the Indian Competition Act has four stated objectives:

1. To prevent practices having an adverse effect on competition
2. To promote competition
3. To protect the interests of consumers
4. To ensure freedom of trade

In contrast, the Preamble of the Customs Tariff Act simply seeks to consolidate the laws governing customs duties. However, it must be noted that the new Section 9, 9A and 9B of the Act, and the Anti-Dumping Rules, 1995, were enacted pursuant to India's obligations under the WTO Agreement on Anti-Dumping ('ADA'). Therefore, the provisions under the Customs Tariff Act would correspond to the same purpose as that of the ADA. According to Hoekman and Mavroidis, the purported purpose behind anti-dumping duties is to protect domestic producers from the effects

of predatory pricing.[3]

Admittedly, the stated purposes behind both legislations differ. Yet, both ultimately seek to prevent market distortions that are likely to impact *perfect competition* within the market, thereby in pursuance of the ideal of free trade.

Impact of Anti- Dumping Duties on Competition

As per Section 9A of the Customs Tariff Act, dumping takes place when an article is imported into India at a price less than its normal value. ‘Normal value’ is defined as the comparable price of the article in the exporting (home) country. In a situation where this value cannot be determined, the cost of production of the highest comparable price of a like article is utilized to determine whether there is dumping. Accordingly, an anti-dumping duty not exceeding the difference between the normal value and imposed price may be levied.

The first important point to note is that Section 9A prohibits *any* form of price discrimination between two countries, and not simply predatory pricing.

In contrast, competition law does not prohibit price discrimination if the consequence is welfare-enhancing. For example, a dominant position and the ability to charge lower prices is not proscribed under Section 4 of the Competition Act — the higher threshold of proving an ‘abuse’ of that dominant position must be satisfied. In fact, Section 4(2)(a)(ii) even provides for the ‘*meeting the competition*’ defence which legitimizes lower prices when other producers within the market are charging the same. Even the definition of ‘predatory pricing’ under the Competition Act does not impugn selling below the cost of production, but only sale when done with the view of reducing competition or eliminating competitors.[4]

The provisions on dumping are ignorant of the benefits of import competition to the domestic market, even if at a lower price. This benefit especially accrues to end user consumers, who would have to pay a lower price for the same or like products. The competitive conditions of the market also benefit to the extent that it forces domestic producers to be more economically efficient, in order to compete with the imports. Therefore, certain cases of dumping may not harm the domestic market, even though it may undercut the market power or possible oligopoly of certain domestic producers. As a corollary, anti-dumping duties reduce import competition by making imports more expensive, which detrimentally affects consumers in the short term, and in the long term creates an economically inefficient system where domestic producers no longer must compete to be the cheapest product in the market.

Accounting for Competition Law Principles

Given the anti-competitive implications of anti-dumping duties, this is a clear concern for the Competition Commission of India (‘CCI’), keeping in mind the Preamble of the Act. This is contentious, given that anti-dumping duties can often be protectionist trade policy tools, thereby falling outside the domain of a regulatory body.

However, there are two possible options which may be utilized to harmonize these fields. *First*, the

Designated Authority (functioning under the Directorate General of Anti-dumping and Allied Duties) should take into consideration principles of competition law before imposing a duty. This would mean that a finding of dumping is subject to a finding of harm or injury to the *competitive conditions* in the domestic market, which would ostensibly be result in a case of predatory pricing. Arguably, the Designated Authority does carry out an analysis of a material injury under Section 9B, but this assessment is restricted to *the industry alone*, and not the rest of the market. Perhaps an amendment to the Customs Tariff Act, inserting a clause analogous to Section 19(3) may be suitable here,[5] though it still would not mean that the Designated Authority possesses the expertise to make such a finding. Accounting for principles of competition law before imposing such duties would ensure that the detrimental impact of these duties upon the competition within the market would be mitigated. In such a hypothetical situation, a duty would only be imposed in a case where the harm to the industry either justifies the reduction of import competition (given that supply and production chains form a part of the competitive conditions of the market), or where the harm to the consumers/competitive conditions is minimal.

Second, the CCI and the Designated Authority may exercise the power of reference under Section 21 and 21A of the Competition Act. Section 21 allows a statutory authority to make a reference to the CCI in regards an issue that falls under the scope of the Competition Act.[6] This would mean that the Designated Authority could request a finding on whether an allegation of dumping has an adverse effect on competition in India and impose a duty accordingly.

Both suggestions require not simply an overhaul of Indian legislations, but a reconceptualization of dumping and anti-dumping duties at the international level itself. This is because Articles 1 and 18.1 of the ADA require a measure taken pursuant to a determination of dumping to be taken in the *manner* provided for within the ADA itself. The ADA does not provide for extraneous considerations such as competition law principles to be taken into account. This factored into the Appellate Body's decision in the *US- Anti- Dumping Act of 1916* case, where the fact that the 1916 Act was an antitrust legislation was disregarded.[7]

Of course, a State is entitled to not impose a duty despite an allegation of dumping to protect its competitive conditions, however, given the propensity of States to use anti-dumping duties as a tool of trade retaliation, it is unlikely that any country would do so in the absence of reciprocity from other States. Perhaps it is time then to replace the global framework on dumping, with one on competition, which in the opinion of this author would better serve consumers in the domestic and international markets.

[1] Haridas Exports v. All India Float Glass Association, (2002) 6 SCC 600.

[2] Haridas Exports v. All India Float Glass Association, (2002) 6 SCC 600.

[3] Bernard M. Hoekman & Peter C. Mavroidis, 'Anti-trust-based remedies and dumping in international trade', (1994) World Bank Policy Research Working Paper, 3.

[4] Explanation to Section 4(2), Competition Act, 2002.

[5] Section 19(3) of the Competition Act lays down certain factors that must be looked into in order to reach a conclusion of an adverse effect on competition.

[6] The Designated Authority's office has been established under the Customs Tariff Act and can be classified as a statutory authority under Section 21, Competition Act, 2002.

[7] WTO Appellate Body Report, *United States – Anti Dumping Act of 1919*, 132 (2000).

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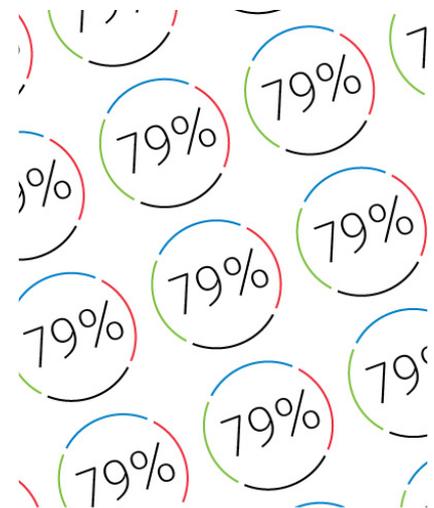
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