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A critical analysis of India's Anti-Dumping Law vis-a-vis Competition Law

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ABSTRACT

Anti-dumping and competition laws are both crucial pieces of legislation for regulating the local market in general and the global market in particular. Although these laws have a common foundation, they yet differ in a number of ways. Anti-dumping legislation initially served to prevent dumping as well as to some extent to increase competitiveness. The scenario of "International Price Predation" served as the basis for it. But over time, the anti-dumping law's emphasis shifted and it began to care less and less about the competition. The market competition is now totally disregarded by the current anti-dumping statute, and predatory pricing is even less of a problem. Therefore, the primary area of disagreement between anti-dumping legislation and competition law is "Price Discrimination," which is entirely forbidden by anti-dumping law because it disregards market competition but only when it has a detrimental impact on trade and market competition. The competition rules and the anti-dumping laws frequently clash and intersect in different ways. Due to the distinct goals that both laws must achieve, they partially appear to be at odds with one another. While antidumping legislation is nothing more than a trade remedy, competition law seeks to protect consumer welfare and healthy competition in the market.

I. INTRODUCTION TO ANTI-DUMPING LAW & COMPETITION LAW

India does not have a lengthy history of enforcing anti-dumping rules, in contrast to Canada and the United States. However, during the past ten years, India has been the top consumer of anti-dumping programmes worldwide. In contrast to its 2% share of global imports, India has brought almost 20% of all anti-dumping lawsuits worldwide. The old Customs Tariff Act of 1975 underwent certain changes when India joined the WTO in 1995, following the organisation of the organisation. Section of the modification adds Sections 9A and 9B. India lacks the anti-dumping-specific laws that the US and Canada do, as well as distinct legislation of such nature. The government can apply anti-dumping duties on nations who dump their goods on the Indian market and seriously harm domestic manufacturers under Sections 9A and 9B of the Customs Tariff Act, 1975. The regulations for implementing Sections 9A and 9B were

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established together with an amendment to the Customs Tariff Act of 1975. The Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and For Determination of Injury) Rules, 1995 are the official name of these regulations. The Custom Tariff Act was amended to comply with the terms of Article VI of the GATT of 1994 as well as the agreements on subsidies and countervailing measures. Following the repeal of the previous Rules, the Customs Tariff (Identification, Assessment and Collection of Countervailing Duty on Subsidized Articles and for Determination of Injury) Rules, 1995 and Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 were simultaneously introduced.

The origins of competition legislation may be traced all the way back to the Middle Ages. Various scholars claim that in the mediaeval centuries, cartels, which were known as guilds, served as competition laws in many European towns. More quickly than wealthy countries, emerging nations began enacting competition rules. The first two emerging nations to enact competition legislation were Mexico in 1917 and Argentina in 1923. While in the 1960s, nations including Chile, Brazil, and Colombia enacted competition legislation. While India's first competition legislation was the Monopolies and Restrictive Trade Practices (MRTP) Act, which was implemented in 1969. Up until 1991, India's commercial competition was governed by the Monopolies and Restrictive Trade Practices (MRTP) Act of 1969. The MRTP Act, 1969 was superseded by the Competition Act in 2002 as a result of the Liberalization, Privatization, and Globalization (LPG) Act's implementation in 1991. The focus of India shifted from a planned economy to a market economy with the passage of this Act. This law encourages both competitiveness and economic efficiency in India. With the advent of LPG, not only did internal competition intensify, but so did competitiveness on a global scale. There are only two common purposes, which are "protect and encourage competition in the market" and "Consumer Welfare," which apply to all competition laws worldwide. Other goals differ from nation to nation, and even within a nation they evolve through time. The goal of the competition legislation is influenced by a number of variables, including the state of the industrial sector, the effectiveness of political leadership, judicial authority, exposure to international competition, and many more.

II. RELATION BETWEEN ANTI-DUMPING LAW AND COMPETITION LAW

In order to achieve economic and political stability, the majority of nations now have national laws governing both competition and anti-dumping. Both of these regulations share the same goal of defending the market from unfair commerce, but they do it in different ways. The

fundamental distinction is that competition laws are established as national laws in various nations to safeguard and encourage competition inside the country, but anti-dumping laws exclusively govern and concern themselves with trade and commerce at the international level. The goal of competition law is to increase market competition while safeguarding the interests of the general public, which includes both consumers and producers. Both the international and national levels have anti-dumping laws, but there is none at the international level for competition law. The use of price commitments and quantitative trade limitations are examples of features in anti-dumping legislation that are acceptable there but prohibited by competition law. Similar to how some methods are permitted under anti-dumping law but illegal under competition law. Anti-dumping legislation does not allow for "price differentiation," which is the focus of competition law. Due to fair trade competition, businesses are able to make the most of possibilities and dynamic economic efficiency. As dumping is based on "predatory pricing," anti-dumping law solely focuses on protecting domestic producers and is less concerned with economic efficiency. The goal of anti-dumping measures introduced under GATT was to ensure fairness between rich and developing nations as well as to protect the interests of the WTO's weaker members. However, "distributive fairness" is disregarded under competition law. The primary goals of competition law are to safeguard and advance market competition by outlawing any conduct that might have a negative effect on that market's level of competition. The unfettered free commerce between market forces of supply and demand, which is wholly indifferent to distributive fairness in society, is thus given higher favour by the competition legislation. In terms of development, competition law has advanced well beyond anti-dumping legislation. At first, it was thought that anti-dumping laws and laws governing competition were complementary. While anti-dumping legislation has its roots in WTO law, competition law has expanded its purview to include companies who operate outside of its borders and have an impact on the domestic market. Anti-dumping laws are also employed as a protectionist measure to stop business abuses. The reasoning behind the anti-dumping law is supported by the prohibition of dumping on several economic and social grounds. However, the main justification for the creation of anti-dumping law is the notion of distributive fairness. In other words, the distributive justice goal of the anti-dumping statute. Maintaining a balance between the various levels of power held by the various states is the aim of distributive justice. For the purposes of the anti-dumping statute, this power imbalance is crucial because businesses may decide to exploit it to cause trade distortions. The antidumping regulations become of utmost importance in this situation. To address these trade disparities, anti-dumping law supports the government's imposition of anti-dumping duties.

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As there are now no common regulations governing competition law, anti-dumping becomes a top issue.[2] Despite this, anti-dumping continues to be crucial since it was politically impossible to implement international competition rules.[3] The objectives surrounding the use of antidumping laws have changed over time, and contemporary antidumping practise has come to facilitate the kind of unfair and anti-competitive behaviour it was intended to prevent, even though both competition and anti-dumping laws initially had the same goal (e.g., the Antidumping law of 1916 in the USA, which was meant to address competition concerns arising out of the practise of "transnational price predation").[4] Due to the impact of anti-dumping laws, businesses have chosen to apply for immunity from the imposition of anti-dumping duties in order to increase revenue. Contrarily, competition law seeks to promote healthy market rivalry between businesses as long as it does not involve predatory pricing. Anti-dumping and competition law objectives have evolved incrementally, and as a result, the two sets of rules are now antagonistic rather than complimentary. Many academics have remarked that the emergence of national legislation has given jurisprudence extraterritorial reach. Thus, the anti-dumping laws have outlived their purpose.[5] "The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organisations in cases where the product is commonly sold at the retail level, to provide information which is relevant to the investigation regarding dumping, injury, and causality," states the WTO agreement, which calls for the inclusion of such considerations. In other words, the concepts of competition law do not address the issue of a nation's economic power being distributed fairly. The competition rules and the anti-dumping laws frequently clash and intersect in different ways. like as, Objective, Price discrimination and Injury.

(A) Objective:

Competition law: The goal of competition law is to utilise restrictive instruments against practises like predatory pricing, anti-competitive agreements, mergers, and other illegal activities that limit competition in the market. Competition law has many additional goals that depend on the jurisdiction, therefore it differs from one nation to another. Several distinctions

[2] Horlick, G. and Vermulst, E., "The 10 Major Problems with the Anti-dumping Instrument: An Attempt at Synthesis" Journal of World Trade 39(1): 67-73, (2005)

[3] *In this regard, OECD (2000) notes that it "does not retain options that have been discarded in joint discussions as unrealistic, such as full harmonisation of competition laws, or an international antitrust authority with supranational powers."*

[4] "*Study on Anti-Dumping and Competition Law", available at: <http://www.cci.gov.in/sites/default/fi les/1> (last visited on March 13, 2020)*

[5] *Andreas, K., "Antidumping rules versus competition rules", Institute for World Economics and International Management, Universitat Bremen*

include:

- Along with the avoidance of anti-competitive actions, promotion of competition is a shared goal.
- Almost all nations share the goal of protecting and advancing the interests of consumers.
- However, in certain nations like Australia and Europe, the goal of competition legislation is not economic efficiency.
- Few nations prioritise the public wellbeing of its workers, manufacturers, etc., although the US and India are notable exceptions.

Since it is not specified in any other nation's laws, India is the only nation that views competition advocacy as a goal of competition law.

Therefore, the overarching goal of the nation's competition legislation is to safeguard and advance both competition and consumer welfare by making high-quality goods accessible to people at reasonable rates and eliminating anti-competitive actions.

Even while anti-dumping laws such as Article VI of the GATT and the Anti-dumping Agreement are universally recognised on an international level, only a few nations have passed national laws based on these laws. The most typical goal of anti-dumping legislation is to offer domestic manufacturing a remedy due to dumping. In addition to this goal, only European nations include public interest and consumer welfare in their national laws, which are absent from Indian law.

(B) Price discrimination:

Pricing discrimination happens when a given good's price ratio and its marginal cost ratio are different. The main justification for pricing discrimination is the exploitation of market surplus for financial gain.

Competition law Only those pricing discriminations that have a detrimental impact on both market competition and consumer welfare are sanctioned under competition law. Unfair pricing is the term used to describe all price discrimination that has an adverse effect on the market and competition and is illegal under competition law. Therefore, price discrimination, which is unfair to the competitors in the market and has negative repercussions on consumers, is the only issue that competition laws address. Price discrimination is defined by the discrepancy between the product's selling price and its cost of manufacture under competition law. In the case of competition law, the technique of estimating the cost of production is varied and differs from country to country, unlike anti-dumping legislation where the cost of production is used to

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determine dumping. The average variable cost of the product is referred to as the cost of production in Indian competition law.[6]

Anti-dumping law: Dumping is described under anti-dumping law as price discrimination between national markets.[7] All instances of price discrimination that harm the domestic business are illegal under anti-dumping regulations, with the exception of short-term dumping. Anti-dumping legislation uses a variety of price discrimination to assess whether an export hurts the domestic sector. By concentrating primarily on price discrimination, it even disregarded more general economic issues like customer interests, etc. The word "price discrimination" is not used as such under anti-dumping statutes; instead, the term "dumping" is used. Anti-dumping rules only address price discrimination that harms or is likely to harm the domestic industry materially. Under anti-dumping law, the dumping margin, which is calculated as the difference between the product's normal value and export price, is used to assess the level of discrimination (here normal value is based on the cost of production and reasonable profit)[8]. However, the word "cost of production" is not defined as such under anti-dumping law; rather, the term is defined as both fixed and variable costs of production in the anti-dumping agreement.[9]

(C) Injury

Significantly detrimental impact on competition analysis as defined by competition law: The Indian Competition Act deems such "discriminatory prices" to be acceptable when they are present in market competition and are either "fair" or "non-discriminatory." Due to the lack of provisions in the Act that outline how to determine whether "price discriminating" behaviour is favourable to "competition," Authorities in the specific Indian market should probably look at the "impact" of the claimed "unfair" or "discriminatory" price on the competition in order to evaluate this. The Competition Act of 2002's guiding principle is the necessity of a "appreciable unfavourable effect on competition." In order to determine whether anti-competitive acts are prohibited because they have or are expected to have "severe detrimental effects on competition," several criteria must be maintained. These criteria include:

- erecting hurdles to future business entrance; driving away foreign competitors from the market; preventing competition by impeding business entry; accruing advantages for consumers;

[6] Section 9 (d) (vi) of Competition Act, 1987
[7] Viner, J., 'Dumping: a problem in International Trade', (1922)
[8] Article 2.2 of the WTO Anti-dumping Agreement
[9] Article 2.2.1 of the WTO Anti-dumping Agreement

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- alterations to how goods or services are produced or distributed;
- encouraging economic, scientific, and technical growth by producing or selling products that provide services.

Injury analysis under the Anti-dumping LawSanctions are only applied when it can be demonstrated that dumping has hurt the domestic sector. The rules concerning the practise of dumping that causes harm to domestic business were passed in order to give "remedy" in the event that such dumping causes "harm" to domestic industry by punishing such dumping as "unfair" dumping. The "margin of dumping" is the highest amount of anti-dumping duties that can be levied. Some nations, like India, go one step further and only levy tariffs to the degree necessary to make up for the "damage" when the injury margin is less than the dumping margin. The following considerations must be "objectively examined," supported by "positive evidence," in order to determine if an injury has occurred.:

- the volume of dumping imports, the impact of those imports on domestic market pricing for comparable commodities, and the subsequent impact of those imports on domestic producers of those goods.[10]

When conducting an investigation, nothing and nothing alone may be ignored. Every inquiry includes a different collection of facts, thus all the standards outlined in the WTO AD Agreement and local laws must be assessed in the context of economic cycles, competitive environments, or the conditions under which the market typically functions within an industry. All the elements stated in Article 3.4 of the AD Agreement must be taken into consideration when considering whether there is significant impairment to the domestic sector. All of the elements listed in Article 3.4 of the AD Agreement must be taken into consideration when deciding whether there has been a significant harm to the domestic sector. Injury assessments are carried out in accordance with anti-dumping regulations based on a number of different factors. To determine whether the domestic industry is suffering harm because of the same commodity or not, it is helpful to look into economic factors such as a real or potential decline in revenue, income, production, market share, efficiency, return on investment, capacity usage, cash flow, inventories, and growth.

III. REMEDIES UNDER THE TWO LAWS

While any conduct that harms the domestic sector is subject to pecuniary penalties under competition law, any discriminating action carried out by a competitive dominating business is

[10] Article 3, WTO Anti-Dumping Agreement

forbidden per se and is thus susceptible to financial penalties under anti-dumping law. The competition law penalises such behaviours, whereas the anti-dumping legislation seeks to lessen the behavioural effects.

Concerns have also been raised over the repeal of anti-dumping laws. Here, it is suggested that steps toward free trade agreements be taken. Regional trade agreements can significantly contribute to the development of free trade. The same result may be obtained by removing tariffs and anti-dumping duties at the same time. There are encouraging indicators in that respect as the entire globe is beginning to understand the intricacies of multi-trade agreements. Additionally, it is anticipated that in the next years, the number of regional trade agreements would increase stably. The primary goal of the Anti-Dumping Law is to uphold and safeguard the interests of indigenous industry. However, less competitive businesses will cease operations immediately and depart the market if they are unable to compete and conduct business with other industry players, much like under the Competition Act of 2002. The Anti-Dumping Act engages in protectionist behaviour, but competition legislation does not. Given that they are similar, both of them are mutually incompatible and cannot coexist. Over the last several years, it has been suggested that anti-dumping and competition measures are similar, as are complementary mechanisms, and that one should be implemented before the other and neither should be implemented at the same time. Anti-dumping policies are now generally a form of protection rather than a means of reviving fair trade (although this is still possible occasionally). To assume that the abolition of anti-dumping measures would automatically lead to the general standardisation of competitive measures would be overly optimistic. Even from an economic standpoint, there is little evidence to justify any anti-dumping laws because market-wide price discrimination is a perfectly reasonable, clever, and legal strategy to increase profit. Criticizing specific export prices only because they seem to be lower than those in other markets is not justified under this line of argument. Domestic price discrimination, or the price disparity between a country's domestic markets, is typically not punished. The fiscal logic of focusing just on applying dumping duties on regional price disparity is debatable. Only examples of predatory pricing dumping and other deliberate dumping raise issues for overall welfare out of all the other forms of dumping.[11]

IV. CONCLUSION

Anti-dumping laws only partially safeguard competition, whereas competition laws actively

[11] *Vermulst, E., "Adopting and implementing Anti-dumping Laws-Some suggestions for Developing Countries", Journal Of World Trade, (1997) vol 31, no:2, pp 5-24*

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protect and encourage it in the marketplace. However, only the anti-dumping legislation in European countries has a goal that is similar to that of competition law. Nowadays, businesses exploit anti-dumping regulations to seek protection by establishing anti-dumping duties to safeguard the industry from it rather than enhancing competition via fair price differential. On the other side, price difference may promote competition up until it results in predatory pricing.

Price discrimination is the primary cause of sanctions under both anti-dumping and competition laws. However, in competition law, price discrimination is employed as a more general concept, particularly with regard to "predatory pricing," whereas anti-dumping legislation exclusively addresses one type of price discrimination, dumping. This demonstrates that the approach used to calculate manufacturing costs under anti-dumping rules cannot also be used to establish whether a product is being offered at a discriminatory price under competition law. Predatory pricing is one kind of "price discrimination" that has been assumed to damage competition and cannot be justified since it was "established for meeting competition."

Investigative authorities may look into the extent to which competition in the relevant market is impacted by barriers to new market entrants, by ejecting existing competitors from the market, or by foreclosing competition when evaluating the effect of an alleged anti-competitive activity on competition. Authorities are also expected to consider any potential pro-competitive implications of the claimed anti-competitive behaviour, such as if the behaviour raises consumer benefits, improves the production or distribution of goods, or supports economic, scientific, or other types of development. Contrarily, in the case of anti-dumping, one of the potential justifications for not enforcing sanctions against all types of international price discrimination (dumping) was to deter the application of anti-dumping laws as a means of eradicating foreign "fair" competition. Therefore, rather of acting as a deterrent for the acts, the restrictions related to the dumping activity that caused harm to the local business were meant to "remedy" the domestic industry's "injury" position. The highest anti-dumping duties that may be levied are either lower than or equal to the "margin of dumping." It is argued that the domestic industry is suffering an injury if dumping results lead to persistently bad trends via these tactics. This might eventually drive manufacturers of similar goods off the market. Competition law and anti-dumping law are related because both sets of laws focus on how alleged anti-competitive behaviour or dumping results in actual "competitors being pushed out of the market."

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