ANTIDUMPING AND COMPETITION POLICY: TOTAL STRANGERS OR SOUL MATES?

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ABSTRACT

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

Keywords: Competition, anti dumping, activism etc.

INTRODUCTION

"The trade certified by GATT is like the fox put in charge of the hen house. The fox is clever enough not only to eat the hens, but also to convince the farmer that it is the way things ought to be. Anti-dumping is ordinary protection with grand public relations program."

J. Michael Finger

Both anti-dumping and competition policies have been in place and evolving for more than a century. Theoretically, anti-dumping laws and competitions laws aim at remedying "transnational price predation" and public interest. The trade (including foreign investment) and competition policies, support, complement and reinforce each other, facilitating market discipline and competitive behavior by both domestic and foreign companies.

The anti-dumping rules were introduced in order to prevent foreign manufacturers and exporters from restricting competition on domestic markets and therefore anti-dumping rules were a necessary addendum to national competition laws, which could not be enforced extraterritorially.

Also, antidumping rules allow practices such as price undertakings and quantitative trade restrictions that are forbidden under competition law. On the contrary anti-dumping rules penalise certain types of price differentiation that may be justifiable under the competition laws.

With change in times, the two policies have evolved with different objectives in sight, which (in some cases) have led to conflicting situations. The competition policy and law of a country is reflective of its Government's intention to prevent individual and collective competition restraints on trade within national borders. The aim of competition policy is to promote consumer welfare and productive efficiency, which in part depend upon market contestability, wherein import competition often plays a key role.

India's decision to impose anti-dumping duty on imports of polypropylene from Saudi Arabia and Oman is being alleged to be a protectionist measure that will artificially

reduce competition in the Indian Market. This is in a way contradicting the competition law in India.

On the other hand, the anti-dumping law is a trade remedy that addresses issues of industries injured due to import competition/ trading across national borders.

In practice, the enforcement procedures of these policies also differ significantly. Anti-dumping procedures are defined under the assumption that a domestic competitive industry is facing a foreign monopolist or an international cartel, but this assumption is not supposed to be tested during the investigation. Thus, in each case, the data to be collected are limited to import figures, price comparisons and performance indicators of the domestic industry. There is no room for any query about industry configurations, entry barriers, market power and other conditions of competition at home or abroad. In contrast, the starting point of every anti-competitive inquiry is the identification of the relevant market and its effect on competition.

There is an attempt to highlight the degeneration and counter productiveness of anti-dumping rules; finally mutating into legal claim on governmental protection from foreign competition in the hands of monopolistic domestic industry. It will assess the conflict and role of competition laws vis-a-vis anti-dumping laws.

USE AND ABUSE OF ANTI-DUMPING LAWS

Interface between competition policy and anti-dumping rules in India began with application of domestic competition laws to cases of alleged under-valued or dumped imports under the realm of the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 ("MRTP Act") days at the hands of the Monopolies Restrictive Trade Practice Commission. The Indian MRTP Commission was approached by several affected producers seeking action against cheap imports, which was later emulated by many others. The basis of intervention in all these cases seems to be the ground of public interest.

Since then the overlap between the competition policy and anti-dumping has come a long way in India. Recently, India's decision to impose anti-dumping duty on imports of polypropylene from Saudi Arabia and Oman is being alleged to be a protectionist measure

that will artificially reduce competition in Indian polypropylene market and strengthen monopolistic positions.

While the application of anti-dumping duty on polypropylene by the Indian government is intended to protect Indian petro-chemical companies from global competition there are many sources and factors that suggest that the support provided to these large industries will be at the expense of Indian downstream industries, importers and average consumers. Such an increase in the dominant position of the Indian polypropylene producers will unilaterally disadvantage wide range of crucial Indian downstream industries that use polypropylene in production and will make these industries less competitive both in domestic and global markets. Higher costs incurred by the downstream industries will also lead to higher prices for average Indian consumers. Exporting countries have also cautioned that the economies of India and the Gulf are inextricably linked through networks of trade. Hence, putting up protectionist fences and impeding the flows of goods and services will unnecessarily increase frictions and reduce economic growth in these regions in the long term.

Similarly, India's decision to impose antidumping duty on phosphoric acid from countries across the globe (including China, Korea, Israel, Taiwan etc) are means adopted by the monopoly holding Indian industries to systematically eradicate any kind of competition within the domestic Industry; in order to sustain their market power and continuously increase prices of their product. The provisions of anti-dumping laws have been blatantly abused, which if examined under the principles of competition law may not be found to be justifiable and sustainable at all.

In the recent times, the trend of approaching anti-dumping authorities for creating trade barriers and restricting competition (from foreign exporters) is on increase. Anti-dumping statistics clearly establish that Indian companies have been among the top users of antidumping laws and have been abusing the provisions to maintain/sustain their dominant positions in their respective markets/industries. In 2008, India led the chart by initiating 54 anti-dumping investigations, followed by Brazil with 23 anti-dumping investigations. Since 1995-2005, India had initiated 564 antidumping investigations.

It may not be entirely wrong to say that anti-dumping rules have undergone sequential change since their initiation and have also begun to deviate substantially from the commonly accepted norms and standards of competition policy and law. It is now widely believed that "anti-dumping is a trouble making diplomacy, stupid economics and unprincipled law."

COMPETITION V ANTI-DUMPING

In order to first investigate and then attempt at harmonising the competition policy with the anti-dumping rules, it may be important to bear in mind that under anti-dumping trials there is neither any need to prove that the foreign competitor accused of dumping enjoys a dominant position in the relevant market; nor is there a need to prove that the domestic industry alleging dumping holds a dominant position themselves. The result of an investigation undertaking the above queries may lead to an interesting question: how many anti-dumping cases would lead to imposition of sanctions/ duty if competition laws were applied instead?

According to an important study by Messerlin, who performed the test with respect to dominant position of the foreign exporter on all anti-dumping investigations conducted by the European Commission during 1980's, the market share of the foreign companies was less than 5 per cent in 56 per cent of the cases, and less than 25 per cent in more than 90 per cent of the cases. A similar study by Niels and Ten Kate, which analyzed anti-dumping cases of OECD-member states between 1979 and 1989 and which is not publicly accessible, confirms this result.

BOTH COMPETITION AND ANTI-DUMPING LAWS APPLY DIFFERENT TESTS

In light of the above, it may be said that if the procedural rules of competition policy would also be taken into consideration in anti-dumping cases; and no duty would be imposed in most of the cases as they may be summarily rejected.

Besides the above, it may also be important to state that the European legislation ensures primacy of competition law over anti-dumping rules.

Having said the above, in most other jurisdictions antidumping is the price to be paid for the maintenance of an open trading system among nations wherein some industries are not prepared to face import competition. It is a safety valve - perhaps a cynical one - that ensures political support to trade liberalising initiatives.

As K W Dam has argued: "The case for antidumping duties is thus not so much sound economic policy but rather statecraft that channels protectionism to narrowly defined products and renders it less harmful to the economy as a whole. Therefore, the downside of antidumping policies is that they do not satisfactorily address the concerns relating to abuse of dominant position and market power; thereby often inducing more distortions in the market than they resolve. In light of all the above, the effort to reconcile a serious enforcement of competition law with an active use of anti-dumping measures implies difficult challenge for any government, as the experiences of European Union and United States well illustrate.

The case of abuse of dominant position by soda ash producers in Europe, as well as the ferrosilicon cartel in the United States, prove the unquestionable supremacy of competition policy whenever the authorities detect illicit practices fostered by antidumping measures.

CAN ACTIVISM PRACTICED BY COMPETITION AUTHORITIES DO AWAY THE EVILS OF FUNDAMENTALLY FLAWED ANTI-DUMPING RULES?

As said by Michael Finger "antidumping, as practiced today, is a witches' brew of the worst of policy making: power politics, bad economics, and shameful public administration"

It is clear from the above that both competition and anti-dumping laws apply different tests. Under competition law, a conduct is deemed prohibited only if it

lessens competition or leads to a loss of consumer welfare. Whereas, under antidumping law, dumping is prohibited only if it injures domestic producers.

We understand that the problem in having different standards for competition and anti-dumping law becomes apparent when one realises an overlap in the two laws in terms of "price discrimination" which necessitates a higher price can be charged to customers who are willing and able to pay the higher price, and a lower price to customers who are either unable or unwilling. Price discrimination, so long as it is not anti-competitive is recognized as a legal measure under competition law whereas, the same is unlawful in terms of the anti-dumping rules.

Based on the above, we have the untenable position in competition policy whereby price discrimination within the domestic suppliers is regulated differently from price discrimination amongst foreign suppliers.

The above hypothesis, pilot to a need to harmonise competition and antidumping law, at least to the extent that it relates to scrutinising price discrimination. In this regard, there are alternative ways to harmonise the two legislations or evolve jurisprudence on the subject as elimination of antidumping could make countries targets of predatory behavior which as such a strategy seems very difficult to pursue at an international level.

Considering that every pricing behavior 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 with 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 conform with competition law ought to promote the welfare of the 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.

Least be said, such harmonization will involve a redefinition of a two-tier approach as proposed by some authors which necessitates an anti-dumping case to be first judged using competition law criteria and, only if it passes them, would it be allowed to proceed as an antidumping case. Thus anti-dumping actions would only be justified if there were

a concern about abuse of market power, reducing the competitiveness of the market. Linking anti-dumping and competition laws in this way would allow competition law to play a central role in shaping anti-dumping. This would help return anti-dumping to the perspective of the early 19th century when it was first introduced.

CONCLUSION

In order to harmonise anti-dumping law with the principles of competition law, it is necessary to update the methods used by anti-dumping law to filter conduct which is potentially harmful from that which is unlikely to be harmful. The competition law can be used as a mechanism of analysis to expose the fundamental flaw in the conceptual framework on which anti-dumping law is predicated.

Further, the determination of customers which are likely to be more sensitive to price increases, can be done by comparing the characteristics of customers in the home market with the characteristics of customers in the export market. It may be said that, importers are likely to be more sensitive to price increases, than domestic customers. And therefore, it may not be unreasonable 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.

To harmonise dumping with the principles under competition law, one would have to make three fundamental revisions:

redefine the domestic market to include all current suppliers or potential suppliers of the product-regardless of whether the product is imported or domestically produced;

revise the circumstances under which the conduct is challenged; and

revise the evidence required to establish a breach.

Some integration initiatives such as EU-Australia-New Zealand trade agreement, have solved their internal disputes arising from anti-dumping by simply abolishing the use of

this instrument among other member countries. Although addressing trade disputes by means of an FTA/RTA may be a measure in the interregnum until the evolution of a detailed harmonised competition and anti-dumping policy/law; but in today's global economy a move towards harmonisation seems inevitable.

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