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Challenges before Anti Dumping policy in Post Globalised Market

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Anti dumping policy should be seen in the changed market reality. The treatment that is given to anti dumping actions of member states at WTO is shaped by many political and economic realities. The enforcement of WTO anti dumping regime faces several challenges and is influenced by several factors. The report of the committee on anti dumping constituted under WTO has the power to review anti dumping actions taken by members but it was found that many a times the members do not fulfil their obligation under the agreement to notify the measures taken by them and further the committee hardly has any tooth to take action against such members .Therefore there is a strong case for reform of the enforcement mechanism entrusted with duty of implementation of anti dumping under WTO.

Key Words- Anti dumping, tariff differentiation, General Agreement on Trade and Tariffs, Trade defence Measures, antitrust law,

General Agreement of Trade and Tariff and the World trade organisation lays down the foundation of the free movement of goods between countries but that free trade regime make it necessary to have safeguards to guard against its misuse, this fact lead to the evolution of trade defence measures as an exception to free trade regime.

Dumping occurs if a company sells at a lower price in an export market than in its domestic market. If such dumping injures the domestic producers in the importing country, under certain circumstances the importing country authorities may impose anti-dumping duties to offset the effects of the dumping**.**

Technically, foreign imports are subject to AD measures. What makes anti dumping distinct from ordinary tariff is that here most favoured nation principle is not applicable. The principle makes it mandatory for all WTO members that from discriminating against trading partners through tariff differentiation. AD duties should only be used to counteract dumping, i.e. selling a product cheaper than the price typically charged domestically.[1]

Dumping may be supported or opposed for several reasons. Those in favour of anti dumping law support it being a protectionist measure for indigenous producers from a practice of unfair trade whereas those against imposition of anti dumping law oppose it because it ultimately ensures benefit of the consumers who are supplied with cheaper product than produced by their native producers.

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Anti dumping came with the purpose to rectify the distortive effect of dumping and re establish fair trade. Article VI of GATT permits members states to impose temporary restrictions to control unfair trade, unexpected surges of "fairly" traded imports which cause, or threaten to cause, injury to domestic industry. These measures are known as Trade Defence Measures (TDMs).In fact anti dumping is a tool for ensuring fair trade and is not instrument for protectionist regime for domestic industry. It serves a relief to the domestic industry against surges of dumping and ensures remedy to domestic market.

As of 28 October 2015, 78 Members had notified their anti-dumping legislation; while 35 Members had notified that they had no such legislation[2] .This data itself shows the popularity of the AD as trade defence[3] .

The anti dumping measures are exception to the principle of free flow of trade as propounded by international trade law. This duty presently is sanctioned by WTO under the framework of Art VI of the GATT. This measure against dumping traces its origin from the 1967 anti dumping code followed by 1979 anti dumping code and finally the measure received its present strength through ART VI of the GATT which seeks to ensure against the misuse of the measure as an indirect way of protecting domestic producers unfairly from international free trade regime. The Uruguay round of negotiation revised an Anti-dumping code to form an Anti-Dumping Agreement. The Anti-dumping Agreement has dealt with the various complexities of Article VI of GATT in detail, which has benefitted various developing countries with respect to their rights under the WTO.

The Dispute resolution mechanism under WTO seeks to balance the two competing ends of misuse of this anti dumping law and right of the contracting state to protect its market against dumping. The concerned states have their own modus operandi to assess dumping by foreign exporters which determines finally imposition of anti dumping duty. This mechanism itself suffers from several inherent ambiguities especially with respect to interpretation of various legal terms where it is necessary to establish injury so as to impose dumping.

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Dumping, for example, it is argued is such a practice, a form of price discrimination, actually has beneficial effects on world and national prosperity, encouraging competition. The rules for responding to some unfair trade practices allow use of import restrictions, such as added duties, which can be anticompetitive[4] . The rules for responding to some unfair trade practices allow use of import restrictions, such as added duties, which can be anticompetitive and can reduce world welfare. In some cases, exporting nations feel bitterness towards these import restrictions on their trade, and argue that the rules on unfair trade are being manipulated by special interests for effectively protectionist reasons.

In the early nineties anti dumping was used as a back door of protectionism therefore the need was felt for its reform and competition policy at GATT was considered to be the means. This influenced Uruguay Round Agreements on safeguards, services, intellectual property rights, and trade related investment measures and to the plurilateral agreement on government procurement.

After advent of tightened ant trust regime the very existence of anti dumping is facing challenges. Some scholars are of the view that in the light of most of the countries of the world having competition law, anti dumping does not serves many purposes and there are more chances of its misuse than its use. Therefore there can there be serious doubt about its relevance in post globalised world. There is another set of argument which says we cannot deny significance of anti dumping law, rather we need to integrate competition law with anti dump-

ing. It has to be first determined whether the practice of selling goods in foreign market at below value amounts to unfair trade practice or is anti competitive, so that jurisdiction of competition authorities can be invoked.Whether such interface is possible or what will be the form of such interface, will be decided in the course of present research. The merit of anti dumping measure can be evaluated by the competition authority constituted under the aegis of WTO and thus prevent its illegitimate use as well. There are other vital challenges as well that anti dumping law faces today under international as well as under domestic legal framework of India.

Anti dumping as a policy can instead of harming domestic industries can in fact make them more competitive can be a proposal to be analysed, and if it is actually a good trade policy whether the existing legal framework is adequate enough or need to be reformed.

Anti dumping is also turned into a tool to shape foreign relation as well where it is used as a retaliatory measure forming the basis of political relation as well in addition to economic relations. Developing countries are also the fastest growing users of TDMs, reflecting the spread in the number of countries adopting Trade Defence legislation and a growing intensity of use. India (28) had made highest initiations of anti-dumping investigations followed by Turkey (16) USA (14) Australia (12) and Brazil (10)[5] in the last year[6].

TDMs often involve a clash of interests between producers and users of the imported product. And, increasingly, there can also be conflicts among producers, with those companies which have outsourced part of their production and thus also have significant import interests, more likely to oppose measures.

The Indian anti dumping investigation is also victim of many ambiguities. The dumping of technologically upgraded and change in market dynamics have changed the dimensions in which anti dumping investigation were carried on, making it more through and complex. Therefore there is a need for expanding the horizons of anti dumping law in changed international trade scenario.

Though the gap between market dynamics of a developed and developing states is reduced considerably but still the developing nations have to adjust with several other economic and political realities therefore the work will also analyse the implications of anti dumping measure by or against India in the context of recent anti dumping cases.

At WTO there are a significant number of active trade remedy disputes at the WTO. In total, there are 19 such disputes, and reports are expected in 2016 in, for example, China's challenge against anti-dumping duties imposed on steel and iron fasteners by the EU, Indonesia's challenge of anti-dumping duties on fatty alcohol by the EU and China's challenge of certain methodologies used by the U.S. in anti-dumping investigations. The panel report is expected no later than early 2016 and it will have an important impact on two similar challenges brought against the EU by Indonesia and Russia[7]. More generally, the panel's findings may affect the way in which members can calculate dumping margins in relation to products which involve energy or raw material inputs closely regulated by governments and could have broader implications on the scope of discretion available to anti-dumping authorities to address government intervention in the market, including in relation to China. The use of anti dumping measure by giant economies of American, China and European Union shows several economic and legal realities.

Regulation of Anti Dumping in India:

Anti dumping and anti subsidies & countervailing measures in India are administered by the Directorate General of Anti dumping and Allied Duties (DGAD) functioning in the Dept. of Commerce in the Ministry of Commerce and Industry and the same is headed by the "Designated Authority". The Designated Authority's function, however, is only to conduct the 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 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.[8]

Applications can be made by or on behalf of the concerned domestic industry to the Designated Authority in the Dept. of Commerce for an investigation into alleged dumping of a product into India. Under the Rules a valid application can be made only by those petitioners/domestic producers who expressly support the application, and account for more than 25% of total domestic production of the like article in question.

The application is deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitutes more than fifty percent of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition as the case may be, to the application.

However, such producers may exclude those who are related to the exporters or importers of the alleged dumped article or are themselves importers thereof. In other words, a domestic producer who is related to the exporter or importer of the dumped article or is himself an importer thereof may not be treated as part of the domestic industry even if he files or supports an anti-dumping petition.

The Designated Authority shall not initiate an anti-dumping investigation unless it receives a well-documented application/petition, which should help it determine:

a. That the domestic producers/petitioners filing the petition and/or expressly supporting the petition account for at least 25% of total domestic production of the like article in question. The application is deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitutes more than fifty percent of the total production of the like article produced by that portion of the domestic industry expressing either support for or opposition as the case may be, to the application; and

b. that there is sufficient evidence furnished by the petitioner/s regarding;

- Dumping of goods in question;
- Injury to the domestic industry; and
- A causal link between the dumped imports and alleged injury to the domestic industry.

The areas which have seen significant levels of complexity are: a) Determination of "Product Under Consideration" and "Like Article," b) Determination of "Domestic Industry" and "Standing," c) Determination of "Individual Margins for Exporters/Producers," d) Confidentiality Aspect e) Circumvention of Duties by modifying the goods or changing the country of production/export. Th definitional aspect of Indian law needs deep reconsideration in the light of present challenges. The impact of anti dumping measures taken by India has impacted the domestic market to a great extent negatively as well. Therefore it is suggested that the present law should be changed and made more stringent so as to have more fair assessment of imposition of anti dumping not as a protectionist measure but to further free trade regime of India as well as international.

The wide-ranging and detailed procedural requirements relating to investigations focus on the sufficiency of petitions to ensure that merit fewer investigations are not initiated, on the establishment of time periods for the completion of investigations, and on the provision of access to information to all interested parties, along with rational opportunities to present their views and arguments. The Rules and regulations also provide for the timing of the imposition of anti-dumping duties, the duration of such duties, and oblige Designated Authority to periodically review the continuing need for anti-dumping duties and price undertakings. It is also provided at its discretion, take anti-dumping actions at the request of a third country, which is a member of the World Trade Organization[9].

If we are also talking about India, the Indian

investigation mechanism of anti dumping is facing several challenges and it is being used as a defensive measure of protection. It has failed the object with which it was evolved.

Anti-dumping and the customs duty

Although anti-dumping duty is levied and collected by the Customs Authorities, it is entirely different from the Customs duties not only in concept and substance, but also in purpose and operation. The following are the main differences between the two: -

- Conceptually, anti-dumping and the like measures in their essence are linked to the notion of fair trade. The object of these duties is to guard against the situation arising out of unfair trade practices while customs duties are there as a means of raising revenue and for overall development of the economy.
- Customs duties fall in the realm of trade and fiscal policies of the Government while anti-dumping and anti subsidy measures are there as trade remedial measures.
- The object of anti-dumping and allied duties is to offset the injurious effect of international price discrimination while customs duties have implications for the government revenue and for overall development of the economy.
- Anti dumping duties are not necessarily in the nature of a tax measure inasmuch as the Authority is empowered to suspend these duties in case of an exporter offering a price undertaking. Thus such measures are not always in the form of duties/tax.
- Anti dumping and anti subsidy duties are levied against exporter / country in as much as they are country specific and exporter specific as against the customs duties which are general and universally applicable to all imports irrespective of the country of origin and the exporter.

Indications for World Trade System:

Antidumping has emerged as the dominant form of trade protectionism is no exaggeration. As more industries discover the benefits of anti-dumping laws and as China takes a more aggressive retaliatory stance against its trading partners, both countries' use of antidumping sanctions will likely continue to increase. To guard against this increased protectionism, this Article argues that World Trade Organization members should reverse their opposition to reforming global antidumping rules and instead enact proposals that place greater restrictions on antidumping laws. It highlights why the present moment is an opportune time for reform, but notes that the window for reform is likely to close as China and India acquire increased Economic strength[10].

Although India is among the most prominent users of the anti-dumping tool allowed by the WTO as a check against a flood of cheap imports that hurt the domestic industry, it is not very common that the government notifies levies on four products on the same day. In recent past, it has been forced to take defensive measures, The definitive anti-dumping duty has been levied on imports of "hexamine" from China and the UAE as well as on "all fully drawn or fully oriented yarnspin drawn yarnflat yarn of polyester (non-textured and non-POY)" originating in or exported from China and Thailand. The duties would be valid for five years, an official statement said[11].

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Under the WTO, the provisions relating to antidumping and countervailing duties are now part of the Single Undertaking that applies to all WTO members under the Agreement on Antidumping and the Agreement on Subsidies and Countervailing Measures. Safeguards for the temporary protection of imports were originally authorized under the GATT's Article XIX, and in 1995 were also more completely developed under the WTO's Agreement on Safeguards[12].

In spite of frequent use of AD measures by India the world trade regime has raised little

concern at the international trade forum. The forum of WTO has failed to address the issue entirely. It is a fact of last decade and has influenced the world trade to a large extent. India has filed roughly 20 percent of all global antidumping cases, quite disproportionate to its share of global imports of 2%. These cases have been narrowly focused on the chemicals industry, though little evidence suggests a major impact in reducing India's imports of chemical products[13].

Large share of the WTO dispute settlement caseload involves challenges to anti dumping, countervailing duties and safeguards is perhaps not surprising, given the relative transparency of these policies and the cross-country proliferation of antidumping use in particular.

Anti Dumping and Anti Trust law

The term "unfair" has evolved to mean something completely different in the practice of AD protection than standard notions of "anticompetitive."As such, there is a very large disconnect between AD protection and the competition policy of developed countries. Any changes in the marketplace that lead to less favourable outcomes for the domestic firm are considered unfair so that AD laws are truly about protecting domestic firms' interests, not competition[14].

Prima-facie competition law and antidumping law may be at crossroads. While competition law is focused on the larger goal of protecting and promoting competition in markets, antidumping law has a much narrower focus, i.e. protecting the domestic industry. Given the divergence in the objectives of the two sets of laws, it is important to analyze the possible ways in which the two may interact and determine whether they are in conflict with each other. Particularly in light of the fact the fact that the competition law regime in India is still evolving, it is imperative to understand the manner in which the Competition Act, 2002 may interact with the existing antidumping law.

The remedial (protectionist) effect of antidumping measures may be questionable even to their ostensible beneficiaries. While antidumping measures may allow inefficient firms to sustain themselves temporarily, it is argued that they tend to eventually harm those firms in the long run. Antidumping measures send the wrong signals to the firms' shareholders and employees, depriving them of any entrepreneurial efforts such as restructuring. Moreover, once in place, antidumping measures are hard to revoke, despite statutory possibilities under a "sunset review" conducted every five years. Furthermore, the antidumping measures taking the form of 'price undertakings' wherein the exporters agree to revise the prices to the extent of the dumping margin or to the extent that the injurious effects of the dumping are eliminated can be said to be promotion of collusion and can have an impact of the conditions of competition[15].

There is no doubt that ADMs are largely being used with protectionist intent. The rules of WTO are not adequate to deter a member from imposing protectionist ADMs and making it withdraw them, if it imposes, by challenging them and succeeding in the Dispute Settlement process. Even if they are eventually withdrawn, they do a lot of damage in the interim. A large number of developing countries have called for reform of the existing rules covering ADM[16]

Conclusion – Anti dumping policy should be seen in the changed market reality. The treatment that is given to anti dumping actions of member states at WTO is shaped by many political and economic realities. The enforcement of WTO anti dumping regime faces several challenges and is influenced by several factors.

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