

Anti-Dumping Measures under GATT and Indian Law

Introduction

After gaining independence in 1947, India committed herself to pursue a policy of mixed economy for economic development. A policy statement on industrial policy was declared in 1948, which was then amended by another declaration in 1956. In line with global happenings, India too adopted economic reforms in 1991 to accelerate economic growth. The main thrust of the reforms has been to reduce bureaucratic controls, expose the economy to a greater competition (external and internal), free industrial licensing from unnecessary regulations, liberalise trade and exchange rates, customs duties and pave the way for globalizing the economy.

With the progressive liberalisation of imports and the reduction of tariffs, domestic producers were up in arms for action against 'dumping' by foreign exporters. Dumping may be attractive to consumers in the short run, but in the long run, it has an adverse effect on the national economy. This practice is however, widely condemned because of the unfair competition it represents.

This Briefing Paper examines the meaning of 'dumping', when dumping takes place, the role of the General Agreement on Tariffs and Trade (GATT) to prevent dumping, action suggested by India under anti-dumping legislation or regulations and finally makes recommendations

What is Dumping?

Dumping is a form of monopoly price discrimination when one country sells goods to another at below marginal cost or price or at a price below that in its own country. Foreign companies dump in order to get rid of their surplus produce or to improve their competitive position in the recipient country.

Producers adversely affected often apply the term as a criticism to all low-price competition, whether or not there is price discrimination between domestic and foreign markets, particularly where low prices can be traced to the use of cheap foreign labour. This is not dumping in true sense, although in some cases it can be construed as a form of it (eg. where monopoly power in another country is exercised by employers to keep wage rate in export trade below those in the rest of the economy). Consumers are concerned whenever there is

dumping as it is a form of unfair trade practice and can lead to distortion in trade.

Persistent Dumping

True dumping i.e. price discrimination may, however, be either persistent or temporary. Persistent or long term dumping arises where the demand conditions facing a producer differ in home and foreign markets, so that profits can be increased by charging different rather than identical prices in the two markets.

To maximise profits a producer charges a lower price in the market where the elasticity of demand is higher (usually the export market). Such dumping is unintentional in the sense that if demand conditions in the two markets were similar, prices charged would be identical after allowing for transport cost etc. In the country receiving dumped goods consumers gain in the

short run as they do from any kind of dumping; competing producers are faced with long term problems of adaptation similar to those arising out of genuine low cost competition from overseas. Protection for aggrieved domestic producers is not justified on economic grounds, although there may be other grounds for it, as the need to protect small farmers or producers, or for political or military reasons.

Temporary Dumping

Temporary or intermittent dumping may be deliberately used as an aggressive weapon to eliminate competing domestic producers in export markets. It may also arise from a desire on the part of producers in other countries to dispose off temporary surpluses without upsetting the home market price structure. These forms of dumping tend to dislocate domestic production in the export market while conferring only temporary gains on consumers. A better case can be made out in theory for protection against this kind of dumping; but even here it is politically difficult to limit it so that it does not become general protection against all kind of foreign competition.

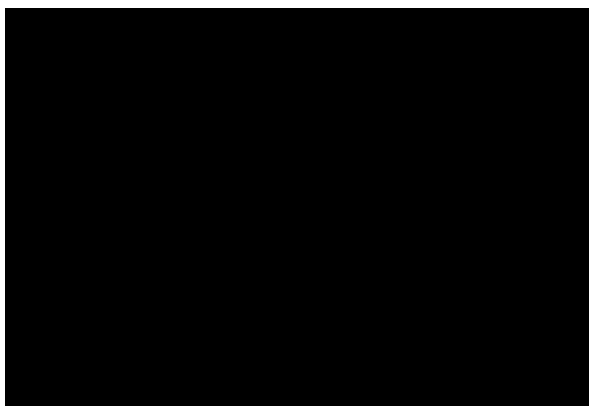
Dumping Margin

The difference between 'normal value' (i.e. price in the domestic market) and the 'export price' expressed as a percentage of the export price is termed as the 'dumping margin'.

Identical or like goods

In India, anti-dumping measures can be initiated only when there is an Indian producer producing goods like or identical to the imported (allegedly dumped) goods. The goods made in India shall either be like the dumped goods in every respect or the goods shall have characteristics closely resembling those goods.

When does a country resort to dumping?



The possible effects of the establishment of a guaranteed minimum price for a product are shown in the diagram. The demand curve has been made relatively inelastic since minimum prices are most frequently attached to agricultural produce.

As the above diagram shows, if the price is fixed at Rs 0.50 per unit, the domestic market will consume only 90 units whereas the producers will supply 120 units at that price leaving a surplus of 30 units. This surplus may be destroyed or the Government can buy and sell them in other country at a relatively low price i.e. dump it. Using the figures from the diagram, if the government can buy the surplus 30 units at Rs 0.50 per unit and sell it abroad at, say, Rs 0.25 per unit, it is only losing Rs 7.50, half as much as it would if it had destroyed the whole surplus. It is better to get something for the 30 surplus units than nothing. This is why food stuffs and various other products are sometimes dumped in other countries. Particularly perishable products like fruits and vegetables, which cannot be stored for long or cannot be processed for a lack of capacity, are dumped to avoid greater loss.

The UK, as one of the largest food importing countries in the world, has been a frequent target for dumping. Since the last war Irish butter, French barley and Polish eggs have been dumped in the UK. The US has very recently accused India of dumping the painkiller pharmaceutical 'Ibuprofen' in the country. The US commerce department, in a preliminary ruling, said imported 'Ibuprofen' from India was being sold in the US for less than half their value. The US also complained of dumping from Japan. They have threatened Japan with retaliatory measures.

The Federation of Indian Chambers of Commerce and Industry has accused China of indulging in large scale dumping of graphite electrodes, drugs, pharmaceuticals and other goods. Ten bulk drugs are allegedly being dumped by the Chinese in the Indian market, forcing local producers to discontinue the production of at least five of them. It is very pertinent to mention that Steel Authority of India Ltd has filed anti-dumping petitions with the Commerce Ministry regarding import of steel plates from Rumania and Italy.

There is no doubt that the cut in customs duty and trade liberalisation has exposed the domestic industry to intense foreign competition. Industry has frequently represented to the government

that many enterprises are confronted with the problem of dumping by foreign suppliers.

Impact on Economy and Consumers

In the country receiving dumped goods consumers gain temporarily as the desired goods are available at lower prices. As mentioned earlier, the landed cost is less than the market price in the exporting country. But dumping is unlikely to last long. Since it is the result of the temporary surplus in the exporting country, it is dangerous to become dependent on dumped supplies - as is likely if home producers and regular suppliers are put out of business by the very low prices of the dumped goods.

However, this price discrimination in favour of foreigners may be practised in order to earn foreign exchange, or it may be made possible by increased economics of scale which would be lost if only the home market was supplied. Either way it represents serious competition to the importing country, whose own industry's future may be jeopardised. Where the competition is the result of efficiency it is legitimate; but where it is the result of a discriminatory policy, possibly even designed to ruin the industry of the importing country so as to remove it as a competitor in world markets, the importing country is justified in imposing counter-vailing duties to prevent this unfair competition.

Role of GATT in prevention of dumping

GATT started after the second world war as a treaty signed by nearly all trading countries outside the communist bloc. Its members agreed to observe certain rules of conduct in trade to cooperate in removing restrictions on trade. Its rules generally ban a number of practices which obstruct free competition in international trade. Among the condemned practices are quota restrictions on imports, subsidies to export and discrimination between the products of one country and another.

Tariffs, however, are an accepted form of protection, but the aim is to reduce them through a process of consultation. Though hard bargaining between countries makes the process difficult and slow, substantial tariff reduction has been achieved through GATT negotiations. The best known of this was the 'Kennedy' Round resulting from negotiations initiated by the President of USA in the 1960. The GATT rules provide for non-discrimination, fair competition, the rational settlement of international trade disputes, liberalisation of trade and the use of

tariffs rather than quotas or other non-tariff barriers to trade.

GATT has also been involved in multilateral trade negotiations for the purposes, *inter alia*, of the progressive lowering of tariffs and of the elimination or mitigation of non-tariff barriers, as for instance with the sponsorship of the so called 'Tokyo Round' of negotiations (1993-1979) and the 'Uruguay Round' (1986-1994).

The Uruguay Round of negotiations of the GATT concluded in April, 1994 with the adoption of the Marrakesh Declaration. The Declaration approved the creation of World Trade Organisation (WTO) to take forward many of the objectives intended by the unrealised International Trade Organisation (ITO). This Round of negotiations dealt with anti-dumping as embodied in the agreement on implementation of Article VI which deals with anti-dumping regulations.

Article VI provides for "the right of contracting parties to apply anti-dumping measures, i.e. measures against imports of a product at an export price below its 'normal value' (usually the prices of the product in the domestic market of the exporting country), if such dumped imports cause injury to a domestic industry in the territory of the importing contracting party".

In case of dumping, the said measures (anti-dumping duty) can be initiated by any member of GATT only in accordance with the Anti-dumping code of GATT. The new agreement also provides that the anti-dumping duty must be less than the margin of dumping and it can only be imposed provided there is:

- (i) dumping,
- (ii) material injury to domestic industry, and
- (iii) a causal relationship between dumping and the injury.

The causal relationship between the material injury sustained by the industry in the importing country and the dumped imports must be established. The code maintains that injury suffered by other causes cannot be attributed to dumping.

Material Injury

The onus lies on the industry to prove that the dumped imports have caused or are likely to cause material injury. However, the following factors are to be taken into consideration to determine material injury:

- (a) Profit/loss of industry during the last 3 to 5 years.
- (b) Trend of domestic prices during the last 3 to 5 years. Evidence of price under cutting or price depression.
- (c) Trend of production/consumption during the last 3 to 5 years.
- (d) Analysis of economic factors during the last 3 to 5 years, such as: decline in output, sales, market price, profits, productivity, return on investments, utilisation of capacity, factors affecting domestic prices, actual and potential negative effect on cash flow, inventories, employment wages growth, ability to raise capital or investment, etc.

Article VI of the GATT agreement allows for investigation by designated authority if there is *prima facie* evidence of (i) dumping, (ii) injury to domestic industry and (iii) a causal relationship between dumping and the injury. However, a written application has to be made with a request to initiate investigation against dumping by or on behalf of domestic industry. The application will not be entertained if the producers expressly supporting the application account for less than 25 per cent of total production of the identical product produced by the domestic industry. The anti-dumping code stipulates that before initiating an investigation, the designated authority shall inform the government of the exporting country.

As soon as the decision is taken to initiate an investigation, interested parties are to be given 30 days' notice for a reply. The investigation is required to be completed in accordance with the provisions of the GATT code which may take anywhere between 180 and 240 days; but the Uruguay Round agreement provides that the investigation must be concluded within one year after initiation, and in no case should take more than 18 months. Provisional measures (duty) must not be imposed earlier than 60 days from the date of initiation of the investigation. The results of the investigation, imposition of any provisional anti-dumping duty and the recommendations for final action must all be communicated to GATT forthwith. In the event of any violation of the anti-dumping code the exporting country concerned can refer the dispute for settlement to the Committee on Anti-dumping Practices, which was constituted by the Uruguay round of negotiation under Article VI. The committee is empowered to set up subsidiary bodies as it may deem fit.

Legislative Measures taken by the Indian Government against Dumping

The Government of India normally initiate anti-dumping action in order to protect 'domestic industry'. An anti-dumping action can only be commenced when there is an Indian industry which produces goods like the goods which are 'dump imported goods'. It means that the goods produced in India must either be like the dumped goods or must have characteristics which are identical to those goods.

The legal basis for anti-dumping investigations and for imposition of anti-dumping duties are provided in sections 9, 9A, 9B and 9C of the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. An investigation will be initiated in accordance with the provisions laid down in the Anti-dumping Code of GATT. In other words, a written application must be submitted to the authority by the domestic industry. Two conditions have, however, to be fulfilled for an application for dumping investigation to be considered valid. These are :

- (a) The applicant domestic producers must be responsible for producing not less than 50 per cent of the total production of the "like products" by the domestic industry; and
- (b) The applicant domestic producers must be responsible for producing more than 50 per cent of the total production of the "like products" by those supporting and opposing the application.

As has been mentioned earlier the applicant must show that the dumped imports are either causing or threatening to cause material injury to the Indian industry.

Factors for determining material injury

The Government of India has identified the following factors to determine material injury:

- (1) The volume of the dump imports
- (2) The effect of the dump imports on prices of "like goods" in the Indian market

- (3) The impact of the dump imports on the relevant industry - This is indicated by:
- a. Decline in output
 - b. Loss of sales
 - c. Loss of market share
 - d. Reduction in profits
 - e. Reduction in production or productivity
 - f. Reduction in capacity utilisation
 - g. Reduction in the returns on investments
 - h. Effect on the price of the goods
 - i. Adverse effect on liquidity

It is desirable to add that factors which are related, relevant and responsible for material injury are taken into consideration during investigation, and other causes of injury which cannot be attributed to dumping are eliminated at the screening stage.

The anti-dumping regulations can be applied in respect of all imports from a state which is a member of WTO and any other country with which India has a Most Favoured Nation (MFN) status.

The written application, praying for action against dumping should contain all material facts with evidence about the dumping activity. The designated authority, on receiving the application will cause a preliminary investigation to establish the merits of the application. If the authority is satisfied that there is enough evidence to show that dumped imports are causing or are threatening to cause material injury or are materially retarding the establishment of an industry, only then will the authority initiate an investigation.

The preliminary findings may be made available, in appropriate cases, within 120 days of the date of initiation. On the basis of the preliminary findings, a provisional duty may be imposed which shall not exceed the margin of dumping. This duty cannot be imposed earlier than 60 days from the date of initiation. However, the final report should be completed within 150 days from the date of preliminary findings.

The authority is empowered to terminate or suspend the investigation in any of the following situations:

- a. At the request of the domestic industry
- b. When there is insufficient evidence of dumping

- c. When dumping margin is less than 2 per cent of the export price
- d. When the extent of the dumped goods from a country is less than 7 per cent of the total imports of the like goods or the collective volume of dumped goods from all such countries is less than 7 per cent of the total imports

There is also a provision in the code that anti-dumping duty can be imposed with retrospective effect in the following circumstances:

- a) Where there is a history of dumping which caused the injury or the importer should have been aware that the exporter practiced dumping which would cause injury, and
- b) When the injury is caused by massive dumping in a short term and the remedial normal anti-dumping duty would have little impact.

Such retrospective duty cannot go beyond 90 days of the date of imposition of provisional duty.

Finally, the imposition of anti-dumping duty under the Customs Tariff Act, 1975 shall remain in force for five years from the date of imposition unless it is revoked earlier. There is, however, a provision for review and an appeal. An appeal is to be filed before the Customs, Excise and Gold Control Appellate Tribunal within 90 days of the date of the order.

Lastly, the Chelliah Committee has recommended that a suitable machinery be established to look into the situation, i.e. whenever international prices dip steeply, say around 20 per cent, regulatory duty may be imposed to allow domestic industry to adjust.

Conclusions

In the light of the above discussions, the following observations can be made, to be considered by all concerned, so that India can move along the path of open market economy smoothly, meeting adequately with any attempt by any sector to disrupt the atmosphere of fair competition.

- (1) Domestic producers should be encouraged to face fair competition by removing import tariff on capital goods, and any unfair competition through dumping

- should be contained without delay.
- (2) The government machinery for dealing with anti-dumping measures should be strengthened so that it can promptly and expeditiously deal with the cases of dumping.
 - (3) Anti-dumping action as a device should not only be used to protect the domestic producers but also to see that the ultimate consumers are not adversely affected.
 - (4) High tariffs on imports should not be passed on to consumers in the form of higher prices while the domestic producers stand to gain from the absence of foreign competition. The government is to see that a balance is restored between the domestic producers and consumers.
 - (5) Expertise in anti-dumping investigation should be built up so as to use the mechanism judiciously in a case where dumping is determined.
 - (6) Specialised cells may be set up for collecting data on sensitive items against which dumping is apprehended.
 - (7) The Government needs to re-establish Tariff Commission as the one which existed during the 50s.
 - (8) Indian companies should build up their own data-base.
 - (9) Industry and non-governmental organisations should constitute watch-dogs to spot the cases of dumping and work in concert with the anti-dumping authority.

Recommendations

CUTS recommends that in order to check and prevent dumping, the following measures be incorporated into the legislation and rules framed thereunder:

- The time limit for imposition of anti-dumping duty should be reduced
- The final findings should be made available within 6 months from the date of initiation of the investigation.
- Imposition of duty after the final findings should be made within 3 months
- A provisional duty should be imposed within 30 days from the date when the authority is satisfied that there is *prima facie* case of dumping to prevent injury to domestic industry

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