STUDY ON ANTIDUMPING AND COMPETITION LAW

(FINAL REPORT)

SUBMITTED TO

THE COMPETITION COMMISSION OF INDIA

NEW DELHI.

SUBMITTED BY

ECONOMIC LAWS PRACTICE

NEW DELHI, MUMBAI, AHMEDABAD & PUNE

TABLE OF CONTENTS

Executive Summary: Study on Antidumping and Competition Law

1. Introduction:

1.1 The process of economic liberalization and institutional reforms which formally began in 1991 has significantly shaped India's transition from a planned economy to a market economy. The substitution of the erstwhile Monopolies and Restrictive Trade Practices Act (MRTP), 1969 by the Competition Act, 2002 is an exercise to facilitate India's transition towards a market economy. The new Competition policy is aimed at promoting and sustaining competition in Indian market and ensuring overall economic efficiency in the wake of a liberalized economy.

1.2 The process of opening up of markets may pose threat to domestic industries, which may wilt in the wake of increased foreign competition. Such threats from foreign competition may not always be 'fair'. In order to allay these fears, the multilateral framework for trade liberalization under the General Agreement on Tariffs and Trade (GATT) provided for certain contingency measures such as 'antidumping' to protect the domestic industry from 'unfair trade practices' such as 'dumping'. India enacted its frame work of antidumping laws and rules in 1995 in order to give effect to India's commitments under the World Trade Organisation (WTO). Since then, India has emerged as one of the most prolific users of antidumping measures in the world.

1.3 The use of anti-dumping law as a viable trade policy measure to protect domestic industry together with the enactment of the Competition Act, 2002 to promote and sustain competition in markets presents a unique policy challenge and is one of the more important policy concerns facing India.

1.4 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.

1.5 Thus in order to determine the conflicts and complementarities that may exist between the two sets of laws and also to explore the possible means to resolve the conflicts and re-enforce the complementarities, if any, the Competition Commission of India (**'CCI'**) has assigned Economic Laws Practice (**'ELP'**) to carry out the present study on **"Antidumping and Competition Law"**. The objectives of the study, the methodology adopted to address the objectives, the key findings on conflicts and complementarities and the issues of advocacy are being presented hereinafter in the executive summary.

2. Objectives of the Study:

1.1 The primary objective of the study is to map out the interface between antidumping and competition law. To this end the study seeks to analyze the following:

- Objectives of the antidumping law and the conflicts and complementarities therein;
- The conflicts and complementarities between antidumping and competition law in terms of the conduct that they seek to regulate, i.e. price discrimination;
- The interface between the substantive provisions and rules on procedures under the two sets of laws with specific regard to price discrimination;
- The impact of the antidumping rules and procedures on competition in markets in India and their implications for the Competition Act, 2002.
- The manner in which the interaction between antidumping and competition law has been dealt with in free trade agreements;
- The issues for advocacy with regard to the interface between antidumping and competition law and the possible means to resolve the conflicts, if any.

3. Methodology:

1.2 The research has been carried out primarily with the help of a comprehensive literature survey of available commentaries, texts and case laws. In addition, in order to give the study a wider perspective, where ever possible the legal regime in India has been compared with the regimes in four other jurisdictions, namely USA, EC, S. Africa and Australia **('subject countries'**). The study entails a three step analysis.

1.3 In Step 1, the relationship between antidumping dumping and competition law has been analyzed in two stages, i.e. in the first stage the objectives if the two sets of laws have been mapped out in order to ascertain the overlaps or contradictions that may exists in terms of the very objectives. Thereafter the parallels that may exist in terms of the conduct that the two laws seek to address have been identified. Finally in so far as they address the issue of 'price discrimination', the differences and similarities between the two laws in the manner in which they address this and highlight the principle areas of conflict between the two laws has been discussed.

1.4 In Step 2, next the principle areas of conflict between the two laws has been identified, and the interaction between the two laws in terms of the substantive provisions and the rules on procedures contained therein has been analyzed. Thereafter the impact of the antidumping rules and procedures on competition in markets in India and their implications for the Competition Act, 2002 has been analyzed. In the context of free trade agreements, the role of competition law and antidumping law has been discussed.

1.5 And finally in Step 3, the Report highlights the issues for advocacy which can be taken up by the Competition Commission of India and also suggests possible means to resolve the conflicts if any between the two set of laws.

4. Findings of the Study:

a. Objectives of Antidumping and Competition Law:

i. Antidumping Law:

4.1 The study reveals that the objectives with which antidumping and competition laws are enacted may differ from country to country and depending upon the specific socio-economic considerations of each country. While there is a fair degree of unanimity in the objectives with which antidumping laws are enacted, i.e. to remedy the situation of injury to the domestic industry due to dumping across all the subject countries (In EC, where apart from the objective of remedying the injury to the domestic industry, protection of 'community interest' also is an important objective). The table below provides a summary of the objectives (as stated in the legal texts) with which antidumping laws have been enacted in the subject countries.

4.2 **Table 1: Objectives of Antidumping Laws of Select Jurisdictions:**

Stated Objectives	The US	The EC	Australia	South Africa	India	WTO AA[1]
Remedying the injury to the domestic industry due to dumping	✓	✓	✓	✓	✓	✓

[1] WTO Antidumping Agreement

Public interest		✓				
Address predatory pricing	✓ (In the Antidumping law of 1916)					
Consumer welfare.		✓				

ii. Competition Law:

4.3 As far as the objectives of competition laws are concerned, they tend to vary from country to country and even within a country they seem to change and evolve over time:

> *"Even within a particular national system, the goals of competition law may evolve and transmogrify, often depending on the state of industrialization of the economy, the strength of the political democracy, the power of the judiciary and of bureaucrats, and the exposure of domestic firms to global competition".*[2]

4.4 Notwithstanding the differences in objectives with which competition laws are enacted and implemented, the common thread of 'protection and promotion of competition in markets and consumer welfare' runs across the legislations in all the subject countries. The competition legislations in the USA and South Africa specifically mention 'economic efficiency' as an objective of their respective competition related laws. Also, countries like the EC, Australia and South Africa have tried to address the issue of 'public welfare' through their competition laws by specifically mentioning promotion of welfare of employees or producers or both as one of the objectives. The EC law on competition seeks to achieve an additional objective of 'economic integration', which is absent in rest other countries. The Competition Act, 2002 of India contains an additional objective of 'competition advocacy which is not specifically stated in other legislation. The table below provides a summary of the objectives (as stated in the legal texts) with which antidumping laws have been enacted in the subject countries.

4.5 **Table 2: Objectives of the Competition Laws in the Subject Countries:**

Stated Objectives	The US	The EC	Australia	South Africa	India
Promotion of Competition and prevention of anti-competitive practices.	✓	✓	✓	✓	✓
Protection and promotion of Consumer Interest.	✓	✓	✓	✓	✓

[2] Fox Eleanor M., "*Anti-trust Law on a Global Scale: Race up, down and sideways*", Public Law and Legal Theory Working Paper Series, Working Paper 3, New York University School of Law, December 15, 1999.

Achieving Economic efficiency	✓			✓	✓
Public welfare-welfare of employees, producers.		✓ (Mentions welfare of both consumer and producer)	✓ (Mentions employee welfare)	✓ (Mentions both producer and employee welfare)	
Competition Advocacy					✓
Geographical and regional Integration.		✓			

b. Overlaps between the Objectives of Antidumping and Competition Law:

4.6 The analysis of the objectives of the two sets of laws as expressly stated in the legislations in the subject countries reveals that prevention of unfair business practices is common interface between the two. While competition laws are primarily aimed at protecting and promoting competition in markets, antidumping laws are aimed at remedying the injury to the domestic industry which may arise due to dumping, which in essence amounts to protection of competitors.

4.7 Furthermore, this difference in the objectives of the two laws however did not exist when the antidumping laws were enacted initially and infact the earliest antidumping laws (such as the Antidumping law of 1916 in the USA) were meant to address competition concerns arising out of the practice of 'transnational price predation'. Till the time antidumping laws were enacted and meant to address such concerns, they were considered as an extension of competition law and the two laws were grounded in common objectives. However, the objectives surrounding the use of antidumping laws have since evolved and modern antidumping practice has come to actually facilitate the kind of unfair and anti-competitive behaviour it was intended to prevent[3]**.** In some jurisdictions however, the antidumping laws still continue to be aligned with their competition law. For instance in the EC the antidumping law, even though meant to remedy the injury to the Community industries does take into account wider public interest considerations through the 'Community interest' requirement and the analysis of the case law indicated that it addresses competition concerns as well.

c. Conduct Sought to be Addressed by Antidumping and Competition Law:

4.8 The study reveals that notwithstanding the seemingly divergent objectives for which antidumping and competition laws are enacted their spheres do overlap, at least in terms of the conduct that they seek to address.

i. <u>Price Discrimination under Competition Law:</u>

4.9 Under competition law only such 'price discrimination', which adversely affects competition in markets and thus has negative consumer welfare impacts, is prohibited by competition statutes. Under competition law such price discrimination is usually referred to as 'unfair' or 'discriminatory' pricing and a

[3] N Gregory Mankiw and Phillip L Swagel, "*Antidumping: The Third Rail of Trade Policy"*, Foreign Affairs, July/August 2005 available at http://www.foreignaffairs.org/20050701faessay84408-p0/n-gregory-mankiw-phillip-l-swagel/antidumping-the-third-rail-of-trade-policy.html

particular instance of 'price discrimination' does not (per se) attract sanctions if it can be shown that it is adopted to meet competition and does not affect the conditions of competition in an adverse manner. This requirement therefore involves an examination into welfare effects of the 'price discriminatory' conduct. Certain instances of 'price discrimination' such as 'predatory pricing' have been assumed to affect competition negatively and cannot be justified on the grounds that they have been 'adopted to meet competition'.

ii. Price Discrimination under Antidumping Law:

4.10 In antidumping law 'price discrimination' is synonymous with 'dumping'. Jacob Viner[4] defined dumping as "price discrimination between national markets." In international trade dumping is said to occur when the sale of products for export is at "prices lower than those charged to domestic buyers, taking into account the conditions and terms of sale." The phenomenon of dumping takes place when a firm sells a product abroad at a price, which is below its fair value[5]. According to Article VI, GATT 1994, a product is said to be dumped when its export price is less than its normal value, that is, less than the sale of a like product in the domestic market.

4.11 The effect of the instance of 'price discrimination' under antidumping is examined with the narrow parameters of 'injury' only to the 'domestic industry' and once dumping and injury have been established, then the examination does not take into account broader economic concerns, such as consumer's interest, the interests of other users of the product and the like whilst imposing an antidumping duty[6]. With regard to the practice of antidumping law in India, it is noted that though consideration of public interest in an antidumping investigation is not mandatory, but in limited instances even notwithstanding the positive recommendation by the Designate Authority/ Ministry of Commerce, the Ministry of Finance has not imposed antidumping duties and this may be due to public interest considerations[7]. The process however is neither formal nor transparent.

d. Overlaps in the Manner in which Antidumping and Competition Law Address the Issue of Price Discrimination:

4.12 Under competition law the definition of 'price-discrimination' is much broader and extends to 'unfair or discriminatory' price in purchase or sale of goods or provision of services. It could take various forms, such direct or indirect, static or dynamic, etc. One of the forms of price discrimination that competition law specifically addresses is 'predatory pricing', which is defined as "selling a product at prices below the incremental cost of producing the output".

4.13 Antidumping law on the other hand is concerned with only one type of price discrimination, i.e. 'dumping'. It does not specifically address the issue of 'predatory pricing'. Instead what antidumping law seeks to address is the issue of price discrimination between two different geographic markets, evidenced by a higher 'normal value' as compared with 'export price'. Antidumping law is therefore concerned only about the price at which the product alleged to be dumped is sold in the two markets (domestic market of the exporting country and export market) and not about the cost of production of the product and whether its is exported at a price below a relevant measure of cost or not. Thus strictly speaking antidumping law does not concern itself with 'predatory pricing'. However, notwithstanding the absence of any express provision to capture the instances of 'predatory pricing'; antidumping laws may to the extent that the exports are made at prices below the average variable cost (and assuming that the normal value is higher) capture the instances of 'predatory pricing'.

---

[4] Viner J, "*Dumping: A Problem in International Trade,"* 1922.

[5] Devault James, "*The Administration of US Antidumping Duties: Same Empirical Observation"s*, 13 World Economy, 75, (1990)

[6] However to the limited extent that antidumping rules in India as well as other countries such as USA prescribe the 'lesser duty rule' (i.e. if a duty lesser than the margin of dumping is sufficient to remedy the injury to the domestic industry then the antidumping duty should be the lesser of the two), which inherently take account of consumer interest to some extent. Further the EC law on antidumping by expressly providing for 'community interest test' takes account of consumer interests also before imposing antidumping duty on a product.

[7] National Board of Trade, Sweden, "*The Use of Antidumping in Brazil, China, India and South Africa – Rules, Trends and Causes*" 2005. In the Newsprint case the Ministry of Finance did notify the recommendation of the Ministry of Commerce and in Met Coke the recommendation was partly imposed.

4.14 In this limited situation therefore, when the export price is lower than the normal value and at the same time also lower than the cost of production (average variable cost for the purposes of a predatory determination and total costs for the purpose of antidumping) that antidumping law can be said to address the issue of 'predatory pricing' and to this extent there exists a distinct overlap between antidumping and competition law.

e. Predatory Pricing and 'Dumping'- the Distinctions:

4.15 Under competition law 'predatory pricing' is understood as a deliberate strategy, adopted usually by a dominant firm, to drive competitors out of the market by setting very low prices or selling below the firm's incremental costs of producing the output (often equated for practical purposes with average variable costs) with intent to eliminate competition or eliminate competitors. Once the predator has successfully driven out existing competitors and deterred entry of new firms, it can raise prices and earn higher profits[8]. The definition of 'predatory price' under competition law therefore has three constituent elements, all of which must necessarily be satisfied before any sanction can be imposed: (i) the firm alleged to be selling at 'predatory price' should be in a dominant position in the relevant market; (ii) the sale must be at prices below a certain measure of cost (usually average variable cost); and (iii) it should be with the intent to reduce competition or eliminate competitors.

4.16 "Dumping' as discussed earlier is a type of international price discrimination, wherein an exporter sells an article at "prices lower than those charged to domestic buyers, taking into account the conditions and terms of sale." As per the definition of 'dumping' as contained in the WTO Antidumping Agreement (as well as the national antidumping legislations in the subject countries), the limited requirement for 'dumping' to be condemned and sanctions to be attached against is that, the 'export price' of the product alleged to be dumped should be less than the price at which it is sold in the domestic market of the exporting country ('normal value') and that it should cause 'material injury' to the domestic industry for the 'like product in the importing country. Thus antidumping law is neither concerned with the requirement of 'dominance' nor 'intention', unlike competition law wherein both these factors are as important conditions as the instance of 'price discrimination'. The table below summarizes the differences between 'predatory pricing' and 'dumping':

4.17 **Table 3: Differences between 'Predatory Pricing' and 'Dumping':**

Predatory Pricing	Dumping
Dominance a Precondition	No need for Dominance. If imports are above *de-minimus* threshold of 3% of total imports from the exporting country in to the import country an action can e initiated[9].
Intent required	No need for intent
Sales below variable costs are predatory, and thus violative	Sales below normal value are violative. (In limited situations, when the 'normal value is determined on the basis of the 'cost of production', the investigating authorities look at total costs being the sum total of average fixed cost and average variable cost).

[8] OECD glossary of terms.
[9] The volume of dumped imports shall normally be regarded as negligible if the volume of dumped imports from a particular country is found to account for less than 3 per cent of imports of the like product in the importing Member, unless countries which individually account for less than 3 per cent of the imports of the like product in the importing Member collectively account for more than 7 per cent of imports of the like product in the importing Member.

Conduct must be likely to cause or have appreciable adverse effects on competition relevant market	Conduct must cause or threaten to cause material injury to the domestic industry in the importing market
Punitive remedies	No sanction for Punitive remedies-antidumping duties are remedial in nature.
Typically national Legislation with no limits on applicability or operation	WTO legislation confined by the provisions of ADA agreement and subject to appeal under the WTO dispute settlement process

f. Does Antidumping Law Conflict with Competition Law?

4.18 It has been argued that antidumping rules as they exist today and as they are implemented may result in anti-competitive effects. It has been argued that imposition of antidumping duties makes little economic sense. Economists argue that 'dumping' is a natural phenomenon and is not necessarily 'unfair' as considered under the WTO Antidumping Agreement (as well as the domestic antidumping legislations in the subject countries).

4.19 From an economic perspective, there are two preconditions for a firm to engage in international price discrimination. First, the firm should have a strong monopolistic - or at least oligopolistic - position in its home market. Second, the firm should be protected from foreign competition in its home market by natural or artificial barriers to trade.

4.20 When these conditions are met, it is quite natural for firms to dump and is not necessarily 'unfair'. Therefore, there does not seem to be any economic justification for antidumping rules that condemn all sales of exports at prices lower than home-market prices.

4.21 In the absence of any sound economic for antidumping laws to exist; it may well be the case that besides the political-economic consideration of protections of the domestic industry there does not seem to be any other plausible reason for continuing with antidumping laws. Further, it has been argued that antidumping laws may do more harm than good. It has been argued that the mere existence of antidumping laws in the statue books lead to anti-competitive behaviour and effects and may thus be contrary to the objectives of competition law. Further, it is argued that the rules on antidumping as they exist and as they are implemented also result in anticompetitive effects.

4.22 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[10]. 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[11].

4.23 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.

[10] Ibid.
[11] Ibid.

g. The Relationship between Substantive Provisions and Rules on Procedures under Antidumping and Competition Law:

4.24 Since both antidumping and competition law seek to regulate similar market conduct, there is a possibility of overlap between the substantive law and the rules on procedures related to 'price discrimination'. The interaction between the two sets of laws has therefore been mapped under the following headings:

(1) The manner in which the two laws measure the 'degree of discrimination' while addressing 'price discrimination';

(2) The procedural steps involved in examining the instances of 'price discrimination';

(3) The manner in which the two laws measure the impact of the practice of 'price discrimination';

(4) The remedy provided under the two laws against the instances of 'price discrimination'.

(5) Injury Analysis under Antidumping Law via-a-vis Appreciable Adverse Effect on Competition Analysis under Competition Law;

(6) Extra-territorial Applicability of Antidumping and Competition Law;

(7) Judicial Positions with regard to the Interaction between Antidumping Law and Competition law.

h. Implications of the Antidumping Procedures on Competition in Markets in India with reference to the Competition Act, 2002

4.25 For an antidumping investigation to be initiated the application must be made by "domestic industry. The WTO Antidumping Agreement defines domestic Industry as:

> *[R]eferring to the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:*
>
> *when producers are related[12] to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers.*

4.26 The definition itself requires the pooling together of domestic manufacturers to bring an action against foreign imports. At some level this is collusive conduct, and thus anti-competitive.

4.27 Further 'material injury' needs to be established to 'industry as a whole' as opposed to only 'domestic industry'. Antidumping rules prescribe the manner in which the investigating authorities are required to carry out the investigation into the various factors at different stages of investigation. The study reveals that these rules confer significant discretion to the investigating authorities, and thereby increase the risk of positive finding on dumping and injury. Further since the very purpose of antidumping law is itself inherently weighted in favour of protecting the domestic industry, procedures that allow investigating authorities significant discretion, may be likely to result in the imposition of antidumping duties.

4.28 The analysis on the procedure for the determination of 'dumping' and 'injury' clearly suggests that it is fraught with certain inherent shortcomings which can actually compensate inefficiencies and lead to anti-competitive levies An erroneous determination on 'dumping' may result in imposition of antidumping duties at much higher level, instead of remedying the 'injury' to the domestic industry may result in

[12] For the purpose of this paragraph, producers shall be deemed to be related to exporters or importers only if *(a)* one of them directly or indirectly controls the other; or *(b)* both of them are directly or indirectly controlled by a third person; or *(c)* together they directly or indirectly control a third person, provided that there are grounds for believing or suspecting that the effect of the relationship is such as to cause the producer concerned to behave differently from non-related producers. For the purpose of this paragraph, one shall be deemed to control another when the former is legally or operationally in a position to exercise restraint or direction over the latter.

penalizing exporters and thereby closing the market to greater competition. Antidumping duties if imposed at such prohibitively high levels will make exports less competitive and become protectionist instruments, which will stifle competition in the market.

4.29 The study has revealed that the use of antidumping measures to remedy the 'injury' caused to the domestic industry finds little support from economists, most of them being of the opinion that antidumping measures tend to decrease welfare and thus have no place in the realm of 'free trade'. However, some economists at the same time argue that to the limited extent that antidumping measures are directed at 'predatory dumping' or 'strategic dumping' they help enhance aggregate welfare. Notwithstanding the divided opinion on the rationale for antidumping measures, most countries have retained antidumping laws on their statue books and continue to use them with abandon.

5. Antidumping and Competition Provisions in Free Trade Agreements/Regional Trade Agreements

1.6 A few studies have, introduced the idea of replacing antidumping with competition laws, especially in free trade agreements (FTA).[13] It has been suggested that the abolition of antidumping laws in favour of harmonized antitrust laws enhances economic welfare, and offers a practical solution to the global increase in antidumping actions. A uniform standard of competition policy can be applied to regulate a single market, regardless of the nationality of each producer. In this way, price discrimination will be examined under the national competition law (or possibly international law in the future); as long as it is acceptable under the competition rules, no litigation will be initiated against it[14].

1.7 There are currently four regional trade agreements, in which the member countries have abolished the application of antidumping measures amongst themselves: the European Union (EU); the European Economic Area (EEA), which came into force in 1994 by the treaty signed between the EU and the European Free Trade Association (EFTA); the Closer Economic Relations Agreement (CER) between Australia and New Zealand; and the 1996 Canada-Chile free trade agreement. In case of MERCOSUR[15], member countries are eventually expected to phase out antidumping laws in favour of harmonized competition law regime, but have not yet done so.

6. Issues for Advocacy for the Competition Commission of India

1.8 The report discusses various aspects of antidumping which can possibly create or perpetuate competition. The report categorically states that given the broader objective, freedom for national governments to legislate without the shackles of an overarching agreement and far more evolved basis of economic analysis; the competition law must set the tone for regulation of all types of price discrimination and antidumping laws must operate within these parameters.

1.9 Further overlapping concepts (such as determination of markets, calculation of selling price and export price) and other procedures have been analyzed and a suggestion has been made for that competition regulator must rapidly establish its determinations so as to bring in the larger view to the application of such concepts.

1.10 The issues for advocacy have been divided into four parts:

A. The first part deals with issues for advocacy to policy makers.

---

[13] For example, see *The Relationship Between Competition Policy and Anti-Dumping Law: The Canadian Experience*, a study by Lecenomics Inc. funded by Consumer and Corporate Affairs Canada, 1990; Ivan R. Feltham, Stuart A. Salen, Robert R. Mathieson and Ronald Wonnacott, *Competition (Antitrust) and Antidumping Laws in The Context of The Canada-U.S. Free Trade Agreement,* a study for the Committee on Canada-United States Relations of The Canadian Chamber of Commerce and The Chamber of Commerce of The United States, Exposure Draft, 19/12/1990; P. Warner, "*Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrus*t". Law and Policy in International Business, v 23, no 4, 1992, pp 791-890; John A. Ragosta and John R. Magnus, "*Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief*", in Michael Hart (ed.), *Finding Middle Ground: Reforming the Antidumping Laws in North America,* (Ottawa: Centre for Trade Policy and Law, 1997) pp 86-142.

[14] Hang Zeng, "*Antidumping and Competition: the Case of China*", 2005

[15] Also known as *Southern Common Market*, is a Regional Trade Agreement (RTA) among Brazil, Argentina, Uruguay and Paraguay, founded in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto.

B. The second part deals with advocacy other regulators. The following issues have been examined:

(i) The impact of the imposition of an antidumping levy on competition in the market.

(ii) The impact of prolonging antidumping levies beyond its required period.

(iii) The impact of price undertakings on competition.

(iv) The protection of Monopoly/Duopoly/Oligopoly Domestic Industry.

(v) The use of review powers to mitigate anti-competitive conditions.

(vi) The uniform application/determination of common concepts.

C. Further the possibility of antidumping law and procedures informing competition law and procedures has been examined under the following heads:

(i) Criteria Used for the Determination of 'Domestic Industry' May Inform the way 'Relevant Product Market' is to be Determined under Competition Law.

(ii) Criteria Used for the Determination of 'Normal Value' May be Used under Competition Law for the Determination of 'Selling Prices' of the Product Alleged to be Sold at Discriminatory Prices.

(iii) 'Fair Comparison' Standards as Employed in Antidumping Investigations May be Used under Competition Law while Investigating into 'Price Discrimination'.

(iv) Comparison of Prices on the Basis of Weighted Average or Transaction-to-Transaction basis.

D. Finally Issues for Advocacy with the Private Individuals or Enterprises are spelt out under the following heads:

(i) Undue Protection in the form of Antidumping Duty is Inimical to the Conditions of Competition.

(ii) Successful Petitions by Monopoly or Oligopoly Producers may Attract the Attention of Competition Authorities.

(iii) Ill effects of Antidumping Duties in the Long Run.

(iv) Use of Data Submitted before the Antidumping Authorities as Evidence under Competition Law.

1.11 The report also highlights that there already exists a mechanism under the Competition Act, 2002 which can facilitate co-operation between statutory bodies and help in addressing anti-competitive practices. The Act expressly provides that the CCI may inquire into the alleged contravention of the provisions of the Act on the basis of a reference made by the Central Government or a State Government or a statutory body[16]. Thus, if the Designated Authority has come to a finding or is of the opinion (may be on the basis of data and information available with it with regard to an antidumping investigation) that anti-competitive practices may exist, it may refer such matters to the CCI.

7. Antidumping and Competition Law: Can They Co-exist or Shall Rules on Antidumping be Replaced by Rules on Competition?

1.12 Our study has shown that the there is no uniform view on the relationship between antidumping and competition law. Some authors argue that antidumping law is an extension of competition law, to the extent that it addresses the issue of 'international predation'. While others argue that the body of antidumping law as it exists and as it is applied, is inherently protectionist in nature and is thereby antithetical to the principles of competition law. Somewhere in between are those who argue in favor of the use of antidumping on "second best" grounds. In such instances, the necessity for an antidumping

[16] Section 19 (1), Competition Act, 2002

dumping duty may be justified because foreign firms are able to leverage entry restrictions in their own home markets into an "unfair" competitive advantage in export markets. In such cases, absent common rules on competition law disciplines, antidumping is required to "level the playing field." [17]

1.13 The findings of this study also reflect this ambiguity with regard to the relationship between antidumping and competition law. To correct the possible anti-competitive effects of antidumping law, the study points towards some solutions that have been introduced and are being explored in various jurisdictions. These range from reforming the antidumping rules themselves (by introducing the 'public interest test') to exploring alternatives to replace them (such as replacing rules on antidumping by safeguard measures or competition). In order to ensure that the new Indian competition law regime complements, and does not contradict the antidumping regime and at the same safeguards the competitive conditions in the market, the substantive and procedural anomalies pointed out in this study will require removal and solutions such as the ones proposed in this study, will require closer examination.

[17] Hoekman, Bernard, "*Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements*", World Bank and CEPR, 1998

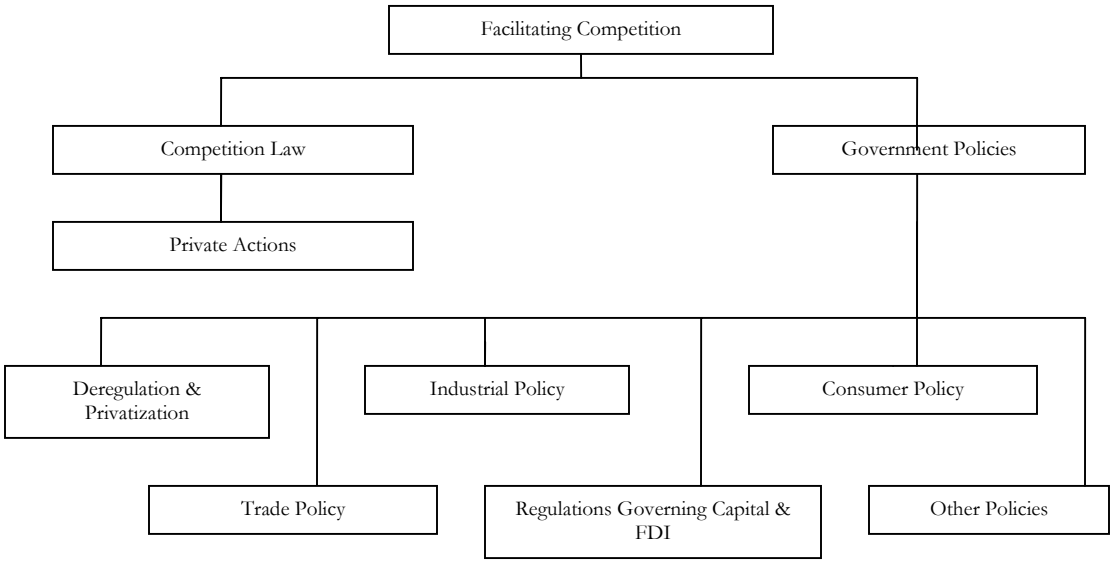
Chapter I: Antidumping and Competition Law

1. Introduction: the Interaction between Law and Policy:

1.1 The study of the relationship between competition law and antidumping law is important to understand in the context of the role they play in influencing trade and commerce in a growing market economy, such as ours. However, before embarking on the study of how these two bodies of law interact, it is essential to understand the purpose for which the respective laws were enacted, and the policy objectives, which they are intended to fulfill.

1.2 Both Competition Law and Anti-dumping provisions have co-existed for nearly a century in some jurisdictions around the world and continue to do so in several jurisdictions. As India implements its new competition regime, it is critical to understand the interplay between anti-dumping and competition, especially since India is amongst the most prolific users of anti-dumping laws.

1.3 The term 'competition policy' is used in different ways in different countries and in different contexts[18]. It has a very broad domain and comprises measures and instruments used by governments that determine the 'conditions of competition' in their markets. It may also be defined as those Government measures that affect the behaviour of enterprises and structure of the industry with the view to promote efficiency and maximize welfare[19]. Competition law is one of the components of competition policy. The diagram below provides a pictorial description of the various components of competition policy.



1.4 As can be seen from the diagram above, trade policy (including anti-dumping) is part of the competition policy. Typically the focus of trade policy is on removal of barriers to trade and creation of market access. Trade policy also provides for measures to protect domestic industry

[18] Definition of competition policy, available online: http://www.competition-commission-india.nic.in/

[19] The welfare impact of competition may be looked at from the producer, the consumer and the employment points of view. While justifying the positive impacts of competition law on welfare of an economy, a distinction is usually not made i.e. welfare gains on account of producers in an economy or consumers in an economy are treated equal. Further, many economists also point out that when companies are owned by shareholders, many of whom are pension funds, then the distinction between consumer surplus and producer surplus is much less clear cut than it at first seems. Thus, this study takes the widely accepted view of welfare and refers to consumer welfare wherever required. A more detailed account of the debate may be found in: Bork, R.H, *The Antitrust Paradox*, Free Press, New York, 1993.

from certain contingency situations (e.g. sudden influx of imported products, or injury to the domestic industry from dumped products etc.).

1.5 The focus of this paper is to contrast one aspect of trade policy – anti-dumping with competition law. Commentators have observed that originally anti-dumping law was nothing but the extraterritorial application of Competition Laws[20]. As national laws have over the years, through the development of jurisprudence begun to have extra territorial reach, several commentators suggest that anti-dumping has outlived its utility.[21] Indeed several have argued that anti-dumping law has not kept pace with the economic refinement that has come about in competition law and one commentator has gone so far as to say that antidumping law, as practiced today, is a witches' brew of the worst of policy making: power politics, bad economics, and shameful public administration.[22]

1.6 If the hypothesis that antidumping laws were enacted to give extra territorial effect to competition law is to be accepted; clearly today the two have deviated. The table below shows some of the fundamental and stark differences between anti-dumping and predatory pricing :

Predatory Pricing	**Dumping**
Dominance a Precondition	No need for Dominance
Intent required	No need for any Intent
Sales below variable costs are predatory, and thus violative	Sales below normal value are violative. Analysis includes sales below total costs – fixed and variable
Conduct must be likely to cause or have appreciable adverse effects on competition relevant market	Conduct must cause or threaten to cause material injury to the domestic industry in the importing market
Punitive remedies	No sanction for Punitive remedies
Typically national Legislation with no limits on applicability or operation	WTO legislation confined by the provisions of ADA agreement and subject to appeal under the WTO dispute settlement process

1.7 Given the divergence, when competition policy and trade policy are implemented through separate set of laws there is bound to emerge significant interaction and even conflict. Since, the aim of this study is to map out the interface between 'competition law' and 'antidumping law' it is particularly important to trace the evolution of the two sets of laws and the economic rationale behind them.

2. An Introduction to Competition Law:

2.1 Competition law, as discussed above, is the key tool to promote competition. The scope, applicability and implementation of competition law vary widely across jurisdictions. As Fox puts it:

[20] Knorr Andreas, "*Antidumping rules versus competition rules*', Institute for World Economics and International Management, Universitat Bremen.
[21] *Ibid*.
[22] Finger, J. Michael, *Editor, "Antidumping How It Works and Who Gets Hurt"*, Ann Arbor" University of Michigan Press, 1993

> *"Even within a particular national system, the goals of competition law may evolve and transmogrify, often depending on the state of industrialization of the economy, the strength of the political democracy, the power of the judiciary and of bureaucrats, and the exposure of domestic firms to global competition".*[23]

2.2 Notwithstanding the differences that may stand between the competition related legislations across different jurisdictions, most modern competition laws seek to address the issue of anti-competitive practices (broadly as manifested in anti-competitive agreements and abuse of dominant position) and combinations (as manifested in mergers, acquisitions etc)

a. The Evolution of Competition Laws:

2.3 Competition laws have a long history. Some authors claim that the first laws against anti-competitive practices date as far back as the middle ages, when cartels, the so-called guilds, were formed in most European cities. A first prohibition of contracts that restrain trade can be traced to English common law of the early fifteenth century.[24]

2.4 The first modern body of competition law can be traced back to the enactment of the Sherman Act of 1890 and the Clayton Act of 1914 in the United States. In the second half of the nineteenth century, the United States and Canada experienced a turbulent process of economic change. Railroads and steamships expanded the scope of many markets, and managerial innovations led to larger corporations and trusts. At the same time, agricultural prices fell as a consequence of monetary stringency associated with the gold standard. Farmers and small business owners discovered that they had to pay high prices for the inputs charged by the trusts while receiving lower prices for their own outputs. They subsequently lobbied for legislation to limit the trusts' power. Their movement was successful and led to the adoption of competition laws in Canada (1889) and the United States (1890).[25]

2.5 The turn of the century also saw the formation of many cartels in Germany and other parts of Europe. Cartels steadily expanded their economic importance in countries such as Austria, Switzerland, Italy, France, the Scandinavian countries and were even recorded in Japan. With the practice of cartelization reaching its peak during the great recession of the 1930s, European countries began to follow the United States' lead in enacting competition laws.

2.6 After World War II, the Allies, led by the United States, introduced tight regulation of cartels and monopolies in occupied Germany and Japan. In Germany, despite the existence of laws against unfair competition passed in 1909 (Gesetz gegen den unlauteren Wettbewerb or UWB) the industry was dominated by a few large cartels. Similarly in Japan, business was organised along family and nepotistic ties, and a few business houses controlled much of the industry. Thus after the end of the World War II more strict competition laws based on the US legislations were introduced in these countries.

2.7 Further developments in competition law however were considerably overshadowed by the move towards nationalization and industry wide planning in many countries. Making the economy and industry democratically accountable through direct government action became a priority. Coal industry, railroads, steel, electricity, water, health care and many other sectors were targeted for their special qualities of being natural monopolies. In contrast, Commonwealth countries were slow in enacting statutory competition law provisions. The United Kingdom introduced the (considerably less stringent) Restrictive Practices Act in 1956. Australia introduced its current Trade Practices Act in 1974.

2.8 Competition laws have been adopted more recently in developing countries compared to the more developed counterparts. Argentina and Mexico, were the early entrants amongst the developing countries, and adopted competition laws in 1923 and 1917 respectively. Competition

[23] Fox Eleanor M., "*Anti-trust Law on a Global Scale: Race up, down and sideways*", Public Law and Legal Theory Working Paper Series, Working Paper 3, New York University School of Law, December 15, 1999.
[24] Passmen Berend R., "*Multilateral Rules on Competition Policy: An Overview of the Debate*", Comercio Internacional Serie 2, International Trade Unit, Santiago, Chile, December 1999.
[25] *Ibid.*

laws were introduced in Chile, Brazil and Colombia in the 1960s.[26] India adopted its first competition law way back in 1969 in the form of Monopolies and Restrictive Trade Practices Act (MRTP) and in the wake changing nature of business replaced the MRTP with a the Competition Act of 2002. In the early 1990s, there were only about 35 developing countries with a competition law in place, but with rapid industrialization and integration into the world market, several other developing countries have taken steps to introduce competition laws and presently the number of developing countries with competition related statutes is estimated to exceed 100, with several more in the process of adopting a competition legislation very soon[27].

3. An Introduction to Antidumping Law:

3.1 Antidumping law is a trade policy instrument sanctioned by the WTO, which results in the deviation of the two pillars of the WTO viz. MFN and Bound Rates. Deemed to be a "trade remedial measure" it seeks to discipline the conduct of firms exporting into their jurisdictions. It is designed to prevent the export of goods in to a foreign market at prices less than the "normal value."[28] Put simply, if an article is sold in the exporting country at 200, but exported at 150, even though it may cost 100 to make, it is dumping. Dumping, through a requirement that the domestic selling price must be in the ordinary "course of trade" which inter alia requires that it must be above the cost of production, also addresses the situation where an article is sold blow cost. To use an extreme example, if the article is sold in the domestic market at 90, exported at 95, but costs 100 to make – this is dumping as well.

3.2 Over the years, anti-dumping has become an effective tool for several countries to protect their domestic industry from foreign competition, thereby eliminating competition from dumped imports to like or similar goods manufactured by domestic industry.

a. The Evolution of Antidumping Legislation:

3.3 The first modern antidumping law was passed by Canada in 1904. After the enactment of the antidumping law in Canada, countries like New Zealand (in 1905), Australia (in 1906) and the United States (in 1916) enacted their own laws on antidumping. Thereafter in the year 1921, the United Kingdom also adopted its first antidumping legislation whilst Canada, New Zealand and Australia substantially amended their acts. These developments, notwithstanding, antidumping remained a relatively infrequently used instrument. In the immediate post-war (World War I) period only South Africa, Canada and Australia were using antidumping as an important trade policy instrument[29]. After various countries enacted rules dealing with practice of antidumping, the issue caught the attention of multilateral initiatives.

3.7 In 1922, the League of Nations undertook a study on the practice of dumping and differential practice, however no agreement was reached[30]. Thereafter on the insistence of countries like the USA, rules on antidumping were incorporated GATT 1947, Article VI and thus the practice of dumping came to be regulated under international law for the first time.

3.8 Following the incorporation of antidumping rules within the GATT 1947, discussions concerning the development of comprehensive antidumping rules continued with GATT Working Parties in the 1950s and 1960s. However, there was no significant development on this issue and it remained a minor trade instrument. Antidumping disputes were relatively few and far between until 1980[31].

3.9 In the Kennedy Round of negotiations under the GATT (1963-67) regulation of antidumping rules was taken up in earnest and an international code on antidumping procedures

---

[26] *Ibid.*

[27] Competition Commission of India, available at http://www.competition-commission-india.nic.in/.

[28] Normal value is defined as the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country. See, Article 2.1, WTO Antidumping Agreement.

[29] *Ibid.*

[30] Waincymer Jeff, "*Implications for Antidumping and Countervailing*", School of Law, Deakin University, Melbourne

[31] *Ibid.*

was adopted. This entered into force in 1968 and was named the 'Agreement on the implementation of Article VI of GATT' or in short the 'Antidumping Agreement'. This formed the basis for the first European Community antidumping legislation adopted in 1968. However, the use of antidumping remained very limited among the contracting parties. Almost all antidumping activity was confined to six major users – the US, the EU, Australia, Canada, South Africa and New Zealand with 24-36 cases filed per year for all these users combined.[32]

3.10 The Kennedy Round was followed by the Tokyo Round Code (1973-78), which entered in to force in 1980 and set out detailed procedural requirements that must be fulfilled in the conduct of investigations. The use of antidumping activity increased dramatically in the post Tokyo Round Period of the 1980s. Around 1600 cases were filed worldwide during the 1980s, which was double the filing rate of the 1970s. However antidumping activities in this period were driven mainly by developed countries. This was because only 27 countries – mostly developed countries signed the Tokyo Round and were bound by its requirements. Developing countries did not subscribe to it. By the early 1990s, however, some of the developing countries also started participating in this activity[33].

3.11 The Uruguay Round Agreements that followed the Tokyo Round and came into force in the form of GATT 1994, more precisely defined the rules and procedures of antidumping measures. The new Agreement on the Understanding of Article VI (AD Agreement) introduced more detailed procedures for initiating and conducting antidumping investigations and reduced discretion with respect to methods used to determine dumping and injury margins, sun set clause, and particular standards for Dispute Settlement Panels to apply in antidumping disputes. It was expected that higher standards of initiations of antidumping cases would restrain its use by member countries by making it more difficult to file complaints and to prove dumping and injury, and by strengthening the dispute settlement system[34]. However, contrary to the expectation, there has been a dramatic increase in the use of antidumping activity by developing countries in the post Uruguay Round. Antidumping has now evolved into a global phenomenon with an increasing number of developing countries adopting these laws and making use of them. In total as many as 2675 antidumping cases were initiated in the 1990s. Of these, 1335 cases were filed in the post WTO period of the late 1990s. Almost all WTO member countries have now adopted/amended their antidumping legislation. Some of the countries that are not members of WTO (such as Russia) have also acquired their antidumping legislation.[35]

3.12 As discussed above there has been a massive proliferation in the enactment as well as the use of legislation on antidumping across the world. It is difficult to specifically point out the policy considerations and the economic rationale behind the enactment of each of these legislations. However this paper shall in the next chapter ascertain the specific rationale behind the enactment of rules on antidumping in the subject countries specific reference to the objectives (as expressly laid down) that these laws seek to achieve.

4. Interface between Competition Law and Antidumping Law:

4.1 As noted above, competition and antidumping laws were initially thought to be complementing each other. Over the years however, this position has changed. First, competition laws have widened their reach to include conduct of firms who are outside the jurisdiction, which affect the national market. Second competition law has evolved much faster than anti-dumping laws. From concepts of law to the economic analysis - there has been a sea change in the concepts and their application (Chicago School Knoff) in the realm of competition. By contrast Anti-dumping laws have evolved within the shackles of the WTO Agreement and have become a protectionist tool in several jurisdictions, with the result that in some extreme instances it impairs competition rather than promotes it. Indeed now the ultimate objectives are

[32] Agarwal Aradhana, "*Patterns and Determinants of Antidumping: a Worldwide Perspective*", Working Paper No. 113, Indian Council for Research on International Economic Relations, 2003.
[33] *Ibid.*
[34] *Ibid.*
[35] *Ibid.*

quite different with competition law aimed at protecting consumers' interests and antidumping law designed to safeguard firms' businesses. Still, the two sets of laws were originally meant to complement each other, and they are intended to act upon the same market distortion[36]. Some commentators have even argued that the two laws can sometimes work at cross purposes as competition laws are aimed at curbing the market power of domestic producers, whereas antidumping law attempts to use market power in order to shift rents away from foreigners[37]. Thus this study on the interface between the two sets of laws focuses both on their objectives as well as their effects.

5. Methodology:

7.1 The research has been carried out primarily with the help of a comprehensive literature survey of available commentaries, texts and case laws. In addition, in order to give the study a wider perspective, where ever possible the legal regime in India has been compared with the regimes in four other jurisdictions, namely USA, EC, S. Africa and Australia **('subject countries')**. The study entails a three step analysis.

7.2 In Step 1, the relationship between antidumping dumping and competition law has been analyzed in two stages, i.e. in the first stage we have mapped out the objectives if the two sets of laws in order to ascertain the overlaps or contradictions that may exists in terms of the very objectives. Thereafter we determine the parallels that may exist in terms of the conduct that the two laws seek to address. Once we have established that the two laws overlap in so far as they address the issue of 'price discrimination', we discuss the differences and similarities between the two laws in the manner in which they address this and highlight the principle areas of conflict between the two laws.

7.3 In Step 2, while taking cue from our analysis in the first step where we have identified the principle areas of conflict between the two laws, we have analyzed the interaction between the two laws in terms of the substantive provisions and the rules on procedures contained therein. Thereafter we have ascertained the impact of the antidumping rules and procedures on competition in markets in India and their implications for the Competition Act, 2002. We also have analyzed the possibility of replacing antidumping rules by rules on competition in free trade agreements.

7.4 And finally in Step 3, the Report highlights the issues for advocacy which can be taken up by the Competition Commission of India and also suggests possible means to resolve the conflicts if any between the two set of laws.

7.5 As per the letter no D.O.7-58/EW/Antidumping/CCI/2007 dated 8th October 2007, and during the meeting between Competition Commission of India and ELP research team on 18th October 2007, it was suggested that the Study should focus on capturing the impact of antidumping provisions, as contained in Antidumping Laws of India, on Competition Law. Thus, greater attention has been paid to substantive provisions pertaining to antidumping investigations and their implications for competition in markets in India under Competition Act 2002.

6. Scope of the Study:

6.1 The study seeks to analyze the interaction between antidumping law and competition law with specific reference to the Customs Tariff Act, 1975 and the Customs Tariff (Identification, Assessment & Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 ("antidumping rules") and the Competition Act, 2002. The scope of the study is in accordance with the "terms of reference" ('TOR') framed by the CCI on 16.1.2008. The study therefore is primarily based on the analysis of the relevant Indian laws. However in order to present a comparative picture, wherever possible, the study has also looked

[36] Ian Wooton and Maurizio Zanardi, "*Trade and Competition Policy: Antidumping versus Anti-Trust*" available at: http://homepages.strath.ac.uk/~hbs03116/Research/Trade%20and%20Competition%20Policy%20Final.pdf

[37] Cadot Oliver, Grether Jean-Maries and Melo de Jaime, "*Trade and Competition Policy: Where do we stand?*" Journal of World Trade, Vol. 34, No. June, pp 1-20.

into the relevant laws in other jurisdictions, such as USA, EU, Australia and Canada (the "subject countries").

7. Scheme of the Report:

7.1 The study is divided into the following seven chapters:

(i) Antidumping and Competition Law: An Introduction

(ii) Antidumping and Competition Law: Mapping the Interface

(iii) Antidumping and Competition Law: The Relationship between Substantive Provisions and Rules on Procedure

(iv) Implications of the Antidumping Procedures on Competition in markets in India with reference to the Competition Act, 2002

(v) Antidumping and competition related provisions in Free Trade Agreements

(vi) Issues for Advocacy for the Competition Commission of India

Chapter II: Competition Law and Antidumping Law: Mapping the Interface

1. Introduction:

1.1 As noted in the first chapter, countries tend to adapt their competition and antidumping laws to achieve their specific economic and political considerations As is evident from the historical development, antidumping laws were initially enacted to address the situation of 'international price predation' and were considered as extension of competition laws. However over the years the focus of antidumping law seems to have changed and antidumping laws as they exist today do not seem to be concerned with the issue of predatory pricing. To this extent it can be said that antidumping law no longer addresses competition related concerns and since it seems to attach sanctions to every instance of international price discrimination which can be shown to cause injury to the domestic industry, it could very well be in conflict with competition law. However there may still remain some areas of overlaps and complementarities between the two laws. In order to ensure that any contradictions, if any, between the two laws are removed and the complementarities between the two regimes are re-enforced, it is important to understand the nature and extent of interaction between the two sets of law.

1.2 This chapter therefore seeks to map the interface between the two and examine what are the conflicts and complementarities between the two. We analyze the differing objectives with which countries enact and implement their laws on competition and antidumping and determine if there are any overlaps between the objectives of the two sets of laws. This in turn informs us while analyzing the relationship between the substantive provisions and the rules on procedures under the two laws. The chapter is further divided into four sections, dealing with: (i) the objectives of competition law and antidumping law; (ii) Overlaps, if any between the objectives of the two sets of laws; (iii) the manner in which competition and antidumping law address 'price discrimination'; (iv) the conflicts or complementarities between antidumping and competition law

2. Objectives of Competition Law and Antidumping Law:

a. Competition Law:

2.1 In the course of the 20th century, competition law has evolved into an effective tool to address situations such as: the abuse of dominant position, (including predatory pricing[38]), anti-competitive agreements, anti-competitive mergers and such other anti-competitive conduct. . The objectives for which countries have introduced competition legislation vary from nation to nation in accordance with its priorities and perceived need for sanction.

2.2 The objectives of competition laws across different jurisdictions, as observed in the texts of their respective competition legislations, can be broadly categorized as following:

a. Promotion of competition and prevention of anti-competitive practices
b. Protection and promotion of consumer interest
c. Achieving economic efficiency
d. Geographic/ regional integration
e. Public interest
f. Competition advocacy

[38] Predatory pricing is a form of price discrimination, wherein a firm in a dominant position sells products at very low prices (below the cost of production, either average variable or marginal cost of production) with the intent either to drive competitors out of the market or to create barriers to entry into the market. The definition of 'predatory price' may differ from country to country. (See, **Annex V** for the definition of 'predatory pricing' in the subject jurisdictions).

Table 1: The Objectives of Competition Laws of the Subject Jurisdictions:

Objectives	The US	The EC	Australia	South Africa	India
Promotion of Competition and prevention of anti-competitive practices.	✓	✓	✓	✓	✓
Protection and promotion of Consumer Interest.	✓	✓	✓	✓	✓
Achieving Economic efficiency	✓			✓	✓
Public welfare-welfare of employees, producers.		✓ (Mentions welfare of both consumer and producer)	✓ (Mentions employee welfare)	✓ (Mentions both producer and employee welfare)	
Competition Advocacy					✓
Geographical and regional Integration.		✓			

2.3 From the comparative analysis in the above table it is apparent that the objectives of promotion of competition in the markets, prevention of anti-competitive practices, protection of consumer interest and achieving economic efficiency are common across all the subject jurisdictions. Additionally the competition legislations in the USA and South Africa specifically mention 'economic efficiency' as an objective of the law. Also, countries like the EC, Australia and South Africa have tried to address the issue of public welfare through competition laws either through promoting welfare of employees or producers or both. The EC law on competition seeks to achieve the objective of 'economic integration', which is absent in rest other countries. The Competition Act, 2002 of India contains an additional objective of 'competition advocacy which is not specifically stated in other legislation. For a detailed coverage of each of these objectives in the jurisdictions under study, please refer to **Annex I.**

2.4 From the analysis of the objectives of competition law, it can be understood that the larger goal to be achieved through competition law of a country is promotion of competition which is closely linked with most efficient allocation of resources in an economy along with consumer welfare through availability of

quality products at affordable prices. The objectives clearly suggest that in order to ensure achievement of these objectives, prevention of anti-competitive practices assumes paramount importance.

b. Antidumping Law:

2.5 In the previous section, we have observed that the objectives of competition law may vary from country to country depending upon the specific socio-economic and political considerations of each country. Similarly, notwithstanding the fact that there is an internationally accepted framework for antidumping laws (GATT Article VI and the WTO Antidumping Agreement), each country may enact its own antidumping laws with its variances, provided they do not contradict the provisions of the international agreements. In this section we therefore discuss the objectives as reflected in the respective antidumping legislations of the subject jurisdictions.

2.6 **Table 2: Objectives of Antidumping Laws of the Subject Jurisdictions:**

Objectives	The US	The EC	Australia	South Africa	India	WTO AA[39]
Remedying the injury to the domestic industry due to dumping	✓	✓	✓	✓	✓	✓
Public interest		✓				
Address predatory pricing	✓ (Only till 1921)					
Consumer welfare.		✓				

2.7 Remedying the injury to domestic industry caused by dumping[40] seems to be the central objective amongst the antidumping legislations reviewed under the Study. And except in the US (Antidumping Act, 1916) antidumping laws across all the subject countries do not seem to (directly) address the issue of 'predatory pricing'. It is pertinent to note that the US's Antidumping Act of 1916 was targeted at 'predatory pricing'; however the Antidumping Act of 1921(which is the existing antidumping legislation in the USA) does not contain any such explicit reference. In the EC, the antidumping law, apart from addressing the issue of dumping and injury also seeks to achieve the objective of 'consumer welfare' and protection of 'community interest'. A detailed account of each of these objectives in the jurisdictions under study has been provided in **Annex II.**

c. Overlaps between the Objectives of Competition and Antidumping Law:

2.8 It is clear from the above discussion that there is little in common in terms of the objectives of antidumping and competition law as they exist today. While competition laws are primarily aimed at

[39] WTO Antidumping Agreement

[40] Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country. If a company exports a product at a price lower than the price it normally charges in its own home market, it is said to be "dumping" the product into the commerce of another country.

protecting and promoting competition in markets, antidumping laws are aimed at remedying the injury to the domestic industry which may arise due to dumping. It can be concluded that the modern anti-dumping laws of today in essence provide for protection of competitors.

2.9 While both competition and anti-dumping laws originated with the same objective (e.g. the Antidumping law of 1916 in the USA which was clearly meant to address competition concerns arising out of the practice of 'transnational price predation) the objectives surrounding the use of antidumping laws have since evolved and modern antidumping practice has come to actually facilitate the kind of unfair and anti-competitive behaviour it was intended to prevent[41]. In some jurisdictions however, the antidumping laws still continue to be aligned with their competition law. For instance in the EC the antidumping law, even though meant to remedy the injury to the Community industries does take into account wider public interest considerations through the 'Community interest' requirement and thus to an extent addresses competition concerns as well.

2.10 Several authors have commented on the divergence of antidumping laws from their original objectives[42]. The "evolution" in its objectives has resulted in a change in the way that antidumping laws are being used and has consequently changed their ultimate effect on the market and on competitive conditions. For example, while the objectives behind earlier antidumping laws ensured that healthy price competition between corporations was encouraged as long as predatory pricing was avoided, today the mere presence of increasingly protectionist antidumping laws has resulted in a change in the economic behaviour of firm[43] wherein instead of profit maximization through healthy price competition, firms choose to seek protection or undertake steps that are more likely to lead to the imposition of an antidumping duty on imports. On the other hand, competition laws continue to encourage price competition within firms in a market as long as it does not result in predatory pricing, with a view to maximizing consumer welfare and protecting the conditions of competition. In other words, the change in the objectives for which antidumping and competition laws are being used today has also in some instances changed their interaction from complementary to conflicting.

2.11 Notwithstanding the divergence in the objectives that the antidumping and competition laws seek to achieve, there does exist some degree of overlap between the two laws in terms of the conduct that they seek to regulate in order to achieve their respective objectives. Among other things they both seek to address the instances of 'price discrimination'. However there are significant now differences in manner in which the two laws define and address the issue of 'price discrimination'. "Intent" which was the cornerstone of predatory pricing now has no relevance in a dumping determination.

3. 'Price Discrimination' as Understood under Competition and Antidumping Law:

3.1 Price discrimination occurs when a firm charges a different price to different customers for the sale of similar products with similar marginal costs. A wider definition has been proposed by Stigler[44]: "A firm price discriminates when the ratio of its prices is different from the ratio of marginal costs for the goods offered". Various economic definitions of price discrimination explicitly exclude price differences due to differences in costs i.e. if cost differences are being passed-on to consumers, then there is no price discrimination[45].

3.2 Typically the primary motive behind price discrimination is that firms are able to extract consumer surplus and hence increase their profits. When customers have different valuations for the product or when there are different groups of customers with identifiable sensitivity to prices (i.e. price elasticity), price discrimination allows a firm to exploit these differences to increase profits. The degree to which firms are able to extract consumer surplus, depend on the information available on consumer preferences.

---

[41] N Gregory Mankiw and Phillip L Swagel, "*Antidumping: The Third Rail of Trade Policy"*, Foreign Affairs, July/August 2005, available online: http://www.foreignaffairs.org/20050701faessay84408-p0/n-gregory-mankiw-phillip-l-swagel/antidumping-the-third-rail-of-trade-policy.html

[42] For instance, Shanker Singham, *A General Theory of Trade and Competition - Trade Liberalisation and Competitive Markets,* Cameron May, 2007.

[43] *Ibid.*

[44] Stigler G. J., "*The Theory of Price"*, Macmillan Company, New York, 1987

[45] Penelope Papandropoulos, *"How should price discrimination be dealt with by competition authorities*?" *Concurrences* N° 3-2007 available online: http://ec.europa.eu/dgs/competition/economist/concurrences_03_2007.pdf

3.3 Given the differential impact of price discrimination on consumer surplus associated with different consumer groups, competition authorities are generally cautious before recommending penal actions against arresting price discrimination. However, given the centrality of price discrimination in the context of antidumping (in fact Jacob Viner[46] defined dumping as "price discrimination between national markets."), antidumping authorities penalize all forms of price discrimination[47] and levy sanctions as long as it can be shown to cause 'injury' to the 'domestic industry'.

3.4 Only such 'price discrimination', which adversely affects competition in markets and thus has negative consumer welfare impacts, is prohibited by competition statutes. Under competition law such price discrimination is usually referred to as 'unfair' or 'discriminatory' pricing and a particular instance of 'price discrimination' does not attract sanctions if it can be shown that it is adopted to meet competition and does not affect the conditions of competition in an adverse manner. This requirement therefore involves an examination into welfare effects of the 'price discriminatory' conduct. Certain instances of 'price discrimination' such as 'predatory pricing' have been assumed to affect competition negatively and cannot be justified on the grounds that they have been adopted to meet competition. (See, **Annex III** for a detailed discussion on price discrimination as understood under competition law)

3.5 On the other hand under antidumping law, as discussed above, every instance of 'price discrimination' is prohibited. The effect of the instance of 'price discrimination' is examined with the narrow parameters of 'injury' only to the 'domestic industry' and once dumping and injury have been established, then the examination does not take into account broader economic concerns, such as consumer's interest, the interests of other users of the product etc. whilst imposing an antidumping duty[48]. (See, **Annex IV** for a detailed discussion on price discrimination as understood under antidumping law).

3.6 By definition, antidumping law does not seem to be concerned with the issue of price discrimination taking the form of predatory pricing. However inherent in the definition of dumping (export of a product at a price less than its normal value is the possibility that antidumping law may end up capturing the instances of 'international price predation'. To the extent that antidumping rules are helpful in capturing the .instances of predatory pricing, it can be said that there exists a clear overlap between antidumping and competition law. It is important therefore to analyze whether there exists any parallel between the way 'predatory pricing' is defined and addressed under competition law with the definition of 'dumping' (which may also capture instances of 'predatory pricing') as under antidumping law.

a. 'Predatory Pricing' under Competition Law:

3.7 Under competition law 'predatory pricing' is understood as a deliberate strategy, adopted by a dominant firm, with an intent to drive competitors out of the market by setting very low prices or selling below the firm's incremental costs of producing the output (often equated for practical purposes with average variable costs) with a view to eliminate competition or eliminate competitors. Once the predator has successfully driven out existing competitors and deterred entry of new firms, it can raise prices and earn higher profits[49].

3.8 The economic literature on the rationality and effectiveness of predatory pricing can be said to veer around two broad extremes. Many economists are of the opinion that 'predatory pricing' as a strategic tool to drive out competitors from a market is difficult to implement and achieve[50]. However, other economists have suggested that price predation might be feasible if it is undertaken to 'soften' up

[46] Viner J, "*Dumping: A Problem in International Trade,"* 1922.

[47] Except short term dumping ('price discrimination').

[48] However to the limited extent that antidumping rules in India as well as other countries such as USA prescribe the 'lesser duty rule' (i.e. if a duty lesser than the margin of dumping is sufficient to remedy the injury to the domestic industry then the antidumping duty should be the lesser of the two), which inherently take account of consumer interest to some extent. Further the EC law on antidumping by expressly providing for 'community interest test' takes account of consumer interests also before imposing antidumping duty on a product.

[49] OECD glossary of terms.

[50] This school of thought questions the rationality of 'predatory pricing' on grounds that: it can be at least as costly to the predator as it is to the victim; targets of predation are not easily driven out, assuming relatively efficient capital markets; and entry or re-entry of firms in the absence of barriers reduces the predator's chances of recouping losses incurred during the period of predation. See *Predatory Pricing*, OECD, Paris, 1989.

rivals for future acquisition, or if potential targets of predation or their sources of capital have less information about costs and market demand than the predator.[51]

3.9 Notwithstanding the lack of consensus among economists with regard to the rationality and effectiveness of 'predatory pricing' competition laws in most jurisdictions treat 'predatory pricing' as an anticompetitive practice and provide for sanctions against it. In India, the Competition Act, 2002 defines predatory pricing as "the sale of goods or provision of services, at a price which is below the cost, as may be determined by regulations[52], of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.[53]" The definition of 'predatory pricing' is defined in most jurisdictions is similar and mirror the definition under the Competition Act, 2002, i.e. sale of goods or provision of services at a price below the average variable cost, with a view to reduce competition or eliminate competitors. (See **Annex V** for the definition of predatory pricing in the subject countries).

3.10 The definition of 'predatory pricing' under competition law therefore envisages the fulfillment of three conditions before any sanctions can be imposed against it:

- First, the enterprise indulging in such a practice should be in a position of dominance;
- Thereafter, the sale of goods or provision of services shall be at a price below a relevant measure of cost (usually average variable cost of production of goods or provision of services);
- And finally the enterprise alleged to be indulging in predatory pricing shall do so with the intent to reduce competition or eliminate competitors.

b. 'Predatory Pricing' as Addressed under Antidumping Law:

3.11 Antidumping law does not specifically address the issue of 'predatory pricing'. Instead what antidumping law seeks to address is the issue of price discrimination between two different geographic markets, evidenced by a higher 'normal value' as compared with 'export price'. Antidumping law is therefore concerned only about the price at which the product alleged to be dumped is sold in the two markets (domestic market of the exporting country and export market) and not directly about the cost of production of the product or intent behind the discrimination. Thus, it is reasonable to conclude that antidumping law, as it is applied today does not directly concern itself with 'predatory pricing'. However, notwithstanding the absence of any express provision to capture the instances of 'predatory pricing'; antidumping laws may to the extent that the "normal value" is below the total cost of production it is "not in the ordinary course of trade" and thus dumped captures the instances of 'predatory pricing'.

3.12 It is in this limited situation when the export price is lower than the normal value and at the same time also lower than the fixed and variable cost of production that antidumping law can be said to address the issue of 'predatory pricing' and to this extent therefore there exists a distinct overlap between antidumping and competition law.

3.13 The two laws however differ vastly while addressing this conduct. Under competition law for sanctions to be attached to 'predatory pricing', two more conditions need to be satisfied , viz. the enterprise indulging in price predation is in a dominant position and it does so with the intent to eliminate competition or competitors. Whereas antidumping law is not concerned about the relative size of the 'exporter' or the intent with which it is exporting at lower prices, and as long as it can be established that the dumped product causes injury to the domestic industry, sanctions can be attached.

3.14 Thus it can be said that even though antidumping law may by default address instances of price predation, international price discrimination does not necessarily imply exports at a price below costs of production[54]. Also there is little in common between antidumping and competition law in terms of the substantive provisions for addressing this issue. Moreover there is little empirical support to the

[51] See *Predatory Pricing*, OECD, Paris, 1989.

[52] The Draft Competition Commission (Determination of cost of production) Regulations provide that the reference to 'cost' in the definition of 'predatory pricing' is to 'average variable cost' the Competition Commission of India determines otherwise.

[53] Under the Competition Act, 2002, predatory pricing has to be by a *'dominant enterprise'* in the *'relevant market'*.

[54] P. A. Messerlin and P K M Tharakan, "*The Question of Contingent Protection*" The World Economy, 1999, vol. 22, issue 9, pages 1251-1270

proposition that antidumping laws may be employed to address the instances of predatory pricing. Empirical studies have shown that very few of the antidumping investigations were initiated against instances of possible predatory dumping. This is supported by the OECD's finding that only 5% of antidumping cases are correlated to anti-competitive practices such as predatory or strategic pricing[55]. Messerlin demonstrates that during the period of 1980-1989 the percentage of possible predatory pricing cases was 2.5 in the E.C. and 5.7 in the U.S.[56] Marceau also shows the figure from the same decade revealing that in 90% of cases, the foreign country's share of the market was less than 25% – too small for predatory pricing to make sense[57].

3.15 Since the goal of competition law is to promote competition, it attaches sanctions to only such price discrimination which adversely affect competition in markets; even if that implies that some competitors may be harmed in the process. On the other hand antidumping law while addressing 'price discrimination' does not take into account competition concerns and its stated goal is to protect "domestic industry" and infact ends up as an instrument to protect competitors. Thus it seems to be in direct conflict with and antithetical to competition law.

4. Do Antidumping Rules Result in Anti-competitive Effects?

4.1 There are two broad schools of thought relating to the economic effects of trade remedial measures such as antidumping. Authors like Nivola (1983) have argued that antidumping laws are aimed at intervening on behalf of efficient domestic manufacturers facing competition from imports that are artificially under priced, usually as a result of "foreign subsidies or other subterfuges." The contrasting view is that antidumping laws are inherently protectionist and the rules as they exist today and as they are implemented may result in anti-competitive effects. Before embarking on a discussion of whether and how antidumping rules may result in anti-competitive effects and thereby be in conflict with competition law, it important to understand the concept of 'dumping'.

4.2 Article VI of GATT 1994 defines dumping as the sale of products in foreign markets at less than the price at which they are normally sold in the domestic market. Dumping is a type of international price discrimination in which an enterprise sets a lower price in the export market than in the domestic market.

4.3 One of the earliest examination and analysis of 'dumping' was carried out by Jacob Viner. He sought to understand the origins and impacts of dumping by considering the motive of the dumping firm, the duration of the dumping, and the ability of the domestic industry to adjust to the dumped goods. All of the forms of dumping described by Viner are generally forms of price discrimination. He identifies three types of dumping situations: sporadic dumping, short-run or intermittent dumping and long-term or continuous dumping. In the case of sporadic dumping the motivation is to dispose of goods for a short-run to get rid of surplus shock. Short-run or intermittent dumping is not continuous and is motivated by entering into a new market, retaining the market share or driving away the competitors from the market. Long-term or continuous dumping is motivated by the intent to reach or maintain full production in large scale economies. Sporadic dumping is likely to result only in damage to the exporting or the importing country. Short-run dumping also does not necessarily hurt.[58]

4.4 Technically, all the three types of dumping as identified above require that the market of origin and the destination market be isolated from one another sufficiently to prevent re-export and thus price equalisation. They also require that the market of origin has a lower price elasticity of demand than the destination market (which implies that the former is not perfectly competitive). Assuming that the Government of the importing country cannot control the competitiveness in the originating market, or the degree of isolation of the two markets, all it can do in response to dumping is to apply border measures.

---

[55] OECD, Committee on Competition Law and Policy, "*Competition Policy and Antidumping"*, DAFFE/CLP/WP1(95)9, 1995, as quoted in Hang Zeng, "*Antidumping and Competition: the Case of China*", 2005

[56] P. A. Messerlin, "*Competition Policy and Antidumping Reform: An Exercise in Transition*", in Jeffrey J. Schott (ed.), *The World Trading System: Challenges Ahead*, (Washington DC: Institute for International Economics, 1996) pp 219-246, as quoted in Hang Zeng, "*Antidumping and Competition: the Case of China*", 2005

[57] Gabrielle Marceau, *Anti-Dumping and Anti-Trust Issues in Free-Trade Areas*, (New York: Oxford University Press, 1994) p 26, as quoted in Hang Zeng, "*Antidumping and Competition: the Case of China*", 2005

[58] See Raj Krishna, "Antidumping in Law and Practice"

These result in increase in the price at which the imports cross the border into the local market. The question which emerges therefore is whether Governments should do this at all?

4.5 Viner points out that "To the importing country cheapness of imports is an advantage". This is the standard economic conclusion that a nation's welfare improves when the price of its imports falls relative to that of its exports. The gains to consumers offset the costs to producers of similar goods. This would suggest that the Government should not act against international supply shocks if they stem from cheap imports. However, he goes on to say that this advantage occurs "... Unless the cheapness is so temporary that it results in greater injury to domestic industry than benefit to consumers". Viner sees this as likely, and thus as the prime justification for acting against dumping. Viner's proposition implies that the interests of consumers should be taken into account in considering action against dumping, but they should be balanced with the interests of producers.

4.6 As per Viner, if dumping is causing injury because it is not temporary, it may well be that the cheapness of the imports stems from a genuine competitive advantage (in which case it is "normal trade"), or that it is part of a predatory strategy. In Viner's framework, only predatory pricing would give rise to Government intervention.

4.7 A more recent categorization of 'dumping' has been developed by Willig, based on the intent of the exporter, its market power, and the structure of the importing market. Willig has classified 'dumping' into two types on the basis of the intent or the reason for which it is practiced- monopolizing and non-monopolizing[59]. There are two sources of monopolizing dumping namely strategic and predatory. Monopolizing dumping can take the form of predatory pricing or strategic dumping and is generally regarded as causing loss in welfare. Willig considers both predatory dumping and strategic dumping to be detrimental so as to justify a response. Non-monopolizing dumping (consists of market expansion, cyclical and state trading) may not necessarily be detrimental to aggregate economic welfare in the importing country. The table below summarizes the various forms in which dumping can take place under the two broad categories of monopolizing and non-monopolizing[60].

a. Monopolizing Dumping:

Category of Dumping	Description	Identification	Impact
Strategic Dumping	Exporting from a protected home market in an industry with high sunk costs enjoying economies of scale	➢ Protected home market of exporter; ➢ Economies of scale; ➢ Large protected home market adversely affects rivals because they can not enjoy economies of scale	➢ Limits the size of the market for rival suppliers; Raises costs in the importing country; ➢ Inhibits competition at home; ➢ Leads to market domination and abuse of market power; ➢ Negative effects in importing nation are likely to outweigh the positive benefits to the exporting country.
Predatory-pricing dumping	Low priced exports to drive rivals out of business to gain monopoly	➢ Below cost pricing that: ➢ endangers the ability of domestic firms to remain in market;	Anti competitive effects in the importing market because foreign suppliers can exercise monopoly power over domestic consumers by raising the price after

[59] Willig (1998)
[60] Holden Merle, "A Reaction to Trade Liberalization or Anti-competitive?" School of Economic and Management, University of Natal, Durban.

Category of Dumping	Description	Identification	Impact
	power.	to remain in market; ➢ captures a market that is presently concentrated; ➢ Collusion is aided among dumping exporters; ➢ Operates in a market with high entry and re-entry barriers.	destroying alternative domestic sources of aupply.

b. Non-monopolizing Dumping:

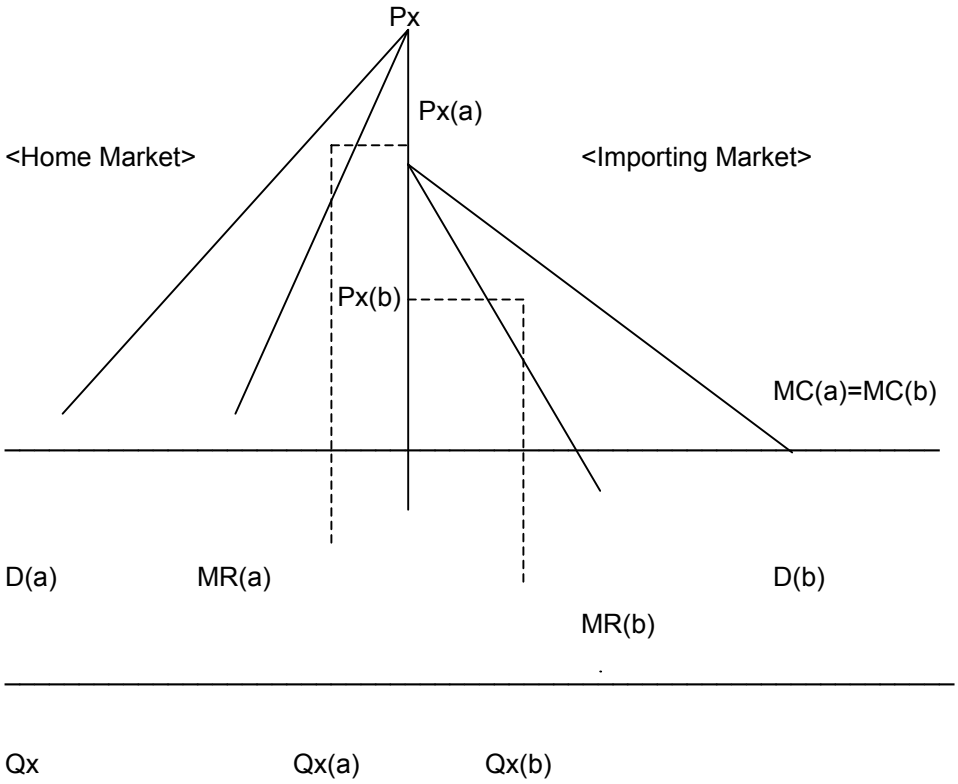
Category of Dumping	Description	Identification	Impact
Market Expansion	Expansion of sales by price discrimination based on different elasticity of demand in the home and foreign market.	Export price less than normal value. Home market bias leads to lower elasticity of demand in the home market, while export market has many competing alternatives sources of supply.	➢ Impacts adversely on consumers in the exporting country who pay higher prices. However to the extent exporters expand, and growth ensues these consumers will also benefit; ➢ Benefits consumers in importing country and harms producers.
Cyclical dumping	Exports priced at very low prices in the presence of excess capacity due to depressed demand	➢ Export price below "full cost"; ➢ and low marginal cost	➢ Enables home country to cover average variable costs and maintain employment; ➢ Benefits consumers in importing country but may harm producers.
State Trading	Exports from state owned industries in economies with inconvertible currencies.	➢ Export prices below cost based on constructed values; ➢ Sometimes third country prices also are used	➢ Earns 'hard' currency for the non-market economy country; ➢ Benefits consumers in the importing country but harms producers in the importing country.

4.8 From an economic perspective there are two preconditions for a form to engage in international price discrimination. First, the domestic and foreign markets must be separated. Secondly, the price elasticity of demand for the good must be different in the two markets. If a firm is faced with inelastic demand in its domestic market it can charge higher prices. Conversely if it is faced with elastic demand in the foreign market it may sell the goods at lower prices.

4.9 When both of these conditions are met, it would be logical for an enterprise to engage in price discrimination or "dump", as illustrated in Figure 1 below. Suppose that a firm in country A exports

product X to country B. If the firm enjoys a strong monopoly position in its home market then it would expect to face less elastic demand for its product in its home market than abroad. This implies that the demand curve for the product in its home market (D(a)) is steeper than that in the importing market (D(b)). To simplify the analysis, suppose that the firm also faces the same marginal costs (MC) in both countries. In this case, the firm should sell quantity Qx(a) at price Px(a) in its home and quantity (Qx(b)) at price (Px(b)) in the importing country in order to maximize its profits.

Figure 1: International Price Discrimination



4.10 Thus economists argue that no sanctions shall be attached to the practice of 'dumping' (international price discrimination) as long as the price discrimination emanates from the ability of the firm to charge differential prices due to different price elasticities of demand. Such an ability of firms to charge different prices in two different markets shall not be treated as 'unfair trade practice'.

4.11 Modern economic theory suggests that the first objective of firms is to maximize profits in the long term. In accounting terms, producing an extra good should yield at least the extra costs of producing that extra good: the so-called 'marginal cost of production'. As long as marginal costs are covered, producing at a price where at least some of the fixed costs are recouped can therefore be considered rational and sound business. For a firm to continue producing without recouping its full costs is reasonable when, for instance:

a. When a firm with market power in the exporting country enters a new market divided by tariffs, transport costs, technical standards, or other factors, it may maintain lower prices in the new and more competitive market (still at a profitable level) without any desire or capacity to eliminate competition in this new market;

b. The market is depressed or there is excess capacity (due to an erroneous decision); then an enterprise with high fixed costs (and low variable costs) may keep on selling below average total cost of production in order to minimize its losses;

c. An enterprise is competing to enter a new market it will be willing to forgo profits (therefore selling below total variable costs) for a while in order to make itself known to consumers with the assumption that it will soon sell at a price which covers full costs. The testing and promotion of new products may justify sales below total average costs and even below marginal costs, for a certain period of time.

4.12 Most economists therefore argue that if at all the rules on dumping have any relevance, it is only when they seek to address the practice of 'strategic' or 'predatory dumping' and not otherwise. 'Strategic dumping' is the term adopted for exporting that injures the domestic rivals through a strategy that encompasses both the pricing of the exports and restraints protecting the exporter's home market[61]. In this scenario the production of goods in question requires significant investment in research and development or other fixed costs, or involves significant learning by doing, which results in significant static or dynamic economies of scale. If the exporters' home market is foreclosed to foreign rivals and if each independent exporter's share of their home market is of significant size relative to their scale economies, the exporters will be able to have significant cost advantage over foreign rivals. With access to both home and foreign markets, they gain cost advantage over domestic firms that are unable to compete abroad. This advantage, which is contingent upon home market being sufficiently large, eventually gives the exporting firms market power[62]. Strategic dumping therefore, as per Willig is likely to injure the domestic industry in the in the importing country by reducing the ability of the domestic firms to take full advantage of scale economies. It is argued therefore that the use of antidumping measures in this case is justified.

4.13 Predatory dumping is a price-setting device practiced by firms to obtain a monopoly in the importing country by driving out rivals from the market. The consumers of the importing country may get some temporary advantage from predatory pricing, though they are likely to eventually suffer when predators begin to recoup their monopoly profits. Such a practice can also result in resource dislocation and some form of economic deterioration. Thus it is argued that the use of antidumping rules can be justified when they are employed to address the instances of 'strategic' or 'predatory dumping'. When used otherwise, it is argued that antidumping rules may induce anti-competitive effects, which may arise either from the mere fact of the existence of antidumping rules in statute books or from the manner in which they are employed.

a. <u>Anticompetitive Effects Arising out of Mere Existence of Antidumping laws and their Indiscriminate Usage:</u>

4.14 Authors like McGee argue that mere existence of antidumping law on statute books encourages foreign suppliers to increase their prices, since by doing so it may be possible to avoid triggering an antidumping action. The mere threat of an antidumping action chills price competition, since foreign suppliers will hesitate to compete too aggressively on price for fear of triggering an antidumping investigation. But no matter how hard they try to avoid such an action, they are not able to totally eliminate the possibility of an antidumping investigation even if they sell their product for the same price worldwide because exchange rate fluctuations can make it appear that they are selling in foreign markets for prices that are below domestic market prices[63]. Also an anti-dumping petition or a threat of petition itself could induce voluntary export restraints by exporting firms, thereby resulting in decreased competition.

4.15 Further it has also been argued by commentators that the mere existence of antidumping laws also makes it possible for domestic producers to charge higher prices than would otherwise be possible. That's because antidumping laws make it dangerous for foreign competitors to engage in aggressive price competition. As a result, domestic producers can raise their prices with little fear of being under-priced by foreign suppliers[64]. Thus existence of antidumping law hurts competition both ways, one by forcing exporters to sell at higher prices and other by providing the domestic producers the freedom to

[61] Willig Robert D., *"Economic Effects of Antidumping",* Brookings Trade Forum, 1998.
[62] *Ibid.*
[63] McGee Robert W., "*Antidumping laws as weapons of protectionism: case studies from Asia*", Working paper, January 2008, College of Business Administration, Florida State University.
[64] *Ibid.*

charge higher prices than what would be otherwise possible. Thus inherently antidumping law can be said to be protectionist because it benefits domestic producers at the expense of consumers by limiting foreign competition and is thereby in direct conflict with the objectives of competition law.

4.16 Very often firms (mis)use antidumping laws by initiating frivolous investigations. This has the effect of raising the cost of doing business for the exporters, apart from leading to efficiency losses. The companies which are the subject of investigation must shift their resources from productive activities to defensive asset protecting activities. The cost of participating in the investigation process may be very high (in terms of legal fees, time and resources allocated for preparing for the investigation etc.) which raises the cost of doing business. For instance, Colombian flower growers spent more than US $ 1 million as legal fees in between 1987 and 1989 to defend themselves against a charge of dumping[65].

4.17 Moreover the use of antidumping laws ostensibly to remedy the injury to the domestic industry but in effect to protect it may result in huge costs on the economy as a whole. The levy of antidumping duty results in increased prices for consumers and in many situations decreased choices. This in effect negates the core objective of consumer protection as envisaged under competition law. The levy of antidumping duty results in huge welfare losses. For instance in a study conducted by the US International Trade Commission it was estimated that levy of antidumping (and countervailing duty) as of 1991 had deprived the US economy of about US $ 1.6 billion[66]. Considering the fact that the usage of antidumping measures has increased manifold since the year 1991, the losses would have assumed much higher proportions today.

4.18 Moreover, studies have shown that once an antidumping investigation is initiated it invariably results in imposition of antidumping duty[67]. For instance, between 1992-93 and 2004, of the 153 antidumping investigations initiated in India only eight cases were terminated without antidumping measures being taken. One case was terminated due to no injury. The reasons found for other terminations were the withdrawal of application by domestic industry (three cases), relationship between the exporter and the petitioner by way of imports (one case), low dumping margin (one case), unsatisfactory industry standing (two cases) and non-properly documented application (one case).Thus virtually any case that is initiated stands a good chance of getting protection under antidumping laws[68].

4.19 Furthermore, 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[69]. 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[70]. In reality in several instances the "sun" does not set on antidumping levies.[71]

4.20 Thus it appears that antidumping law seems to do more harm than good by resulting in huge welfare losses and thereby it can be said to negate the benefits that would have ensued otherwise due to healthy price competition.

---

[65] McGee Robert W, "*Antidumping Laws as Protectionist Trade Barriers: a Case for Repeal*", Policy Analysis, No. 14, the Dumont Institute of Public Policy Research.

[66] Cho Sugjun, "*Remedying trade remedies*", available online: http://ssrn.com/abstract=969387

[67] See, the Chapter on "*Antidumping in India'*, in "*The use of Antidumping in Brazil, China, India and South Africa- Rules, Trends and Causes*"- study by National Board of Trade, available online: htto://www.kommers.se

[68] Agarwal Aradhana, "*Antidumping law and practice: an Indian perspective*" Working Paper 85, ICRIER, April 2002.

[69] *Ibid.*

[70] *Ibi.*

[71] For instance the USA imposed antidumping duty on Spun Acrylic Yarn from Japan from 1980 to 1994, similarly Australia imposed antidumping on Polyvinyl Chloride from Brazil from the year 1991 to 2002. In India the imposition of antidumping duties on Caustic Soda from Qatar is a case on this point.

b. Anticompetitive Effects Arising out of the Manner in which Antidumping Laws are Implemented

4.21 Apart from the anti-competitive effects that may arise from the mere existence and levy of antidumping duties, the manner in which the laws are enforced and implemented may also lead to anti-competitive effects. There are a number of problem areas with antidumping law, which may manifest in anti-competitive effects.

4.22 First, the definition of dumping is so mechanical that the motive of dumping is not considered. A firm is likely to be subject to an anti-dumping investigation automatically if it exports a product at a price lower than the normal value in the home market, regardless of whether there is a predatory intent or not. As a consequence, duties could be imposed on low but justified pricing. In contrast, most competition laws and policies regulate only the price discrimination with the predatory intent to drive competitors out of the market.

4.23 Second, under current anti-dumping rules national authorities are allowed to exercise enormous discretion. Since the criteria for determining the export price and the normal value are neither stringent nor specific, the importing country can determine incidents of dumping at will. This implies that small changes in methodological rules could yield important advantages for domestic firms contesting dumping cases. Furthermore, there are no specific criteria to determine material injury. In addition, there is no generally accepted mechanism to examine the causal relationship between dumping and injury. Therefore, poor performance by domestic firms in the related domestic industries may easily be attributed to the dumped products during economic recession. Also the 'standing' requirement for the domestic industry to successfully petition for antidumping investigation is such that it lends itself to the protection of inefficient domestic industry. This is more apparent in the case of India.

4.24 A striking feature of the antidumping cases in India is the extreme concentration in domestic markets. The review of antidumping investigations in India from 1992-2003[72] shows that in more than one-quarter of the cases, the industry had a sole producer. In around 80% of the cases, the industry had one to four producers. In only 11 cases, the industry had more than 6 producers. What is more striking is the concentration among petitioners. In 90% of the cases the number of petitioners was between one and three. In those cases where there was only one petitioner, his average market share was 89.7%. In the cases where the number of petitioners was two and three, average market share was 62.7% and 76.6 % respectively. Clearly, the petitioners were the dominant producers in their industry. In around 49% of the cases there was a sole petitioner and on an average his share was 89.7%. Of the 97 cases there were only three cases in which the number of petitioners exceeded five.

Table 3: Domestic Market Structure of industries subject to AD investigations

No. of Products/ Petitioners	No. of cases (Producers)	No. of cases (Petitioners)	Average market share
1	23	47	89.7
2	11	22	62.7
3	9	18	76.6
4	12	4	59.3
5	13	3	67.8
6	3	0	-
More than 6	11	3	-
Total	82	97	-

4.25 Evidence that the domestic complainants were in dominant market position raises the possibility that the antidumping law in India is being used for inefficient protectionist purposes and thus highlighting the fact that antidumping laws are prone to misuse and may result in undue protection to an inefficient domestic industry.

[72] See, Agarwal Aradhana, "*Antidumping law and practice: an Indian perspective*" Working Paper 85, ICRIER, April 2002.

4.26 Third, price undertakings (if used instead of antidumping duties) may induce price cartels, which would hinder fair price competition. Anti-dumping rules allow exporters to avoid anti-dumping actions if exporters agree to raise their prices. While such agreements are a means of suspending ongoing or imminent anti-dumping cases, they can be used to promote anti-competitive behaviour. Specifically, such rules may promote cartelization, reflecting the interests of certain producers in the importing country who seek further protection.

4.27 Thus the antidumping rules may because of the inherent infirmities and the manner in which they are applied give rise to anti-competitive results and thus may pose conflict with the objectives of competition law.

Chapter III: Antidumping and Competition Law: The Relationship between Substantive Provisions and Rules on Procedure

1. Introduction:

1.1 In the previous chapter, we have seen that both antidumping and competition law[73] seek to address the issue of 'price discrimination'. Antidumping law seeks to address all those forms of price discrimination, which cause or are likely to cause material injury to the domestic industry. Competition law on the other hand seeks to address only such price discrimination, which is 'unfair' or 'discriminatory' (including predatory) in nature and has an "appreciable adverse effect" on the market.

1.2 Since both sets of laws seek to regulate similar market conduct, there is a similarity between the substantive law and the rules on procedures related to 'price discrimination'. It is important therefore to analyze the substantive law as well as the procedural rules under the two laws in order to ascertain the conflicts or complementarities that may exist. The interaction between the two laws can be mapped under the following four broad headings:

(1) The manner in which the two laws define and address 'price discrimination' and measure the 'degree of discrimination';

(2) The procedural steps involved in examining the instances of 'price discrimination';

(3) The manner in which the two laws measure the impact of the practice of 'price discrimination';

(4) The remedy provided under the two laws against the instances of 'price discrimination'.

2. Price Discrimination as Understood under Antidumping and Competition Law:

2.1 The phrase 'price discrimination' is not expressly used under antidumping laws, rather the word used is 'dumping', which is defined in terms of the price at which a product is exported from one country to another. If a product is exported at a price less than the normal value (price at which it is sold in the domestic market of the exporting country, in the ordinary course of trade) then it is said to be dumped[74]. There is no divergence from this definition of 'dumping' in any of the jurisdictions under this study as they all are based on and reflect the definition as contained in GATT Article VI. (See, **Annex VI** for the definition of 'dumping' as contained in the respective antidumping legislations in the subject jurisdictions).

2.2 The law on antidumping recognizes only one type of dumping, i.e. price dumping, implying therefore that it does not concern with 'cost dumping'[75]. However, notwithstanding the lack of an express reference, the law on antidumping both under the WTO AD Agreement and the relevant domestic legislations provide for the determination of the cost of production of a product, in situations where 'normal value' is not be to be determined on the basis of the price of the like product in the domestic market of the exporting country.[76] The requirement that the normal value be established in the "ordinary course of trade" involves an assessment of the cost of production, as sales below the cost of production, made within an extended period of time and in substantial quantities are deemed not to be in the "ordinary course of trade[77]. In such situations, if the cost of production is higher, the 'normal value' would also increase and consequently the possibility of a positive determination of dumping would increase.

2.3 Competition law on the other hand is concerned with 'unfair' or 'discriminatory' pricing of varying nature and degrees including predatory pricing. (See, **Annex VII** for the definition of 'unfair' and 'discriminatory pricing' under various jurisdictions. Also see, **Annex V** for the definition and understanding

[73] Competition law has a broader domain and regulation of 'price discrimination' is one of the constituent elements of competition laws.
[74] GATT Article VI (1).
[75] The practice of selling goods at prices below per unit cost of production of the goods is referred to as 'cost dumping'.
[76] Article 2.2, WTO Antidumping Agreement
[77] As per footnote 5 to Article 2.2.1 of the WTO Antidumping Agreement, sale below per unit costs are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represent not less than 20percent of the volume sold in transactions under consideration for the determination of the normal value.

on 'predatory pricing' under the subject jurisdictions.) It follows from the understanding on 'price discrimination' under competition laws that it involves a comparison of the actual market/sale price (alleged to be unfair/discriminatory) with a constructed price based on the cost of production of the product. Similar to the situation in antidumping, with specific regard to an investigation concerning predatory pricing, if the cost of production of the product alleged to be sold at a discriminatory price is high vis-à-vis the market/ sale price, the probability of a positive finding on price discrimination increases.

a. Measuring the Degree of Discrimination:

2.4 Under antidumping law, the degree of discrimination, which is known as 'dumping margin' in antidumping parlance is measured by calculating the difference between the 'normal value' and the 'export price'. However, if for any reason, the domestic selling price is not in the ordinary course of trade or is not reliable, the law provides for the determination of the normal value on the basis of 'cost of production' and reasonable profit for the product[78]. Whereas under competition law the degree of discrimination is the difference between the price at which the product is sold and the cost of production of the product. Thus as discussed above the relevant benchmark for measuring the degree of discrimination under the two laws is arrived at by determining the cost of production of the product, which is alleged to be dumped or sold at discriminatory price.

(i) <u>Determining the Cost of Production under Antidumping and Competition Law:</u>

2.5 Both the WTO AD agreement and the domestic legislations of all the subject countries provide that in situations where the 'price in the exporter's domestic market' is not in the ordinary course of trade or cannot be relied upon the normal value can be arrived at by calculating the cost of production of the product (and adding to it the selling, general and administrative expenses and the profit margins). Thus in such situations, the degree of discrimination is captured by comparing the export price (allegedly dumped price) to the calculated normal value (based on the cost of production of the product). The critical factor here is the determination of the 'cost of production'.

2.6 The WTO AD Agreement does not explicitly lay down what constitutes 'cost of production'. However the Agreement defines 'per unit cost of production', as fixed and variable costs of production[79]. The Indian AD legislation also is silent on this aspect; however past practice of the Designated Authority shows that the cost of production under Indian law is taken as the total cost of production.[80] The EC law on antidumping defines the cost of production as being all the costs of materials and manufacture of the product, plus a reasonable amount for selling, administrative and general expenses. The cost of materials and manufacture include both fixed and variable costs. Similarly under US, Australian and South African law also the cost of production takes into account both the fixed and variable costs. Thus as per the existing practices or requirements under the laws of all the subject countries, the cost of production while determining the normal value is reflective of the 'total cost' of production of the product arrived at by adding the fixed and variable costs incurred in the production process.

2.7 By contrast, different jurisdictions employ different standards for determining the cost of production of the product alleged to be sold at a discriminatory price under their respective competition laws, but none of them use the 'total cost' of production to arrive at the benchmark price. The Indian competition law refers to the cost of production as being the 'average variable cost' of the product[81] with reference to a product being sold at predatory price. In EC either of average variable cost or average total cost is used as the benchmark to determine whether a product is sold at predatory price[82]. Similar to the provision in Indian legislation, the South African competition law also refers to cost as 'marginal cost' or 'average variable cost'[83]. In United States also, the practice as developed by the courts is to look at 'average variable cost' of production while making an enquiry into whether a product is sold at a predatory

[78] Article 2.2,WTO Antidumping Agreement
[79] Article 2.2.1, WTO Antidumping Agreement
[80] Attached as **<u>Annex XIII</u>** are the costing formats required by the Indian Antidumping authority.
[81] Draft Rules, the Competition Commission (Determination Of Cost Of Production) Regulations,
[82] *Compagnie Maritime Belge Transports SA v. Commission of European Communities*, [2000] EUECJ C-395/96. *See aslo, AKZO Chemie BV v Commission of the European Communities,* 1991 E.C.R. I-3359.
[83] Section 9(d)(iv), Competition Act.

price[84]. The Australian competition law refers to sale below the 'relevant cost to corporation[85]' as an abusive business conduct (selling at predatory price). However what constitutes 'relevant cost to corporation' is not specified and it is left to the courts to determine this.

2.8 From the above discussion it appears that the understanding on 'cost of production' under competition law is different from the understanding under antidumping law. While antidumping law looks at total cost of production of the product, the investigation under competition generally involves comparison of the sale price with 'average variable cost' or 'marginal cost' of production with the exception of EC jurisdiction where the average total cost may also be taken as relevant parameter. The reliance on 'total price' under antidumping law is because domestic antidumping authorities are inclined towards inflating the benchmark price (normal value) in order to prove the existence of dumping (possibly because antidumping measures have a strong protectionist bias). By contrast competition law does not take into account total cost of production; rather it uses a lower threshold - average variable cost. This is possibly because competition law is not aimed at protection but at promotion of competition and selling at lower prices in the market (unless it is economically unsustainable) is likely to promote competition[86].

2.9 Based on the discussion above, a finding on 'cost of production' of a product under an antidumping investigation cannot be used as the basis to determine whether the product is being sold at a discriminatory price under competition law and vice-versa.

3. 'Determination of Dumping' and the Manner in which It May Influence the Understanding and Examination of 'Price Discrimination' under Competition Law:

3.1 In the previous section we have observed that the understanding on 'price discrimination' under the two laws differs and so do the parameters used under the two laws to measure the degree of price discrimination. Notwithstanding such fundamental differences, for the purposes of this study it is necessary to analyze the procedure for determining 'dumping' under antidumping laws and the bearing, if any, they may have on the way 'price discrimination' under competition law is understood and addressed.

3.2 To further elaborate, 'price discrimination' under competition law assumes various forms such as non-anonymous price discrimination, quantity discounts, dynamic price discrimination. While under antidumping law despite the fact that only one form of price discrimination is addressed (i.e. dumping), the methods for determination of dumping do take into consideration such factors as sale to related parties, bulk sales and spot sales, dynamic dumping (dumping over a period of time, at varying export prices) and the like. Given the understanding that antidumping law takes into account such factors while making a determination on dumping (price discrimination) the possibility of these factors as employed in an antidumping investigation having a bearing on the understanding on 'price discrimination' under competition law can not therefore be entirely discounted without a detailed analysis.

a. Determination of Dumping:

3.3 The determination of dumping is a technical exercise involving a comparison of the normal value (the home market sales price of the like product in the exporting countries) with the export price in order to arrive at the margin of dumping. Antidumping law prohibits the imposition of antidumping duties unless an investigation into the existence of dumping and consequent injury to the domestic industry has been carried out. Under the scheme of antidumping legislations in all the subject countries an investigation can be initiated either 'suo-moto' by the designated authority (known as the Directorate General of Antidumping and Allied Duties in India) or on the basis of a petition by the 'domestic industry' comprising of the producers of the 'like product'. Once the designated authority has come to a 'prima facie' opinion that dumping and injury exist, an investigation is carried out for the 'industry as a whole'.

(i) 'Domestic Industry' Determination under Antidumping Law vis-à-vis the Identification of 'Relevant Market' under Competition Law:

[84] Phillip Areda and Don Turner, "*Predatory Pricing and Related Practices under Section 2 of Sherman Act"*, (1975) Harvard Law Review 697, as quoted in Korah Valentine, 'EC Competition Law and Practice", 2004

[85] Section 46, Trade Practices Act, 1974

[86] The use of total cost as a 'relevant cost parameter' in antidumping law further strengthens the protectionist inclination of antidumping laws towards domestic industry whereas the usage of average variable cost as relevant cost parameter furthers the process of competition. This gap is a further reflection of the increasing divergences in the manner in which both laws are employed.

3.4 Under antidumping law a sanction can be imposed against the practice of 'dumping' only when it causes or is likely to cause 'injury' to the 'domestic industry'. Similarly under competition law, sanctions are imposed on alleged anti-competitive practices[87] when they cause or are likely to cause an 'appreciable adverse effect on competition' in the 'relevant market'. Thus it can be said that under both the laws sanctions are attached to the alleged unfair practice or the anti-competitive practice (as the case may be) depending upon their impact on 'domestic industry' or the competition in the 'relevant market' respectively. It is important therefore to understand the definition and constituent elements of 'domestic industry' under antidumping law and 'relevant market' under competition law and ascertain the inter-linkages between the two, if any.

3.5 Under Indian antidumping law (as well as under the domestic laws of the other subject countries and the WTO AD Agreement) the term 'domestic industry' is defined as:

> *"the domestic producers as a whole engaged in the manufacture of the like article and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case (such producers may be deemed not to form part of the domestic industry)."*

3.6 It is clear from the definition that the term 'domestic industry' is used to refer to the industry for the 'like product'. The identification of 'domestic industry' therefore depends upon the determination on the 'likeness' of the product alleged to be dumped with the products manufactured and produced by the domestic industry. The WTO AD Agreement defines, a 'like product' as a "product, which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.[88]" While the AD agreement does not contain any further guidance on what constitutes a "like product", the WTO dispute settlement body has interpreted term in great detail,[89] and various investigative authorities in different WTO Member countries have developed some criteria, which they apply on a case-to-case basis. Apart from physical characteristics, functions and end uses, pricing, quality, tariff classification, channels of distribution etc., one of the most important criteria applied by Members in determining the 'like product' is the degree of 'commercial substitutability or interchangeability' of the products. (See, **Annex VIII** for detailed discussion on 'likeness' test as used and applied under the subject jurisdictions). It is important to note that the determination on 'likeness' of products in order to identify the 'domestic industry' shall be based on sound economic principles as too narrow a definition of 'like products' leave out certain section of the industry even though they produce similar or identical goods and at the same time too wide a definition may create an obvious protectionist bias in favour of the domestic industry. Once the 'domestic industry' and 'relevant market' is identified the second leg of the analysis i.e. whether there in 'material injury' to the 'domestic industry' within a relevant geographic market, or within the national territory of the administrating authority. This is discussed in detail below.

---

[87] It may be noted that under the Competition Act, 2002 it is presumed that there shall be an 'abuse of dominant position' when an enterprise or a group, directly or indirectly, imposes 'unfair or discriminatory' price in the purchase or sale (including 'predatory price') of goods or services. [Section 4 (a) (ii)] A plain reading of the provision suggests that there is no requirement of showing 'appreciable adverse effect on competition' in the relevant market in India when 'price discrimination' results from an abusive conduct of a dominant enterprise or a group. However not every form of 'price discrimination' is held to be *per se* illegal and the law carves out and exception for and permits such 'price discrimination' which may be adopted to meet competition. Interestingly even though the Act (Section 4) is silent on the requirement of 'appreciable adverse effect on competition' in case of 'abuse of dominant position', under Section 32 it provides that the CCI may inquire into acts taking place outside India (including abuse of dominant position) if such position is or likely to have an appreciable adverse effect on competition in the relevant market in India. To this extent therefore, the requirement of 'appreciable adverse effect on competition' in case of 'abuse of dominant position' can be said to exist under the Act.

[88] Article 2.6, WTO Antidumping Agreement

[89] The WTO Panel in the case of *Indonesia-Automobiles,* interpreted 'like products' to mean that similar physical characteristics is one criterion, but other factors, such as tariff classification principles, whether the products are substitutable, and brand loyalty and reputation, may also be utilized by national antidumping authorities in making the 'like products' determination.

3.7 Similarly under competition law an investigation into whether a product[90] is being sold at a discriminatory price is to be carried out with respect to the 'relevant market', which may be determined either with reference to a 'relevant product market', or 'relevant geographic market' or both. To the extent that the 'relevant market' under competition law may be determined with reference to a 'relevant product market' there may exist a parallel with the determination of the 'domestic industry' as producers of 'like product' and the injury they are perceiving within a market. The Competition Act, 2002 defines 'relevant product market' as the:

> *"Market comprising of all those products or services which are regarded as interchangeable or substitutable by the consumer, by reason of characteristics of the products or services, their prices and intended use."*

3.7 The competition related legislations in other subject jurisdictions also define 'relevant product market' in terms of commercial substitutability. Given that competition law, unlike antidumping law is a national prerogative, there are differences. By way of example, in South African legislation however there is no definition of 'relevant product market' and instead it defines 'goods and services' as "including any other goods or services that are reasonably capable of being substituted for them, taking into account ordinary commercial practice and geographical, technical and temporal constraints"[91].

3.8 Notwithstanding such differences, the definition of 'relevant product market' under competition laws of the subject countries is almost the same and is akin to the concept of 'commercial substitutability' in antidumping law. Factors such as the physical characteristics or end use of the goods, price of goods or services, consumer preferences, existence of specialized producers, classification of industrial products and the like are all considered while making a determination of 'relevant product market'. The determination of the 'relevant product market' under competition law is also based on economic principles through which, on account of a strict narrow definition may result in the exclusion of certain products from the ambit of 'relevant market' and a broad definition runs the risk of expanding the ambit of relevant market so wide that effective impact on competition may not be captured adequately.

3.9 From the above discussion it is clear that the criterion for determining what constitutes 'domestic industry for the like products' under antidumping law and what forms 'relevant product market' under competition law is similar primarily because both are based fundamentally on commercial substitutability of the products. Under both the laws commercial substitutability has to be determined with reference to factors such as physical characteristics, functions and end uses, pricing, quality, tariff classification of the products and the like. Further both the laws seek to define 'domestic industry' or 'relevant product market' in such a manner that the impact of the alleged practice of price discrimination is captured in the most optimal manner.

3.10 The above finding on similar coefficients being used under both the laws to determine the ambit of 'domestic industry' or 'relevant product market' (with reference to which the impact of the alleged price discrimination is to be assessed) clearly indicates the existence of an interface between the two laws. Therefore investigative authorities under the respective antidumping and competition laws may find the analysis made by each other relevant in considering possible violations under their respective laws and rules.

3.8 Further under antidumping law in certain exceptional circumstances the domestic industry can also be determined with reference to a particular territory (geographical area)[92]. Similarly under competition law 'relevant market' can also be determined with reference to the 'relevant geographic market. To this extent therefore an additional parallel between the two laws may exist.

3.9 Rule 11 (3) of the Antidumping Rules provides that, the designated authority may, in exceptional cases, give a finding as to the existence of injury even where a substantial portion of the domestic industry is not injured, if:

---

[90] Competition laws also address provision of services at discriminatory prices. However services are not covered under antidumping law, the discussion on discriminatory pricing under competition law shall be limited to goods.

[91] Section 1(1)(X), Competition Act,1998.

[92] See, the proviso to Rule 2 (b) and Rule 11 (3), Customs Tariff (Identification, Assessment and Collection of Antidumping duty on dumped articles and for determination of injury) Rules, 1995 (Antidumping Rules).

(i) there is a concentration of dumped imports into an isolated market; and

(ii) the dumped articles are causing injury to the producers of all or almost all of the production within such market.

3.10 To the extent that 'injury' to the domestic industry is determined with respect to an isolated market wherein all or almost all of the producers are suffering injury due to dumping, it can be said that the impact of the alleged unfair practice (dumping) can be measured with reference to a particular geographic area.

3.11 Similarly under competition law appreciable adverse effect on competition of the alleged anti-competitive practice may also be determined with reference to the 'relevant geographic market'. Since the impact of the alleged unfair conduct (in case of antidumping law) or anti-competitive practice (in case of competition law) under both the laws may be measured with reference to a particular geographic area, there exists a possibility of overlap between the two laws.

3.12 The AD Rules do not provide any definition of 'isolated market', however it is clear from the words used in Rule 11 (3) that the determination of 'isolated market' under antidumping law is based on the concentration of 'dumped articles' in a particular area. The market is therefore isolated with reference to the inflow of dumped products. The Competition Act, 2002 on the other hand provides a detailed definition of what constitutes 'relevant geographic market'.

3.13 As per the Act, 'relevant geographic market' means a market comprising the area in which the conditions of competition for supply of goods or provision of services or demand of goods or provision of services are distinctly homogenous and can be distinguished from the conditions prevailing in the neighbouring area. Thus under the Competition Act, 2002 the determination of 'relevant geographic market' depends upon the conditions of competition for demand and supply of a particular good or service.

3.14 It is apparent from the above discussion that even though both antidumping and competition law may entail an examination into the impact of the alleged unfair or anti-competitive practices with reference to a particular geographic area, the manner in which the geographic area is isolated under the two laws is different. While under antidumping law it is contingent upon the concentration of the dumped imports, under competition law it depends upon whether the conditions of competition for the demand or supply of the product are homogenous or not. Thus, as far as the determination of 'isolated market' under antidumping law and 'relevant product market' under competition law is concerned there does not exist any inter-linkages between the two.

b. Examining Antidumping Investigation Procedures and their Correlation (if any) with the Understanding on 'Price Discrimination' under Competition Law:

3.15 This section seeks to analyze the methodological aspects and procedural issues involved in antidumping investigations and thereafter ascertain the parallels that exist or may exist with the understanding on 'price discrimination' under competition law. The process of calculating dumping margin involves four steps: (i) Calculation of normal value; (ii) Calculation of export prices; (iii) Adjustments to make prices and normal value comparable; and (iv) Calculation of dumping margin. Each of these steps involves certain calculations, which according to our analysis may have some resemblance with the manner in which price discrimination is understood under competition laws. While the inherent infirmities of conducting a comparison between methodological/procedural aspects of two laws are apparent, nevertheless it will still be useful to embark on this to identify the relationship between the two. The comparison analysis is restricted to identifying any such methodological aspect under antidumping law, which can influence the understanding on and investigation into an allegation of price discrimination under competition law.

(i) Calculation of Normal Value:

3.16 In determining normal value it is important to appreciate the difference between exports from market economy countries and non-market economy countries. Normally, the legal provisions require the normal value to be determined on the basis of the sale price of the 'like product' in the domestic market of the exporting country. If there are no sales of the 'like product' 'in the ordinary course of trade' in the domestic market of the exporting country or when account of the particular market situation or the low

volume of the sales in the domestic market of the exporting country, such sales do not permit proper comparison, then there are options available to determine normal value:

a. on the basis of a comparable price of the 'like product' when exported to a third country, provided that the price is representative; or

b. by determining the cost of production in the country of origin plus a reasonable amount of administrative, selling and general costs and profits.

3.17 However, in circumstances when the exports have been made from 'Non-market Economy' (NME) countries, normal value is determined on the basis of 'appropriate third country' (surrogate country) or in situation when the exporters do not co-operate with the investigation process, the normal value is determined on the basis of 'facts available'. The rationale behind this that a Non-Market Economy does not reflect the true input costs and/or commerce in not conducted on market economy principles, thus rendering the domestic selling price unreliable.

3.18 The WTO AD agreement defines normal value as "the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country[93]." From a reading of the definition, it is clear that it has three constituent elements[94]:

a. It is the comparable price in the ordinary course of trade;

b. With reference to 'like product';

c. That is destined for consumption in the exporting country.

3.19 Our analysis of the definition of 'normal value' under the domestic antidumping legislations of all the subject countries shows that that they all contain the same elements and reflect the definition as contained in the WTO AD Agreement. Under certain jurisdictions (EU and USA) there might be slight variances in the language used; however the essential components as contained in the definition under the WTO AD Agreement do get reflected under all the laws of all the countries under study. (See **Annex IX** for detailed discussion on the definition of 'normal value' under various jurisdictions).

3.20 **Comparable price:** Antidumping rules under all the jurisdictions require that for normal value to be based on the domestic sale price, it should be representative enough to permit a proper comparison to be made with the export price, which implies that: (i) the transaction prices should reflect the general price situation in the country of export/origin so that special prices, due to such factors as end of season sales, may be disregarded when establishing the normal value; and (ii) In addition, the volume of transactions in the domestic market must be sufficient enough to permit a valid comparison to be made with the exports.

3.21 Under competition law also the enquiry into alleged price discrimination, shall necessarily involve an examination into whether the sale of the product at discriminatory prices is reflective of the 'general price situation'[95] in the relevant market or not. The understanding on price discrimination under the competition laws of all the subject countries is that if a certain price discrimination can be justified on the ground that it is necessary in order to 'meet competition', then the prohibition under the law would not apply. This implies that the investigation into the existence of 'price discrimination' is to be carried out with reference to the 'general price situation' i.e. the mere fact that a firm indulges in quantity discounts or end of season sale etc. shall not be considered as resulting in price discrimination.[96]

3.22 It is clear from the above discussion that both the laws envisage that the selling price of the product alleged to be sold at discriminatory price is to be determined with due regard to the 'general price situation' in the market and due allowance shall be made for factors such as end of season sale, quantity discounts etc.

[93] Article 2.1, WTO Antidumping Agreement
[94] See, Appellate Body Report, US-Hot Rolled Steel, para 165
[95] Even though the Competition Act, 2002 does not use exact phrase, the reference to 'discriminatory price' which may be adopted to 'meet competition' would imply this.
[96] It may however be noted that a dominant firm with the ability to absorb losses for some time may use quantity discounts as a means to thwart or eliminate competition in the markets.

3.23 **Ordinary course of trade:** In antidumping investigations, the investigative authorities (including in all the subject countries) normally consider the price between 'related parties' that do not reflect market (arm's length) conditions and 'sales at prices below cost' as not being in the 'ordinary course of trade'.

3.24 **Related Party Transactions:** In an antidumping investigation the requirement that the sales under consideration need to be in the 'ordinary course of trade' precludes the consideration of sales to related parties. Indeed, some investigative authorities carry out the assessment of whether domestic prices to related parties are at arm's length by comparing the prices (as disclosed by the exporter) with the domestic prices to independent parties. This comparison is made in terms of averages. If the difference between the two sets of average prices is 'significant[97]' domestic prices to related parties may be considered as not to be in the 'ordinary course of trade' and such transactions will not be considered as the 'normal value' for the product under investigation.

3.25 As discussed before, under competition law an examination into alleged price discrimination would involve a comparison of prices at which the product is sold with the cost of production of the product (average variable cost in case of predatory pricing). In such examinations the attempt of the errant enterprise will typically be to project the prices at which the product is sold to related parties (in cases of predatory pricing, it is in the interest of the firm to sell at non-predatory prices to related parties, as related parties are in a manner of speaking captive customers) as being evidence of its non predatory intent

3.26 As discussed above, under antidumping law the investigation specially focuses on whether the sales in the domestic market of the exporting country have been made to related parties or to independent parties and all such sales which have been made to related parties are disregarded while determining the normal value. Similarly from a competition law point of view it is important therefore to properly investigate related party transactions to establish the predatory or other intent of the enterprise.

3.27 **Sale at prices below cost:** the WTO AD agreement as well as the domestic legislations in the subject countries specifically provide that sales of the like product in the country of export at prices below cost may be treated as not being in the 'ordinary course of trade by reason of price and may be disregarded for determining normal value if the authorities determine that such sales are made: (i) within an extended period of time (normally one year but in no case less than 6 months)[98]; (ii) in substantial quantities[99]; and (iii) are at prices which do not provide for the recovery of all costs within a reasonable period of time[100].'

3.28 Under competition law, the determination into whether a product is sold at 'predatory price' involves an examination into three factors- (i) whether the firm indulging in predatory pricing is in 'dominant position'; (ii) whether the sale is below the 'cost of production'; and (iii) whether the sale is done with the intention to predate. It is comparatively easier to examine the first two requirements as they can be deduced from the relative size of the firm in the relevant market and by comparing the selling prices to the 'cost of production'. The third requirement of 'intent to predate' is difficult to establish and depends upon the factual matrix of the case under consideration.

3.29 With respect to the third requirement, i.e. 'intent to predate' are also to some extent reflected in the 'ordinary course of trade' analysis wherein whether the sales are made:

a. within an extended period of time (normally one year but in no case less than 6 months);

b. in substantial quantities; and

c. are at prices which do not provide for the recovery of all costs within a reasonable period of time are also considered.

[97] The term 'significant difference' has not been clarified under the WTO AD Agreement and the practice may differ from one country to another.

[98] Footnote 4 of the WTO Antidumping Agreement.

[99] Footnote 5 of the WTO AD Agreement provides that sales below total cost are made in substantial quantities under either one of the two situations, namely: (i) the weighted average price of domestic sales in the country of export, or export sales into a third country, is below the average total cost; or (ii) sales below total cost represent at least 20 percent, in volume terms, of all domestic sales in the country of export (or export sales into a third country).

[100] Article 2.2.1 WTO Antidumping Agreement.

3.30 Such analysis can also form a basis for determining predatory intent under competition laws. Positive evidence that any one or all the three elements exist will indicate an intention to predate so as to reduce competition or eliminate competitors. Thus it can be said that the methodological tools used under antidumping investigations to asses whether sales below cost are in the 'ordinary course of trade' can also be used to determine whether price discrimination is taking place with a predatory intent.

3.31 **With reference to like products:** Under antidumping laws the term 'like product' has two applications. In the context of dumping margin calculations, it is the good produced in the country of export which is like the exported product. In the context of the determination of injury to the domestic industry, it is the good produced in the country of import which is like the exported product. Despite such differing applications, the test of likeness under antidumping laws remains the same. For the purposes of competition law the 'likeness' test is relevant only so far as the determination of the 'relevant market is concerned. This has been discussed in detail above at Para 3.6 to 3.10.

(ii) Determination of Export Prices:

3.32 The export price is typically the transaction price, as established between two independent buyers. However, the export price will need to be duly adjusted to the factory gate so as to ensure a fair comparison between the export price and the normal value. Typically, the ex-factory levels which are arrived at after making numerous adjustments. These include adjustments for taxes, discounts and rebates actually granted and directly related to the sales concerned, packaging costs, costs relating to the export and transportation of the product, costs charged for the product's entry into the country, including transport, maintenance, insurance, loading and unloading and handling costs, and other unforeseen costs incurred from the commencement of transportation at the point of export until delivery to the buyer. This "ex-factory" export price is compared to the "ex-factory" normal are compared at the same level, to establish dumping.

3.33 However, where the export price is unreliable on account of any compensatory or other arrangement between the exporter and the importer or a third party, the export price may be constructed on the basis of the price at which the imported products are first resold to an independent buyer, or if the products are not resold to an independent buyer, or not resold in the condition as imported, on such reasonable basis as the authorities may determine.[101]

3.34 As discussed above, export price could be either 'actual export price' or it may be 'constructed export price'. The former is arrived at by determining the ex-factory export prices after making numerous adjustments, while the later requires constructing the export price after providing for certain additional allowances. The determination of export prices in both the situations involves various adjustments as claimed by the exporters to be examined by the concerned investigation authorities and it is in the discretion of the concerned authority to accept or reject them. Such discretion increases the possibility of variances in the calculation of 'export price' based on the investigating authorities' subjective evaluation of adjustments that permissible. For instance while determining the 'ex-factory' export prices if certain adjustments on account of costs relating to transport, insurance etc. are not accepted, the 'export price' would be consequently lowered. Similarly effect can be felt if overhead costs/profits are overestimated while constructing the export price. Under both the situations there is a risk of downward revision of 'export price' thereby increasing the chances of positive finding on dumping.

3.35 An antidumping investigation involves a comparison between 'normal value' (which is the sale price of the product alleged to be dumped in the domestic market of the exporting country) and 'export price' (which is the price at which the product alleged to be dumped is exported or is first resold to an independent buyer). On the other hand under competition law an investigation against allegations of international price predation would involve a comparison of the price at which the product is exported or sold in the importing country and the cost of production of the product. The common factor under both antidumping and competition law investigations is that the 'export price' determined under antidumping law may be the same as the price at which the 'product is exported' as determined under competition law. An investigation concerning international price predation under competition law may therefore undertake a similar exercise as that undertaken by the antidumping authorities.

[101] Article 2(3) of WTO Antidumping Agreement.

3.36 We have also seen that the discretion with the investigative authorities under antidumping laws in accepting or rejecting various adjustments may result in determination of a lower export price thereby increasing the chances of a positive finding on dumping. This may result in protection of competitors and have serious implications for the state of competition in the relevant market in India. The possible impact of such procedural rules and practices on the state of competition shall be discussed in detail in the next chapter.

(iii) Adjustments to Selling Price:

3.37 Assuming for the purposes of this discussion that 'normal value' is determined on the basis of the domestic selling price, the WTO AD Agreement stipulates that a 'fair comparison shall be made between the export price and normal value' to arrive at the determination of dumping. This comparison shall be made at the same level of trade, normally at ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits for differences which affect price comparability, including differences in conditions and terms of sale, taxation, level of trade, quantities, quality, physical characteristics, currency conversion and any other differences which are also demonstrated to affect price comparability. Antidumping legislation in different countries has different levels of elaboration on these adjustments.

3.38 Several jurisdictions go to great length to list the adjustments to be made. Further they also provide that any factor which can be demonstrated to affect price comparability may be considered by the investigating authorities, thus providing a wide scope of leeway to the investigating authority.

3.39 Under competition law, while there is no direct parallel that can be drawn, it is nevertheless necessary to note that an investigation into alleged practice of 'price discrimination' is to be carried out by comparing the selling price of the product with the cost of production of the product. The comparison under competition law may also be made with reference to the 'fair comparison' standards prescribed under the antidumping laws. In fact unless the comparison between the selling price and the cost price under competition law is a 'fair comparison' and is made for like/same products and at the same level of trade, the instance of price discrimination/ predation cannot be captured properly. It is important therefore that competition law in India contains provisions requiring the comparison between the two (selling price and cost of production of the product) to be a 'fair comparison'. In doing so the policy makers/competition authorities can take cue from the rules and practices under the antidumping law on the various factors which go into the making of a comparison between normal value and export price 'fair'.

(iv) <u>Calculation of Dumping Margin/Predatory Pricing:</u>

3.40 The WTO AD Agreement envisages that the 'dumping margin' shall be the "amount by which the normal value exceeds the export price". The Agreement recognizes two general methods of calculating the dumping margin: (i) a comparison of a weighted average normal value with a weighted average export price; and (ii) a comparison of normal value and export prices on transaction-to-transaction basis. The AD Agreement however also recognizes a third method, a comparison of a weighted average normal value to individual export prices, however the use of this method is permitted only in certain specific circumstances. In particular, it is permitted when the investigating authorities have been able to find "a pattern of export prices which differ significantly among different purchasers, regions or time periods" and provide an explanation as to why such differences can not be "taken into account appropriately" by either one of the two general methods.

3.41 Under competition law the determination of whether a product is sold at a discriminatory price (predatory price) is done by comparing the selling price with the cost of production of the product. However there could be various prices at which a product may be sold in a given relevant market. Some of these could be below the 'cost of production', and others could be above. There could also be variations in prices below the benchmark measure of 'cost of production' and above it. In such situations the investigating authorities under competition law will have to arrive at a certain aggregate measure of prices. There will be an overlap in this practice and methodology both in anti-dumping and the competition laws.

4. Injury Analysis under Antidumping Law via-a-vis Appreciable Adverse Effect on Competition Analysis under Competition Law:

a. Determination of 'Injury' under Antidumping Law:

4.1 As discussed before, neither the WTO AD Agreement nor the domestic legislation in any of the subject countries treat the practice of 'dumping' as illegal per se. The practice of 'dumping' attracts sanctions only when it can be proved to cause 'injury' to the domestic industry. One of the probable reasons for not attaching sanctions to every form of international price discrimination (dumping) was to prevent antidumping measures from being applied merely as a tool for eliminating 'fair' competition from abroad. Therefore the sanctions that were attached to the practice of dumping resulting in injury to the domestic industry were designed to 'remedy' the situation of 'injury' to the domestic industry as opposed to providing a punishment for the conduct (both the AD agreement and domestic legislations in all the subject countries refer to the conduct of 'dumping' as being 'unfair'). Antidumping duties can therefore utmost be imposed to the extent of the 'margin of dumping.' Some countries such as India take this rule further, and if the injury margin is lower than the dumping margin, then duties will be levied only to the extent that it is sufficient to remedy the 'injury'.

4.2 The WTO AD Agreement does not define 'injury'; rather it sets out a series of parameters with are indicia of injury. As per the AD Agreement, the assessment of 'injury' encompasses three concepts: (i) material injury to the domestic industry; (ii) threat of material injury to the domestic industry; and (iii) material retardation of the establishment of a domestic industry. Given that the antidumping law is required to operate within the boundaries set by the WTO AD Agreement, an examination of several of the domestic legislations shows that there is no deviance form this understanding; however there could be, and indeed are, significant differences in the manner in which the subject countries provide for the examination into the existence of each of the three constituent elements of 'injury' analysis.

(i) Material Injury:

4.3 The WTO AD Agreement does not define term 'material injury' but it mandates that the determination of injury shall be based on 'positive evidence' and involve an 'objective examination' of two factors- (i) the volume of the dumped imports; (ii) the effect of the dumped imports on prices in the domestic market for the like products; and (iii) the consequent impact of these imports on domestic producers of such products[102].

4.4 Article 3.2 of the AD Agreement addresses the first two factors, providing additional guidance regarding the criteria to be considered and the analysis to be conducted with respect to the volume and price effects of the dumped imports. Article 3.4 of the Agreement addresses the third factor, listing the specific criteria that should be considered in evaluating the impact of the dumped imports on the domestic producers.

4.5 The enquiry into the volume of the dumped imports shall be to determine whether there has been a significant increase in dumped imports, either in absolute terms or relative to the production or consumption in the importing Member[103]. The examination into the effect of the dumped imports on prices shall entail an analysis into whether there has been significant 'price undercutting' by the dumped imports as compared with the price of the like product in the importing country. In the alternative the examination may also entail an analysis of whether the effect of such imports is to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree[104].

4.6 The examination into the impact of the dumped imports on the domestic industry is to be based on an evaluation of such economic factors and indices having a bearing on the state of the domestic industry, including actual or potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of

[102] Article 3.1, WTO AD Agreement
[103] Article 3.2, WTO AD Agreement
[104] *Ibid.*

dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments[105].

4.7 The antidumping injury determinations in the subject jurisdictions are based on the rules under the WTO AD Agreement as outlined above. For instance, even though the EC Regulation does not define the concept of material injury, it lists three factual elements that must be assessed in order to determine the existence of material injury. The three factors mirror the requirements prescribed under the WTO AD Agreement, except that they require the 'effect' and 'impact' of the dumped imports on the 'community market' and 'community industry' respectively as opposed to the 'domestic market' and 'domestic industry' as required under the WTO AD Agreement.

4.8 Similarly, the antidumping legislations in other subject countries also provide for the determination of 'injury' based on the three factors prescribed under the WTO AD Agreement.

4.9 Investigating authorities treat the determination of material injury on a case-by-case basis and no single factor can be disregarded. Each investigation involves a unique set of facts and thus all the criteria as prescribed in the WTO AD Agreement and the domestic legislations shall be evaluated within the context of business cycles, conditions of competition, or the circumstances under which the market normally operates within the industry in question. In this regard the investigators should seek to identify whether dumped imports are causing injury that is outside the norm or beyond the usual competitive conditions under which the industry routinely operates. While determining whether material injury to the domestic industry exists, all the factors as listed in Article 3.4 of the AD Agreement must be considered.

(ii) Threat of Material Injury:

4.10 In an antidumping investigation, the threat of injury and material injury are generally considered in the alternative, as the threat of injury implies material injury in the imminent future, rather than material injury in the present. The threat of injury analysis by its very nature shall necessarily be prospective, nevertheless the AD Agreement emphasizes that a determination based on threat of injury can not be based "merely on allegations, conjecture or remote possibility[106]" and rather the Agreement provides that "a situation in which the dumped imports would cause injury must be clearly foreseen and imminent."

4.11 Article 3.7 of the WTO AD Agreement lays down a non-exhaustive list of specific factors to be considered in determining whether the domestic industry faces a threat of material injury, including: (i) a significant rate of increase of dumped imports into the domestic market indicating the likelihood of substantially increased importation; (ii) sufficient freely disposable, or an imminent, substantial increase in, capacity of the exporter indicating the likelihood of substantially increased dumped exports to the importing Member's market, taking into account the availability of other export markets tom absorb any additional exports; (iii) whether imports entering at prices that will have a significant depressing or suppressing effect on domestic prices, and would likely increase demand for further imports; and (iv) inventories of the product being investigated.

4.12 The 'threat of injury' determination can not be based solely on the factors specified in Article 3.7 of the AD Agreement, but must also take into account the factors listed in Article 3.4 of the Agreement, as well as any other indicators relevant to whether the domestic industry will suffer imminent harm due to non-levy of antidumping duties.

4.13 The law and practice with regard to the 'threat of injury' determination in the subject countries broadly reflect the tenets of the WTO AD Agreement. All the factors as mentioned in the agreement are examined as a whole, as none of the factors can alone conclusively determine whether material injury will occur in the absence of protective measures.

(iii) Material Retardation:

4.14 The concept of 'material retardation' is distinct from both 'material injury' and 'threat of material injury'. It would apply in cases where there does not exist any domestic industry producing a like product, and efforts to establish such an industry have been materially hindered as a result of the dumped imports.

[105] Article 3.4 WTO AD Agreement
[106] Article 3.7, WTO AD Agreement

It may arise in cases where there has been some production of the like product, but such production has not reached a sufficient level to allow consideration of injury or threat of injury to an existing domestic industry, or it may arise in cases where production of the like product has not even begun in the importing country.

4.15 Similar to the law and practice on determination of 'injury' and 'threat of injury' determination, the law and practice in the subject countries on the determination of 'material retardation of the establishment of a domestic industry' also reflects the prescribed rules under the WTO AD Agreement. This provision has been used very sparingly in most jurisdictions and there are very few cases in which the investigating authorities have found injury to the domestic industry on this account.

4.16 However notwithstanding the legal requirement that injury determination shall be based on the examination of various factors (some of them specified under the WTO AD Agreement and the domestic legislations in the subject countries), the methods used for the determination of injury are of vary from one county to another, and in some countries from one investgaton to another.. There can be various causes of injury to the domestic industry and finding out that part of the injury which could be ascribed to dumping is a difficult task. There is no specific mathematical formula for determining the existence of injury. The decision with regard to the existence of 'injury' and whether all the determining factors exist is very often left to the subjective satisfaction of the investigating authority.

4.17 Amongst the five countries under study, the USA is the only country that uses different econometric models for determining injury. It uses five different counterfactual models to measure injury determination. These models measure how the conditions of the industry under investigation would differ from its current state had dumping not occurred and then carry out a comparison with the factual world to determine the extent to which dumped imports change prices and/or quantities[107]. The other four subject countries rely on the examination of various factors as discussed above for the purposes of injury determination. The examination of each of these factors involves a certain degree of subjectivity, which may often be tilted in favour of the domestic industry. (See, **Annex X,** for definition of 'injury' and the parameters involved in its analysis in the subject countries)

b. The Concept of "Appreciable Adverse Effect on Competition"

4.18 Under competition laws, a 'price discriminatory' conduct of an enterprise or a group in a 'dominant position' is per se prohibited and the law does not impose any requirement that such conduct shall cause or have any adverse effect on competition in the relevant market in India. However if such 'price discriminatory' conduct is adopted to meet competition, then the Indian Competition Act does not regard it as being 'unfair' or 'discriminatory' and such conduct is permitted[108]. Implicit in this carve- out from the general rule that price discrimination is prohibited per se, is that if an enterprise can show that the alleged 'price discrimination' is adopted to "meet competition" then the prohibition no longer applies. In the absence of any guidelines in the Act that define how the relevant authorities are to determine whether a 'price discriminatory' conduct is adopted to 'meet competition', it is possible that authorities will look into the 'effect' of the alleged 'unfair' or 'discriminatory' pricing on competition in the relevant market in India. In other words, whether price discrimination is adopted to "meet competition" or not, may be determined with reference to the ultimate effect of such price discrimination in a relevant market. The 'effect' on competition could in turn, be determined with reference to the same parameters used by the Act to determine whether a conduct has an 'appreciable adverse effect on competition' in the relevant market in India[109], although the thresholds for each determination need not necessarily be the same.

[107] Aggarwal Aradhana, "*Antidumping Law and Practice: An Indian Perspective*", Working Paper No. 85, April 2002, Indian Council for Research on International Economic Relations.

[108] See, Explanation to Section 4 (a), Competition Act, 2002.

[109] The Competition Act, 2002 prescribes this test only for the determination of the effect of 'anti-competitive agreements' and 'combinations' and not with respect to the examination of 'abuse of dominant position.' However Section 32 of the Act which relates to extraterritorial application of the provisions of the Act empowers the Competition Commission of India to inquire into whether an alleged conduct of the dominant enterprise has, or is likely to have an appreciable adverse effect on competition in the relevant market in India.

4.19 The requirement of 'appreciable adverse effect on competition' forms the touchstone of the Competition Act, 2002. The alleged anti-competitive practices are evaluated with reference to several factors before they can be held to be illegal by the reason of causing or likely to cause 'appreciable adverse effect on competition'. These factors include:

a. Creation of barriers to new entrants in the market;

b. Driving existing competitors out of the market;

c. Foreclosure of competition by hindering entry into the market;

d. Accrual of benefits to consumers;

e. Improvements in production or distribution of goods or provision of services;

f. Promotion of technical, scientific and economic development by means of production or distribution of goods pr provision of services.

4.20 Similarly, under antidumping law the touchstone for the imposition of antidumping duties is whether 'injury' is caused or likely to be caused to the domestic industry due to dumping. However the concept of 'injury' as defined and understood under antidumping law is narrower in scope as compared to the concept of 'appreciable adverse effect on competition' under competition law. The 'injury' analysis under antidumping law is limited to the impact of the alleged price discriminatory conduct (dumping) on the domestic industry for the like product (competitors), on the other hand the 'appreciable adverse effect on competition' analysis involves a determination on the impact of the alleged anti-competitive practice on the state of competition in the relevant market and not merely upon the competitors.

4.21 In assessing the effect on competition of an alleged anti-competitive practice the investigating authorities may examine the degree to which competition in the relevant market is affected either through the creation of barriers to new entrants in the market, or by driving existing competitors out of the market or by foreclosing competition. In addition the competition authorities are also required to take into account the pro-competitive effects that may ensue from the alleged anti-competitive conduct, such as whether the conduct results in accrual of benefits to consumers or improvements in production or distribution of goods or promotion of technical, scientific and economic development and the like.

4.22 It is clear from the above discussion that a positive finding on the 'appreciable adverse effect on competition' would be based on the consideration of a number of factors and not just on the negative impact on the competitors. In essence therefore this test is broader than the test for determining 'injury' under antidumping law. However to the extent that competition authorities consider the impact of the alleged anti-competitive practice with reference to whether the 'existing competitors are driven out of the market', it may mirror the tests for the determination of 'injury' under antidumping law, since the injury determination is in essence a determination on whether the instance of injurious dumping may result in the existing competitors being driven out of the market.

4.23 The injury analysis under antidumping law is carried out with reference to a number of parameters. Enquiry into economic factors such as actual or potential decline in sales, profits, output, market share, productivity, return on investment, utilization of capacity, cash flow, inventories, growth helps establish whether the domestic industry for the like product is suffering injury due or not. If dumping results gives rise to sustained negative trends across these factors, the domestic industry is said to suffer injury, which may consequently force the producers of the like product out of the market. Clearly, to this extent there exists an overlap between competition and antidumping law since both the sets of laws focus on whether the alleged anti-competitive practice or the dumping results in existing 'competitors being driven out of the market'.

5. Remedies against the Practice of 'Price Discrimination' Under the Two Laws:

5.1 As discussed before, both the laws seek to prohibit price discriminatory conduct by enterprises. While antidumping law prescribes sanctions in the form of antidumping duty or price undertakings on such conduct that causes injury to the domestic industry, under competition law such price discriminatory conduct, practiced by a dominant enterprise which is predatory in nature is prohibited per se and thus is subject to pecuniary sanctions. There is an important distinction between the manner in which the two

laws seek to address the practice of 'price discrimination', while the antidumping law seeks to remedy the effects of the conduct, competition law punishes such conduct. The remedy prescribed under competition law against the practice of predatory price discrimination may range from an order to end the practice and not desist from it in future, to monetary penalty and in certain cases even division of the enterprise enjoying dominant position. Fundamentally, because they both seek to address different situations therefore the remedies provided under the two laws are different from each other.

5.2 However, notwithstanding the different nature of remedies provided under the two laws, the possibility of remedies under the antidumping laws having a bearing on competition cannot be negated. Particularly, 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.

5.3 Further, the effects of a price undertaking action may be understood by the fact that it raises the domestic price of the imported good and thereby reduces import volume. Also the timing of the action's initiation and duration are known. Whether a price undertaking impacts primarily upon prices or import volume or on both is dependent upon a number of case-specific factors. Empirical analysis does not tell us per se whether to expect a 'significant' structural break in both the volume and unit-value series, but it does suggest that there should be a break in at least one of them[110]. As the impact of price undertakings suggest that they tend to produce anti-competitive effects i.e. raising market prices, hence they by nature can be said to offset what competition law would ideally seek to achieve.

6. Extra-territorial Applicability of Antidumping and Competition Law:

6.1 Anti-dumping laws by their nature are extra-territorial. They seek to address conduct originating outside India, which has an impact within India. Indeed as per the provisions of the WTO AD Agreement, the investigating authority can impose sanctions against a third country, if the industry of another member of the WTO (not the nation of the investigating authority) is suffering injury on account of the third country's conduct in the Indian market.[111] However, the entire application of the antidumping law requires that the goods be imported into India. Section 9 A of the Customs Tariff Act, 1975 which contains the provisions related to the imposition of antidumping duties clearly states that the Central Government may impose antidumping duties on articles 'upon their importation'.

> *"Section 9 a (1): Where any article is exported from any country or territory (hereinafter in this section referred to as the exporting country or territory) to India at less than its normal value, then, upon the importation of such article into India, the Central Government may, by notification in the Official Gazette, impose an antidumping duty not exceeding the margin of dumping in relation to such article."*

6.2 However in one particular instance, the Indian anti-dumping authority has continued duties in a sunset review where there were no imports, on the basis that the injury was likely to recur, based on the prices of exports by the enterprise to third countries and the surplus capacities in the exporting country, even though there were no imports in to India during the period of investigation[112]. By contrast, under competition law, assume three Indian or foreign manufacturers who are dominant in India, could meet in a foreign country and agree to raise their prices in India in tandem. Such conduct would be actionable under the competition law, notwithstanding the absence of any imports.

6.3 Under antidumping, once an imported product is alleged to be imported at dumped prices, designated authority (Directorate General of Antidumping and Allied Duties) is empowered to carry out investigations in the territories of the exporting countries in order to determine the 'normal value' of the product alleged to be dumped into India[113]. It may be noted that this power of the designated authority to carry out investigations in the territories of the exporting countries is limited to the extent of determining

[110] Tim Lloyd, Oliver Morrissey, Geoffrey Reed, "*Estimating the Impact of Anti-Dumping and Anti-Cartel Actions Using Intervention Analysis Source*", The Economic Journal, Vol. 108, No. 447, 1998.

[111] Article 14, WTO Antidumping Agreement

[112] Anti-Dumping Investigation concerning imports of Caustic Soda from Qatar, No.55/1/2001-DGAD

[113] Rule 9, Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

'normal value' of the product alleged to be dumped and therefore can not be extended to examine any other conduct of the exporter.

6.4 Specifically and explicitly the effects doctrine is the basis of the Indian Competition Act of 2002[114] and thus can be invoked even when a particular conduct has not taken place in India. Section 32 of the Competition Act, 2002 empowers the Competition Commission of India to inquire into acts taking place outside of India but having effect on competition in India and states that:

> *The Commission shall, notwithstanding that:*
>
> *(a) an agreement referred to in Section 3 has been entered into outside India; or*
>
> *(b) any party to such agreement is outside India; or*
>
> *(c) any enterprise abusing the dominant position is outside India; or*
>
> *(d) a combination has taken place outside India; or*
>
> *(e) any party to combination is outside India; or*
>
> *(f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India,*
>
> *have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India.*

6.5 Clearly the Competition Act, 2002 which empowers the Competition Commission of India to enquire into the conduct of persons or enterprises located outside of India has a wider reach as opposed to the provisions related to antidumping under the Customs Tariff Act, 1975 which can be invoked only to determine the price at which the product (alleged to be dumped) is sold in the domestic market of the exporting country.

7. What are the Judicial Positions with Regard to the Interaction Between Antidumping Law and Competition Law?

7.1 The above analysis identified the procedural overlap between the two regimes. The section below highlight the judicial position on this issue in India and other jurisdictions (EU) and the manner in which the courts have understood and mapped out the interface between the two laws.

a. India:

7.2 The issue of the relationship between antidumping and competition law had come up before the apex court in India in the case of Haridas Exports v. Float Glass Manufacturers Association[115], wherein while deciding the issue of jurisdiction of the Monopolies and Restrictive Trade Practices ('MRTP') Commission under the MRTP Act, 1969 vis-à-vis the Antidumping provisions of the Customs Tariff Act, 1975. While, under the factual matrix of the case, the Hon'ble Supreme Court held that the MRTP did not have any extra territorial jurisdiction; the Hon'ble Supreme Court analysed both competition law and antidumping laws and took the view that the two Acts operate in different fields and have different purposes. The Court stated that "the jurisdiction of the MRTP Commission is not ousted by the Antidumping provisions in the Customs Act. The two Acts operate in different fields and have different purposes.[116]"

7.3 The Court sought to distinguish between the two regimes on the following grounds:

[114] According to this doctrine, domestic competition laws are applicable to firms (either domestic or foreign) located outside the state's territory, when their behaviour or transactions produce an "effect" within the domestic territory. As per this doctrine the 'nationality' or 'location' of firms is irrelevant for the purposes of antitrust enforcement actions of all firms can be scrutinized under the law, irrespective of their nationality. See, glossary of competition terms, available online: http://ec.europa.eu/comm/competition/general_info/e_en.html

[115] 2002 (145) E.L.T. 241 (S.C.)

[116] *Ibid*., para 51.

	Competition Law Actions	Antidumping Actions
1	Competition Law is concerned with the regulation of competition in a particular market within the territory of a country. Thus, it would take within its sweep a whole host of anti-competitive practices including (i) monopolistic trade practices, as defined in Section 2(i) of the MRTP Act, (ii) restrictive trade practices, as defined in Section 2(o), and (iii) unfair trade practices as defined in Section 36 A.	An Antidumping law is concerned with addressing just one type of unfair, international practice that causes injury to the domestic industry, i.e. 'dumping' of goods by an exporting country.
2	A compliant under the MRTP Act can be filed by a Trade Association or any consumer or a Consumer association, or a Government or the State Government or even by the Director General on its own knowledge or information. (Section 10(1)(A) of the MRTP Act.)	An antidumping petition can be filed by the domestic industry as defined under the Antidumping Rules or suo motu by the Designated Authority. (Rules 2(b), 5(1) of the Antidumping Rules)
3	Competition law procedures allow and require consideration of interest groups such as manufacturers, importers, exporters, consumers and the general public. Commercial actors can have their interests assessed through the determination of the market, causation or injury. Interests of consumers are taken into account when assessing the impact of business practice on competition.	No interest group other than the domestic industry has full legal standing in antidumping cases. The predominant interest group is of domestic producers. Industrial users and consumers do not have legal standing to maintain a complaint.
4	In predatory pricing enquiries, the complainant has to establish that the predator acted with intent to eliminate competition and competitors. Actual injury is not required.	In antidumping complaints, intent is irrelevant but actual injury has to be shown. Further, a causal link has to be established between the dumping and the injury suffered.
5	In most countries, competition cases are dealt with by a curt of law, where parties are entitled to full discovery rights and due process.	Antidumping enquiries are always conducted by government agencies through administrative procedures.

7.4 However, notwithstanding the finding that Customs Tariff Act (Antidumping law) cannot oust the jurisdiction of MRTP Act, the Hon'ble Court refused to permit an action restraining imports at predatory prices under the MRTP Act on the ground that the Act did not have extraterritorial application. The Hon'ble Supreme Court stated that:

> *"The jurisdiction of the MRTP Commission, in our opinion, is not ousted by the Anti-dumping provisions in the Customs Act. The two Acts operate in different fields and have different purposes. . .*
>
> *The grievance of the respondents is that import is being made at predatory prices. The challenge is to the actual import. But allowing such a challenge will amount to giving the MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to import, which jurisdiction the Commission does not have. It is not a Court with power of judicial review over legislative action. Therefore, it would have no jurisdiction to*

decide whether the action of the Government in permitting importof float glass even at predatory prices is valid or not. The Commission cannot prohibit import, its jurisdiction commences after import is completed and any restrictive trade practice takes place."

7.5 It is clear from the above discussion that in India, Courts consider competition and antidumping law as being mutually exclusive and do not perceive any conflicts between the two. Now that the Competition Act of 2002, specifically has extra-territorial jurisdiction, the jurisprudence in this space is bound to evolve given the overlap between the two regimes. However, until such time as the Hon'ble Supreme Court has occasion to consider the issues again, as per the law in India the Haridas Exports case remains the guiding principle on the interface between antidumping and competition law in India.

b. <u>European Communities ('EC'):</u>

7.6 The jurisprudence on the interface between antidumping and competition law is more developed in the EC and on various occasions the EC institutions have examined the issue of whether antidumping measures may result in restrictions on competition.

7.7 The EC law on antidumping specifically incorporates the 'community interest' test (See, **<u>Annex XI</u>** for discussion on provisions related to 'public interest' in various antidumping legislations including EC.), which in essence addresses the competition related concerns arising out of the application of antidumping measures. It is the stated position in the EC law on antidumping that, antidumping duties may indeed help restore effective competition in the Community market. It requires that imposition of antidumping measures shall be based on an "appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers". Thus by providing for the evaluation of the interests of the 'users' and 'consumers' of the product on which antidumping duty is purported to be imposed, the EC law in effect has sought to balance the competition related concerns that may arise due to such levy. For example, in Grain oriented electrical sheets**,** the European Commission argued that:

"[i]n assessing Community interest, the Commission recalls that the very purpose of protective anti-dumping measures is to eliminate the trade-distorting effects of injurious dumping and to restore effective competition on the Community market. In the current proceeding, given that material injury has been caused to the complainant industry by the dumped imports, failure to take measures would aggravate the already precarious situation of the Community industry . . .

. . . in order to fund the levels of investment necessary to ensure the long-term competitive supply of quality products to their customers, Community producers must earn adequate profits. Without investment in product quality and new product development the competitiveness of the Community producers will suffer[117]*."*

7.8 Moreover concerns that antidumping measures may lead to situations whereby effective competition may itself be impaired are not generally entertained by EU institutions. For example in Personal fax machines the EU institutions defended the anti-dumping measures as follows:

"The imposition of anti-dumping duties on those exporters for which high anti-dumping and injury margins were established, and whose exports would be subject to high anti-dumping duties, is likely to lead to a drop in sales volume and market share for these parties. However, for the majority of exporters concerned the impact of the duties will be moderate and it is not expected that these exporters would be significantly affected in respect of their competitive situation. Therefore, there will be still a considerable number of strong competitors of the Community producers on the market.[118]*"*

7.9 Notwithstanding the above there have been occasional cases where competition arguments became a major issue. One notable case is the Extramet I court case. This case concerned an anti-dumping proceeding concerning calcium metal from China and the USSR. Extramet was the largest

[117] *Grain oriented electrical sheets from Russia* (provisional), OJ (1995) L 252/2 at Recitals (38)-(39).
[118] *Personal fax machines from China, Japan, Korea, Malaysia, Singapore, Taiwan and Thailand* (definitive), OJ (1998) L 128/1 at Recital 121.

importer of calcium metal in the EU. It produced from such calcium metal granules of pure calcium used primarily in the metallurgical industry. Péchiney, the only producer of calcium metal in the Community, complained of dumping of calcium metal in the EU. The Commission initiated an antidumping proceeding and anti-dumping duties were imposed. Extramet appealed to the European Court of Justice, arguing that Péchiney had self inflicted its injury inter alia by refusing to supply calcium metal to it, and that this had been the reason why it started importing. Extramet simultaneously submitted a complaint alleging an abuse of a dominant position by Péchiney, but this was pending. Nevertheless, the Court handed down its Judgment. Extranet had raised the "self inflicted" injury point before the Council and the Commission as well. However, the Commission held that, if a violation of Articles 85 (collusion that restricts competition) or 86 (abuse of dominant position) was established in the future, a review of the measures would still be possible. It held that:

> *"[i]t results from none of these considerations that the Community institutions have effectively examined the question of whether Péchiney has not itself contributed to the injury suffered by its refusal to supply, and they have not established that the injury suffered does not follow from the facts alleged by Extramet. Consequently, they have not correctly proceeded in the determination of the injury.[119]"*

7.10 Following the Judgment the Commission notified its intention to collect additional data. In April 1994 the Commission again imposed a provisional anti-dumping duty (In October 1994 the Council confirmed this assessment and imposed definitive anti-dumping duties[120]). In the Regulation it noted that[121]:

> *". . . the Community producer was condemned in March 1992 by the Competition Court in France ('Conseil de la Concurrence') for this behaviour, and on appeal ('Cour d'Appel de Paris') the judgment at first instance was confirmed in January 1993. However, the Cour d'Appel also declared that no abuse of a dominant position or any unlawful competitive practices could be attributed to Péchiney after 1984.*
>
> *The Commission nevertheless tried to establish whether the injury incurred by the Community industry could have been caused in part by the unwillingness of the Community producer to supply to one of the main importers of dumped products a product that the importer could use to operate its plant satisfactorily and on a sustainable basis.*
>
> *In addition to Péchiney's manifest willingness to supply IPS [formerly: Extramet], as witnessed by a number of deliveries of the product, the Commission sought to find out what means the Community producer had deployed to meet the demand of IPS. Péchiney provided sufficient evidence of investment made in plant and research and development to adapt its standard product to IPS's processing requirements. The Commission was able to establish that this investment accounted for a significant percentage of Péchiney's potential volume of business with IPS .*
>
> *The Commission considered whether the adoption of antidumping measures might lead to a situation in which effective competition might be significantly reduced. In view of the facts that the Community producer was willing to supply any potential buyer, including IPS, that alternative supplies were available from the United States of America and Canada, and that the imports from the People's Republic of China and Russia would remain available, the Commission concluded that the danger was not such as to override the need to preserve the Community industry, the disappearance of which would, indeed, cause a reduction of competition."*

[119] Case C-358/89, *Extramet Industrie vs Council*, [1991] ECR I-2501, Recital 20.
[120] *Calcium metal from China and Russia* (definitive), OJ (1994)L 270/27.
[121] *Calcium metal from China and Russia* (provisional), OJ L (1994) 104/5.

7.11 From the above discussion on cases concerning imposition of antidumping duties in the EU, two points clearly emerge:

a. The EC law on antidumping since it requires the evaluation of community interest before the imposition of antidumping duty duly addresses the competition related concerns that may arise duty to such imposition.

b. As is evident from the observation of the ECJ in the Extramet case, findings under Competition rules can temper and impact the proceedings as well as the findings under antidumping law.

c. United States of America:

7.12 The primacy of antitrust laws over antidumping laws was demonstrated in the United States in the Ferrosilicon case[122].

7.13 In 1989 the three largest producers of Ferrosilicon in the US got together to evolve a cartel. In collusion with their European counterparts they fixed prices, which paved the way for lower priced imports from third countries. Given the peculiarities and nuances of antidumping laws and procedures they were able to bring a successful application for the imposition of antidumping duty on these exporting countries. Any new exporter who entered the market was given the option of joining the cartel or facing; and indeed an antidumping action was brought against a Brazilian exporter. Finally a cartel member action blew the whistle and the conspiracy was exposed and the participants faced civil and criminal consequences. Eventually, the International Trade Commission (ITC) revoked its antidumping orders when the perjury and other serious misconduct of the cartel members was brought to its attention[123].

7.14 Clearly, there was no mis-conduct vis-à-vis the imposition of the antidumping duty. The resultant cartel was sufficient to strike down the anti-dumping levy, thus demonstrating the supremacy of the competition laws over the antidumping laws.

d. Conclusion:

7.15 Both the cases in the EU and the US demonstrate that if the imposition of an antidumping duty will distort competition in the market, anti-dumping duty will not be levied. In India there is no such clarity. However, given the competition law seeks to address a broader type of price distortion conduct than anti-dumping law, and seeks to protect the consumer over the competition, clearly the balance ought to tilt in the favour of competition law having an overarching effect over all laws addressing price discrimination conduct, including antidumping law.

7.16 The opinion of the Supreme Court of India does not allude to any supremacy of one law over the other in the decision of the Hon'ble court (in Haridas Exports v. Float Glass Manufacturers Association). Clearly no conclusions can be drawn by that decision, which was based on the MRTP Act, and which is in the process of being withdrawn by the new Competition Act, 2002. Clearly a new comprehensive anti-competition legislation will be considered for its scope and application, including overlap with prior statutes.

[122] United States of America v. SKW Metals and Alloys INC., and Charles Zak, United States Court of Appeal for the Second Circuit, Nos. 547, 569, 703 -- August Term, 1998

[123] See, Jr. Araujo Jose Tavares de, Macario Carla, and Steinfatt Karsten, "Antidumping in the Americas", Organisation of American States Trade Unit Studies, 2001.

Chapter IV: Implications of the Antidumping Procedures on Competition in Markets in India with Reference to the Competition Act, 2002

1. Introduction:

1.1 We have earlier observed that the pre-dominant area of interface between antidumping and competition law lies in the manner in which they seek to address the issue of 'price discrimination'. Under antidumping law the understanding on and scope of 'price discrimination' is much broader, and in many ways more simplistic than 'price discrimination' under competition law. It seeks to attach sanctions to every such price discrimination arising out of the difference between 'normal value' and 'export price' if it causes injury to the domestic industry, without any regard to whether the goods are exported at a price below the cost of production or not or whether the difference in price is due to purely economic factors (such as different price elasticity of demand). Further, 'intent' plays no role in the analysis. Every such instance of price discrimination which can be linked to 'injury' to the domestic industry is deemed to be an 'unfair' trade practice under antidumping law.

1.2 Competition law on the other hand does not seek to attach sanctions to every act of 'price discrimination', and only such instances of 'price discrimination' are prohibited and punished which arise out of 'abuse of dominant position' and are 'unfair' or 'discriminatory' and, where relevant, intended to cause 'appreciable adverse effect' in the market. The benchmark for determining whether prices are 'unfair' or 'discriminatory' is arrived at by evaluating the effect of such price discrimination on the conditions of competition in the relevant market. This implies that under competition law 'price discrimination' does not per se become 'unfair' or 'discriminatory' and infact the law permits such practices if they are adopted to 'meet competition' in the market. Nonetheless, certain forms of 'price discrimination' such as 'predatory pricing' are viewed as inherently inimical to the conditions of competition and therefore attract per se prohibition under most jurisdictions.

1.3 In the earlier chapter on the economic rationale for the two laws we have observed that the scope of antidumping laws is wide enough to address the issue of 'international price predation' also. Thus to the extent that both antidumping and competition laws seek to address and attach sanctions to the practice of 'predatory pricing' they tend to promote competition in the relevant market. However since antidumping law goes beyond addressing only the instances of 'international price predation', it could have serious implications for the conditions of competition in the relevant market in the importing country and negate the objective of promoting and sustaining competition in markets as envisaged under the Act.

1.4 Antidumping law appears to be protectionist in nature and literature on its economic rationale seems to suggest that it is antithetical to competition therefore. Further, the frequent use has led to the view that antidumping laws are thwarting competition. There is a prima facie conflict in as much as one regime is designed to protect the domestic industry, and the other to ensure free and fair competition. Both state that the end beneficiary is the consumer. In the instance of antidumping, the consumer is served through the protection of the local competition i.e. the domestic industry and under competition law, which is much wider through the regulation of dominant enterprises and anti-competitive conduct

1.5 The exact effect of and relationship between 'protection' and 'competition' at some level overlaps. For instance protection of inefficient domestic industry through high antidumping duties can harm consumers. On the other hand protection of an infant domestic industry, which stands the risk of material injury due to dumping, can very well be justified on the grounds of promoting and preserving competition in the domestic market.

1.6 Thus it would be hazardous to argue that the effect of antidumping laws and procedures are per se anti-competitive. The effect of antidumping rules and procedures on competition would therefore depend upon the manner in which they are applied. If they are applied so as to grant undue protection to the domestic industry, they could very well harm competition. On the other hand a strategic use of antidumping law and procedures to protect a nascent domestic industry to the extent that it can withstand foreign competition.

1.7 One critical aspect that needs to be considered is the effective administration of anti-dumping duties. Duties are imposed either on the basis of a fixed levy or on the basis of a variable levy. In the latter a flat anti-dumping duty is levied on every unit of import post the levy from the source found to be dumping. In case of a variable duty a reference price is fixed and the duty is based on the quantum of difference between landed value of the dumped product and the reference price. This levy is in most cases (other than the US) based on historical data of the period of investigation which is often nearly two years old[124].

1.8 A serious fall out of the imposition of the duty is that there are attempts to circumvent it either through third countries, mis-declaration or inflation of export price (in case a reference price levy is fixed) and there is a plethora or jurisprudence around this conduct. Needless to add that this has an effect on the state of competition as well. By contrast penalties under the competition law are directly punitive, and designed to impose substantial sanctions to disincentives to anti-competitive conduct. Further the scope to circumvent the penalties is minimal and thus prevents the further distortion of competition.

1.9 This chapter shall therefore entail an analysis of the rules on procedure for carrying out an antidumping investigation and shall seek to ascertain such rules which could either be inherently biased in favour of the domestic industry or are at a greater risk of being misused so as to protect the domestic industry against foreign competition. This will help us determine whether the procedural rules, either per se or as applied can have any effect on competition in India. Further, wherever applicable this chapter shall point out how antidumping rules (when resulting in anti-competitive effects) can have a bearing on the provisions of Competition Act, 2002.

2. Can the Determination of 'Standing' of 'Domestic Industry' affect Competition in India?

a. Requirements for Imposition of Antidumping duty and Possibility of Collusion:

(i) Standing:

2.1 As discussed in the previous chapter, an antidumping investigation can be initiated on the basis of a petition by the domestic industry for the like product. One of the pre-requisites for carrying out the investigation is that the petitioners shall constitute a major proportion of the total domestic production of the article. (See, **Annex XII** for a discussion on definition of 'domestic industry' and the 'standing requirement' under the subject jurisdictions). While the law provides for there to be a division and opposition within the domestic industry at the time of initiation, there is generally never any opposition as manufacturer/importers from the allegedly dumping countries are generally excluded from the definition of the domestic industry. In certain situations, the domestic industry may be characterized by a monopoly or oligopoly type of situation (i.e. a market situation wherein there is only one player or there few players). The law however does not prescribe any requirement for any minimum number of constituents and even a single monopoly manufacturer can bring this action, for its own protection from dumping.

2.2 From the above discussion on the antidumping rules in India on the standing of the domestic industry to get an investigation initiated, two glaring issues which could affect competition in India emerge: (a) the requirement that the petitioners shall comprise of at least 25% (and not be opposed by any other group with greater share of the domestic production) of the like product tacitly creates a climate for collusion among the few producers in the domestic market; and (b) lack of a separate legal requirement in situations where the domestic industry is characterized by a monopoly or an oligopoly raises the risk of misuse of the antidumping law.

2.3 Determination of 'injury' to the domestic industry depends upon an examination into various economic factors across the whole domestic industry. It would be in the interest of the petitioners therefore to together show that they have suffered injury. However even though the domestic industry may collude together to show injury, such a behaviour does not qualify as an anti-competitive practice under the Competition Act, 2002. Notwithstanding this, the effect of such behaviour can affect competition in India. Since the domestic industry is required to come together first to seek initiation of an investigation and need to put up a collective case for injury to the industry as a whole. Any consequent imposition of

[124] The investigation takes one year to conclude and the application usually pertains to a period prior to the initiation.

antidumping duty may result in undue protection to the domestic industry against foreign competition, which can then have an adverse effect on the conditions of competition in the relevant market in India.

(ii) Injury to the Domestic Industry as a Whole:

2.4 An antidumping investigation involves an examination into two broad factors: (i) existence of dumping; and (ii) resulting injury. Examination into the existence of both of these factors further involves a number of investigative steps and an enquiry into a number of sub-factors. Further, the quantum of antidumping duty in all cases must be closely calibrated with the injury suffered in order to ensure that the effect of the antidumping duty is compensatory and not penal. This would ensure that the antidumping duty nullifies the "predatory price" of a dumped import, but at the same time does not entirely discourage exporters from selling their product in the market, provided they do so at non-dumped prices. In other words, antidumping duties are unlikely to impact competition in a market if they force exporters to sell at non-dumped prices, but may be detrimental to competition if they are so high as to dissuade exporters altogether from selling into a market. To this end, the procedures used in computing the antidumping duty must ensure that even if antidumping duties are imposed, they are not imposed at levels, which will destroy competition in the market.

2.5 While the WTO AD Agreement permits imposition of AD to the full extent of the dumping margin, several countries opt to limit the duty to the injury margin on the rationale that the moment the quantum of duty exceeds the limit required to remedy the situation of injury, it would lose its 'remedial' nature, thereby further making the exports less competitive, which can have an adverse impact on the conditions of competition in the relevant market in India.

2.6 A positive finding on 'injury' to the domestic industry due to 'dumping' is a necessary precondition for the imposition of an antidumping duty. Not surprisingly the law and the procedures, including those used to arrive at an injury determination, are usually weighted in favour of the domestic industry.

2.7 Where antidumping authorities make a determination of injury on account of the impact of dumped products in the Indian market and are able to establish a causal relationship between the two, then it is likely that such a determination will enhance competitive conditions in the market, insofar as the resultant antidumping duty dissuades exporters from selling products at dumped prices which destroy local competition. However, where an injury determination has been made on account of factors extraneous to the dumping without a causal link between the dumping and the injury caused, then the resultant antidumping duty impedes competition in the market insofar as it excludes exporters from selling competitively priced products into a market where domestic industry is itself unable to do so.

2.8 As per the antidumping rules, 'injury' to the domestic industry shall be determined with respect to the volume and effect of dumped imports on the domestic industry. The effect of the volume of dumped imports is to be gauged with reference to various factors highlighting the domestic industry trends, such as prices, sales, profits, output, market share, investments, capacity utilization, return on capital employed, cash flows, inventories, employment and wages, growth. However, the jurisprudence clearly does not require that there be injury on all parameters[125]. Indeed, there are several instances in Indian law alone, where injury on less than five parameters has resulted in the imposition of anti-dumping duties[126].

2.9 Estimation of injury is mostly based on the price undercutting effects induced by the dumped products. This method involves the comparison of adjusted weighted average sale prices of foreign products with the prices of similar products in the domestic market. Injury margin is calculated as the difference between the fair selling price calculated as being due to the domestic industry and the landed cost of the product under consideration. This calculation of the extent of price undercutting itself is flawed. There is some degree of ambiguity in the calculation of domestic price, which is calculated by projecting the actual cost at the optimum level of capacity utilization. In doing so, the investigating authorities use the actual price data for the whole industry and not for the most efficient units. In other words the baseline

[125] See, Lubrizol (India) Pvt. Limited vs. Designated Authority, Final Order Nos. 12-13/2005-AD, dated 28-7-2005 in Appeal Nos. C/41 & 76/2003-AD, 2005 (187) ELT 402 (Tri.Del) para 17.1

[126] See, Final Findings in the Anti-dumping Investigation involving import of Poly Vinyl Chloride (PVC) Suspension Grade from Taiwan, China PR, Indonesia, Japan, Korea RP, Malaysia, Thailand and USA dated 26th December, 2007 paras. 311 – 314 and Sunset Review Final Fidnings in the Anti-dumping Investigation involving import of Caustic Soda originating in or exported from Qatar dated 7th March, 2008, para. 117

established by the authorities for what constitutes price undercutting may well be based on the performance of uncompetitive Indian manufacturers.

2.10 This method tends to inflate the 'fair selling price' for two reasons- (i) one, because the calculations are based on the information provided by the domestic producers; and (ii) in many cases the domestic industry may have highly inefficient cost structure due to a host of reasons such as wrong location, smaller size, obsolete technology, high input costs, waste of raw materials etc. Such inefficiencies should not ordinarily be protected if true competitive conditions are to be maintained in market. Further, no account is taken on of the fact that the price difference can be caused by a number of factors such as economies of scale, use of better technology, difference in quality etc. that actually enhance competitiveness. Indeed in the Indian context, there is jurisprudence that Indian industry will be taken as it exists and compensated accordingly[127]. The likelihood of a positive finding on 'injury' decreases with the efficiency of the domestic industry. Ironically therefore, this method for calculation of injury tends to protect inefficiency.

2.11 Another complex analysis that requires to be done is to segregate the injury caused because of 'dumping' from that which is caused because of other extraneous factors. The law provides that a duty can only be imposed if the dumping is the 'cause' of the injury.

3. Conclusion:

3.1 The above discussion on the procedure for the determination of 'dumping' and 'injury' clearly suggests that it is fraught with certain inherent shortcomings which can actually compensate inefficiencies and lead to anti-competitive levies. Indeed an erroneous calculation of dumping or injury margin can result in penalizing exporters and thereby closing the market to greater competition. Antidumping duties if imposed at such prohibitively high levels will make exports less competitive and become protectionist instruments, which will stifle competition in the market or lead to circumvention of these levies, which will further be anti-competitive.

3.2 Further we have also observed that notwithstanding the anticompetitive effects, which may arise because of the antidumping rules and procedures, the rules may also have a bearing on the Competition Act, 2002. For example a determination of "relevant market" under the Act could inform the determination of what constitutes the "domestic industry" under the Antidumping Rules. Consequently, to the extent that the rules, procedures and their application under an antidumping investigation, could be used in a parallel competition proceeding and vice versa, the regulators may consider using the findings of parallel investigations to inform their own proceedings or at some level, the possibility of a conflict between the two is very real.

[127] See- Nippon Zeon Co. Limited vs. Designated Authority 148-154/97-A, dated 4-2-1997 in Appeal Nos. C/74-80/96-A, 2005 (187) ELT 402 (Tri.Del) paras. 26, 29 and 30

Chapter V: Antidumping and Competition Provisions in Free Trade Agreements/Regional Trade Agreements

1. Introduction:

1.1 As discussed earlier the use of antidumping measures to remedy the 'injury' caused to the domestic industry finds little support from economists, most of them being of the opinion that antidumping measures tend to decrease welfare and thus have no place in the realm of 'free trade'. However, some economists at the same time argue that to the limited extent that antidumping measures are directed at 'predatory dumping' or 'strategic dumping' they help enhance aggregate welfare. Notwithstanding the divided opinion on the rationale for antidumping measures, the GATT, 1994 provides for the use of such measures as a trade policy instrument in contingent situations (injury to the domestic industry due to cheaper imports). As such, antidumping laws may in specific situations represent relatively more efficient policy alternative to regulate predatory dumping as compared to other policy choices. Thus most countries have retained antidumping laws on their statue books and have not replaced them entirely. One of the possible reasons could be that countries perceive high economic and political costs associated with such initiative.

1.2 A few studies have introduced the idea of replacing antidumping with competition laws, especially in free trade agreements ('FTA').[128] It has been suggested that the abolition of antidumping laws in favour of harmonized antitrust laws enhances economic welfare, and offers a practical solution to the global increase in antidumping actions. A uniform standard of competition policy can be applied to regulate a single market, regardless of the nationality of each producer. In this way, price discrimination will be examined under the national competition law (or possibly international law in the future); as long as it is acceptable under the competition rules, no litigation will be initiated against it[129].

1.3 There are currently four regional trade agreements, in which the member countries have abolished the application of antidumping measures amongst themselves: the European Union (EU); the European Economic Area (EEA), which came into force in 1994 by the treaty signed between the EU and the European Free Trade Association (EFTA); the Closer Economic Relations Agreement (CER) between Australia and New Zealand; and the 1996 Canada-Chile free trade agreement. In case of MERCOSUR[130], member countries are eventually expected to phase out antidumping laws in favour of harmonized competition law regime, but have not yet done so. In all the four free trade agreements, parallel to the abolition of rules on antidumping has been the creation of a set of comprehensive and harmonized rules on competition. This has led to the idea that rules on competition have replaced the rules on antidumping and that a necessary pre-condition for abolishing the rules on antidumping is a simultaneous creation of competition rules. This assumption has its shortcomings; it may not hold true in all situations (in fact there may not necessarily be a correlation between the two); and it overlooks the conditions that may have facilitated this. In the forthcoming section we shall: (i) briefly analyze the conditions which have facilitated the abolition of antidumping rules and simultaneous creation of rules on competition in the above identified four regional trade agreements (taking a cue from the results of other studies on this issue); and (ii) thereafter suggest whether this may be replicated in India's free trade or regional trade agreements.

---

[128] For example, see *The Relationship Between Competition Policy and Anti-Dumping Law: The Canadian Experience*, a study by Lecenomics Inc. funded by Consumer and Corporate Affairs Canada, 1990; Ivan R. Feltham, Stuart A. Salen, Robert R. Mathieson and Ronald Wonnacott, *Competition (Antitrust) and Antidumping Laws in The Context of The Canada-U.S. Free Trade Agreement,* a study for the Committee on Canada-United States Relations of The Canadian Chamber of Commerce and The Chamber of Commerce of The United States, Exposure Draft, 19/12/1990; P. Warner, "*Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrus*t". Law and Policy in International Business, v 23, no 4, 1992, pp 791-890; John A. Ragosta and John R. Magnus, "*Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief*", in Michael Hart (ed.), *Finding Middle Ground: Reforming the Antidumping Laws in North America,* (Ottawa: Centre for Trade Policy and Law, 1997) pp 86-142.

[129] Hang Zeng, "*Antidumping and Competition: the Case of China*", 2005

[130] Also known as *Southern Common Market*, is a Regional Trade Agreement (RTA) among Brazil, Argentina, Uruguay and Paraguay, founded in 1991 by the Treaty of Asunción, which was later amended and updated by the 1994 Treaty of Ouro Preto.

2. Analyzing the Conditions for the Abolition of Rules on Antidumping:

2.1 In three of the above identified regional trade agreements: the EU, the EEA and the CER between Australia and New Zealand, the abolition of rules on antidumping was followed by the application of a uniform competition policy at the regional level. Some commentators therefore argue that if participating nations can espouse a common approach to competition policy, the huge costs (political and economic) involved in the abolition of antidumping rules may be adequately offset, implying thereby that a necessary pre-condition for the removal of antidumping measures is the creation of uniform rules on competition. According to this view, the presence of supranational competition authorities or harmonized competition laws among the members of a regional trade agreement facilitates the elimination of antidumping, presumably because, under such conditions, competition policies are more efficient than antidumping in dealing with "unfair" trade practices[131].

2.2 On the other hand, however it is argued that antidumping and competition address different concerns and thus the mere coincidence that one policy was introduced after the other was removed does not imply that one policy replaced the other. For instance with regard to the CER between Australia and New Zealand some authors have observed that[132]:

> *"The 1990 amendments represented a policy shift that was not a straightforward swap of one regulatory tool for another. Rather, it was tantamount to a redirection of trans-Tasman trade policy through greater emphasis on the competitive process and the interests of buyers, rather than on 'fairness' and the interests of domestic producers alone. The policy shift was intended to direct attention to those actions of powerful firms likely to harm the competition process itself. […] Aimed at preventing abuse of market power, they were not a direct substitute for the traditional antidumping trade remedy which exposed a wider range of price discrimination. Antidumping duties and competition law remedies are each aimed at a different market problem; they have different objectives, they target a different range of business conduct, and they employ different analytical tests, tools and procedures to achieve a determination"*

2.3 Similarly, Hoekman's examination of preferential trade agreements that have eliminated the use of contingent measures such as antidumping against other members shows that there is no explicit link between the implementation of uniform competition policy and the removal of antidumping laws. Instead, his study suggests that it was the comprehensive effort towards economic integration that explained both the elimination of antidumping and the establishment of harmonized set of competition rules.[133] The formulation of harmonized competition laws within members of these countries was also a result of the deeper economic integration.

2.4 It is therefore a possibility that the abolition of antidumping rules is linked to the degree of economic integration between the member countries of the regional/free trade agreement. In the two European agreements and the CER between Australia and New Zealand, the abolition of antidumping rules seems to have been fostered by the process of deep economic integration and creation of a common market, with more or less similar conditions of competition in the domestic markets of the member countries.

2.5 However the fourth regional trade agreement, i.e. the Canada-Chile free trade agreement belies this assumption that the abolition of the antidumping rules necessarily requires deeper economic integration between the member countries. Compared to the EU, EEA and the CER between Australia and New Zealand, the level of economic integration between these countries is limited. Given the low level of economic integration, the removal of antidumping measures would have involved huge costs for both the member countries, thus it would be interesting to understand the guiding parameters for the adoption provisions removing antidumping rules. One possible explanation lies in the 'safeguards'

---

[131] (Lloyd and Vautier (1999)), as quoted in Jr. Araujo Jose Tavares de, Macario Carla, and Steinfatt Karsten, "Antidumping in the Americas", Organisation of American States Trade Unit Studies, 2001.

[132] *Ibid.*

[133] *Ibid.*; *See also*, Hoekman, Bernard, "*Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements*", World Bank and CEPR, 1998

provisions incorporated in the Agreement, which can be invoked by the parties in the transition period (till complete economic integration is achieved).[134]

2.6 It is therefore clear from the above discussion that: (i) there may not necessarily be a co-relation between the abolition of antidumping rules and the insertion of provisions on competition within the free trade areas; (ii) Past practice seems to indicate that antidumping rules have been abolished in certain free trade agreements more because of the reason of deeper economic integration amongst the members (thus lower costs involved in removal of contingent measures), than the idea that competition rules can better address the issue of 'price discrimination'; and (iii) also in situations where the markets are not very deeply integrated, removal of rules on antidumping measures may be followed by incorporation of other forms of contingent measures (such as safeguards) and not complete replacement of antidumping rules by rules on competition.

3. What should be India's Position with Regard to Antidumping and Competition Clauses in Free Trade Agreements?

3.1 As discussed above from the empirical evidence there appears to be no singular reason why some countries have chosen to abolish rules on antidumping and incorporate rules on competition in their free trade agreements with other trading partners. Also, there does not seem to be any explicit linkage between the abolition of one and incorporation of rules on the other. In certain free trade agreements where countries have achieved this, it appears to have been made possible because of complete integration of markets, whereas in others, one form of contingent protection has give way to another, till the time economic integration could be achieved. It is difficult to say that the guiding motive in any of these free trade agreements for the removal of antidumping rules and simultaneous incorporation of rules on competition has been the idea that competition policy is a better tool to address the issue of 'price discrimination'.

3.2 However this is not to suggest that India cannot explore the idea of incorporating rules on competition in the free trade agreements that it enters with its trading partners. Whether these rules shall replace provisions on antidumping is a question that needs evaluation on a case-by-case basis.

3.3 India's decision on whether to altogether remove the provisions on antidumping in the free trade agreements to which it is party should be based upon an analysis of the extent to which it uses antidumping measures to protect its domestic industry as compared to the other contracting parties to the agreement. If it is a more frequent user of such measures, then the costs incurred in removing rules on antidumping may be higher than the ensuing benefits and India may very well consider retaining them in the free trade agreement. Nevertheless, if India decides to altogether remove provisions on antidumping in light of the significantly high degree of economic integration with its trading partners (parties to the agreement), it may be useful to examine the possibility of inserting provisions for other forms of contingent protection such as safeguards so that the risk of exports from the trading partners inundating its domestic markets and harming the domestic industry is minimized. Also once rules on antidumping are removed, there would remain no mechanism to check the practice of price predation, and to counter this India should ensure that relevant provisions of its competition law address such instances of predatory pricing.

[134] Chapter F of the Canada-Chile agreement provides special rules for safeguard actions during the transition period and states that,*"each Party retains its rights and obligations under Article XIX of the GATT 1994 and the Agreement on Safeguards of the WTO Agreement except those regarding compensation or retaliation and exclusion from an action to the extent that such rights or obligations are inconsistent with this Article."*

Chapter VI: Issues for Advocacy for the Competition Commission of India

1. Introduction:

1.1 Since one of the functions of the Competition Commission of India ('CCI'), established under the Competition Act, 2002 is to create awareness about the Act and its interface with other laws in force in India, it is critical that this study addresses its overlap with antidumping laws, given the widespread use and awareness of antidumping proceedings in India. In this environment advocacy is of paramount importance.

1.2 The study highlights the fact that competition can be hindered not only by private anti-competitive conduct (such as collusion or abuse of dominance) but also by the existing body of rules and regulations, the manner in which they are enforced and interpreted by the regulatory authorities. While private anti-competitive conduct can be addressed by enforcing the provisions of the Act, the potentially anti-competitive effects arising out of other laws and regulations themselves and the manner in which they are enforced are more difficult to address. In these situations, active competition advocacy at different levels of the state machinery and with other stakeholders can be used as an effective tool to address the competition related concerns arising either out the laws and regulations themselves or out the manner in which they are enforced and interpreted.

1.3 In the present chapter we shall therefore highlight the findings of the study so that the CCI can take up issues arising out the interaction between antidumping and competition law with various stakeholders- (i) the policy makers; (ii) the relevant public officials; (iii) as well as enterprises who are impacted/likely to be impacted. We shall also suggest possible solutions, which may be used to address the competition-related concerns arising out of the imposition and administration of antidumping law in India.

2. Issues for Advocacy with the Policymakers:

2.1 At the very outset, we had discussed that notwithstanding their shared objective (i.e. ensuring the most efficient allocation of resources and thus increasing aggregate welfare); the two laws when implemented may in some situations conflict with each other and in other situations may prove to be complementary. On one hand, antidumping laws may be used by governments to protect an inefficient domestic industry, in which case they directly conflict with the objectives of competition law since such protection invariably has an adverse effect on competition. On the other hand, if antidumping laws are applied strictly to capture the practice of 'international price predation' to the extent that it is devoid of any dominance or intent and circumspect and astute application of anti-dumping laws will compliment the objectives of competition law.

2.2 What is perhaps a sensitive issue to tackle will be that anticompetitive laws subsume virtually all situations in which antidumping laws are utilized. Having said that, the fundamental distinction is that antidumping laws grant protection to the domestic industry directly and that it has a more 'lax' standard in as much as it penalizes sales less than the domestic selling price linked to the total cost of production rather than to the average variable cost of production. Further, there is no requirement of intent or dominance for an antidumping levy to be imposed. While all these features go to make it attractive for those seeking solace under its provisions; its impact on competition at best is not entirely. Clearly over zealous application of antidumping laws can thwart rather than benefit competiton.

2.3 Thus the CCI will be well served to make use of its good offices to spread awareness among policymakers that antidumping law can have both anti-competitive and pro-competitive effects:

a. To the extent that antidumping law is used as a tool to protect inefficient domestic industry, it may adversely affect competition in India and therefore there is a need to reassess the effectiveness of antidumping law.

b. To the extent that antidumping law addresses the issue of 'international price predation' it compliments the objectives of competition law.

3. Issues for Advocacy with the Regulatory Bodies:

3.1 As discussed before, since both antidumping law and competition law seek to address the issue of 'price discrimination', there is a certain degree of overlap between the two laws and the procedures employed therein. Also since antidumping law and procedures are relatively well established in India, it is possible that the principles and tools used under antidumping investigations can be employed under an investigation against 'price discriminatory' conduct under competition law.

3.2 Similarly antidumping law can also draw from and be informed by competition law principles while addressing the issue of 'price discrimination'. The CCI may consider taking up the following issues of interaction between the two laws with the concerned authorities. This may help resolve some of the apparent and real conflicts that may exist between the two laws and at the same time it may also help in making the process of investigation under the two laws more efficient.

3.3 We have already discussed that antidumping law and procedures as they are applied and enforced may result in undue protection to the domestic industry and hence can be inimical to competition in the markets in India. Therefore as an advocacy measure the CCI may consider sensitizing the antidumping authorities about the following aspects of the antidumping law and procedures which are likely to raise competition concerns:

A. Issues for Advocacy between Regulators:[135]

(i) Examination of the Impact of the Imposition of an Antidumping Levy on Competition in the Market:

3.4 The collateral impact of the levy of antidumping duties is the impact it is bound to have on competition in the market. The imposition of provisional duties itself will remove one or more sources of supply in the market. A logical conclusion of the imposition of a levy is that the prices for the domestic industry will increase. Unbridled increase, in the absence of any viable third country sources will certainly impair competition.

(ii) The Impact of Prolonging Antidumping levies beyond its Required Period:

3.5 Several investigating authorities are not averse to the extension of levies beyond the mandated five year period. As a consequence of this, the country against whom the levy is in place is bound to move to other markets, thus denying consumers of a viable and often efficient source of supply.

(iii) Impact of Price Undertakings on Competition:

3.6 A price undertaking under the antidumping rules is inherently uncompetitive. It is tantamount to officially sanctioned 'price fixing' which will impede competition. Price undertakings are not imposed – they are reached by mutual agreement. Often the private enterprises who have operated under a price undertaking will be inclined to prolong it as long as possible.

(iv) Protection of Monopoly/Duopoly/Oligopoly Domestic Industry:

3.7 Antidumping rules are designed to protect domestic industry. The law is agnostic towards whether the domestic industry is a monopoly enterprise or otherwise. If the domestic industry is a monopoly enterprise (or otherwise in any other collusive relationship) the removal of a source of imports through excessive antidumping duties can create conditions conducive to free and fair competition.

(v) Use of Review Powers to mitigate Anti-Competitive Conditions:

3.8 Investigating authorities are empowered to *suo moto* initiate proceedings and are empowered to periodically review anti dumping levies. This power must be exercised to remedy anti-competitive conditions post the levy of an antidumping duty. By way of example, if the state of the domestic industry has not improved; however the burden on the consumer has gone up, the investigating authorities must consider remedying the situation as a consequence of the unsuccessful levy.

[135] Given that this paper is concerned with the overlap with antidumping laws, these issues are restricted to the realm of antidumping.

(vi) Uniform Application/Determination of Common Concepts:

3.9 There are several common concepts under antidumping and anti competitive regimes. These include:

a. Determination of Relevant Market;

b. Adverse Effect on Competition/Material Injury;

c. Determination of Sale Price/Normal Value and Export Price and grant of adjustments

3.10 Given that competition law is unfettered by any over-arching global agreement; and that it is more evolved in its economic analysis; the anti competition law must lead the way in establishing such precedents. In the Indian context the pre-existence of a robust anti dumping regime is somewhat unusual when compared to the global experience. Typically a competition regime predates the anti dumping regime. To this extent, the nascent competition regime in India must expeditiously use its resources to establish this hierarchy.

B. Possibility of antidumping law and procedures informing competition law and procedures:

3.11 As discussed earlier, since both antidumping and competition laws seek to address the issue of 'price discrimination', it is possible that the law and procedures under one may influence and inform the other. In this section we shall highlight certain aspects of antidumping law and procedures, which may inform the competition law procedures and practices. Moreover it may be noted that there already exists a mechanism under the Competition Act, 2002 which can facilitate co-operation between statutory bodies and help in addressing anti-competitive practices. The Act expressly provides that the CCI may inquire into the alleged contravention of the provisions of the Act on the basis of a reference made by the Central Government or a State Government or a statutory body[136]. Thus, if the Designated Authority has come to a finding or is of the opinion (may be on the basis of data and information available with it with regard to an antidumping investigation) that anti-competitive practices may exist, it may refer such matters to the CCI.

(i) Criteria used for the determination of 'domestic industry' may inform the way 'relevant product market' is to be determined under competition law:

3.12 The criterion for determining what constitutes 'domestic industry for the like products' under antidumping law and what forms 'relevant product market' under competition law is singular, i.e. both are based on commercial substitutability of the products. Under both the laws commercial substitutability has to be determined with reference to factors such as physical characteristics, functions and end uses, pricing, quality, tariff classification of the products etc. Therefore there is strong case for co-operation between the investigative authorities under the two sets of regulation. The findings under one law may inform the investigation as well as the finding under the other and vice versa. For instance, a finding on the group of product which have been held to be alike for the purposes of 'domestic industry' determination under antidumping law can be used by competition authorities in an investigation concerning alleged price discrimination with respect to the same or similar products for the purposes of 'relevant product market' determination'.

(ii) Criteria for the determination of 'normal value' may be used under competition law for the determination of 'selling prices' of the product alleged to be sold at discriminatory prices:

3.13 Both antidumping and competition the laws envisage that the selling price of the product alleged to be sold at discriminatory price is to be determined with due regard to the 'general price situation' in the market and due allowance shall be made for factors such as end of season sale, quantity discounts etc. Therefore the competition authorities may, while comparing the selling price of a product with the cost of production (in case of predatory pricing) shall be mindful of the fact that the sales have to be 'in the ordinary course of trade', and must reflect the 'general price situation' and to this extent they can draw from the practices under antidumping law.

[136] Section 19 (1) and 21, Competition Act, 2002

3.14 Further antidumping law requires that sales below cost of production in the domestic market of the exporting country shall be considered as not in the 'ordinary course of trade' (for the purposes of 'normal value' determination) when: (i) it is within an extended period of time (normally one year but in no case less than 6 months); (ii) in substantial quantities; and (iii) are at prices which do not provide for the recovery of all costs within a reasonable period of time. The test of sales within 'ordinary course of trade' may be useful in determining the 'predatory intent' under competition law as all the three conditions may be used to corroborate the existence of such intent. To this extent therefore competition authorities may be informed by this requirement under antidumping law.

(iii) 'Fair comparison' standards as employed in antidumping investigations may be used under competition law while investigating into 'price discrimination':

3.15 Under antidumping law the comparison between 'normal value' and 'export price' shall be made at the same level of trade, normally at ex-factory level, and in respect of sales made at as nearly as possible the same time. Due allowance shall be made in each case, on its merits for differences which affect price comparability, including differences in conditions and terms of sale, taxation, level of trade, quantities, quality, physical characteristics, currency conversion and any other differences which are also demonstrated to affect price comparability. Under competition law, while there is no direct parallel that can be drawn, an investigation into alleged practice of 'price discrimination' is to be carried out by comparing the selling price of the product with the cost of production of the product (average variable cost). The comparison under competition law may also be made with reference to the 'fair comparison' standards prescribed under the antidumping laws. In fact unless the comparison between the selling price and the cost price under competition law is a 'fair comparison' and is made for like/same products and at the same level of trade, the instance of price discrimination/ predation cannot be captured properly.

(iv) Comparison of prices on the basis of weighted average or transaction-to-transaction basis:

3.16 Under antidumping law comparison between 'normal value' and 'export price' is carried out either with reference to weighted average of the two or with reference to 'normal value' and 'export price' on a transaction-to-transaction basis. Under competition law the determination of whether a product is sold at a discriminatory price (predatory price) is done by comparing the selling price with the cost of production of the product (generally average variable cost). However there could be various prices at which a product may be sold in a given relevant market. Some of these could be below the 'cost of production', and others could be above. There could also be variations in prices below the benchmark measure of 'cost of production' and above it. In such situations the investigating authorities under competition law will have to arrive at a certain aggregate measure of prices. One way to do this would be to take cue from the practice under antidumping law and arrive at the aggregate measure (price) by calculating the weighted average selling price separately under the two broad categories of prices: (i) above the benchmark price: and (ii) below the benchmark price. Thus competition law could draw from the practice of using 'weighted average price' while making a comparison between selling price of a product and its cost of production in determining whether a product is sold at predatory price.

4. Issues for Advocacy with Private Enterprises:

4.1 It is apparent that antidumping law and procedures in India are such that they may result in undue protection to the domestic industry against foreign competition and thereby affect the conditions of competition in India. Considering the inherent bias towards protecting domestic industry of antidumping law, it is important that the domestic industry which seeks initiation of investigation against dumping is made aware of the competition concerns arising out of the imposition of antidumping duty. The CCI may therefore consider reaching out to various enterprises, particularly in those sectors where the maximum number of investigations have been initiated (such as chemicals, steel etc) and make them aware of such concerns. The following issues may specifically be highlighted by the CCI:

(i) Undue protection in the form of antidumping duty is inimical to the conditions of competition:

4.2 The CCI may reach out to the industry and try and convince them of the benefits of increased competition from abroad and the downside of protection (resulting or continued inefficiency, decreased

incentive to innovate etc.). The CCI may particularly apprise the private enterprises of the benefits of utilizing antidumping duty only in situations when there is genuine price predation and injury to the industry.

(ii) Repeated successful petitions by monopoly or oligopoly producers may attract the attention of competition authorities:

4.3 As discussed, antidumping law favours the domestic industry and more so in situations when it comprises of a single player or a limited number of players. However, the very fact that such an enterprise is held to have the requisite standing to successfully initiate an antidumping investigation can indicate 'dominance' in the relevant product market (as understood under competition law) or even the presence of a domestic "cartel". This may attract the attention of the CCI if it were to be made aware of a possible cartel or the abuse of dominance by the domestic industry Consequently, domestic Indian industry must be made aware that their dominant position in the market which enables them to initiate an antidumping investigation, particularly in cases of an oligopoly or monopoly, may also attract scrutiny by the CCI for possible abuse of such dominance or collusion or cartelization. This would make domestic monopolies wary of misusing anti-dumping laws to continue their market dominance.

(iii) Ill effects of antidumping duties in the long run:

4.4 Imposition of antidumping duty on products which can be used as inputs in the production of other products or on intermediate goods may increase the input cost for downstream industries. This in turn may increase the prices of the final product produced by the downstream industry, which apart from affecting the consumers adversely may also affect the industry benefiting from antidumping duty as well as the industry for the final product. For example an antidumping duty on colour picture tubes (which is a major cost in the production of television sets) will drive up the prices of television sets. In light of increased prices of television sets, consumer demand may decline and it is also possible that consumers may switch to LCD or plasma TVs, in effect adversely affecting both the domestic industry for colour picture tubes and television sets. The CCI may therefore explain such implications of the imposition of antidumping duty to private enterprises.

(iv) Use of data submitted before the antidumping authorities as evidence under competition law:

4.5 Since the domestic industry has the incentive to cumulatively show injury under antidumping investigations, it may collude while providing information to investigating authorities in order to together show injury. This pricing information provided by the domestic industry in the course of an antidumping proceeding may be used by the CCI as an indication of collusion or price fixing. The CCI may therefore consider informing the domestic Indian industry of the possibility that their collusive efforts in an antidumping investigation may invite CCI scrutiny and they should desist from such practices. This may serve two purposes: (i) make the antidumping investigation process more efficient since the domestic industry will be forced to present accurate data without colluding; and (ii) assist the CCI in identifying possible instances of collusion or price fixing amongst certain industrial sectors and suo moto initiate a parallel competition investigation into such practices.

5. Antidumping and competition law: Can they co-exist?

5.1 Our study has shown that the there is no uniform view on the relationship between antidumping and competition law. Some authors argue that antidumping law is an extension of competition law, to the extent that it addresses the issue of 'international predation'. While others argue that the body of antidumping law as it exists and as it is applied, is inherently protectionist in nature and is thereby antithetical to the principles of competition law. Somewhere in between are those who argue in favor of the use of antidumping on "second best" grounds. In such instances, the necessity for an antidumping dumping duty may be justified because foreign firms are able to leverage entry restrictions in their own home markets into an "unfair" competitive advantage in export markets. In such cases, absent common rules on competition law disciplines, antidumping is required to "level the playing field." [137]

[137] Hoekman, Bernard, "*Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements*", World Bank and CEPR, 1998

5.2 The findings of this study also reflect this ambiguity with regard to the relationship between antidumping and competition law. To correct the possible anti-competitive effects of antidumping law, the study points towards some solutions that have been introduced and are being explored in various jurisdictions. These range from reforming the antidumping rules themselves (by introducing the 'public interest test') to exploring alternatives to replace them (such as replacing rules on antidumping by safeguard measures or competition). In order to ensure that the new Indian competition law regime complements, and does not contradict the antidumping regime and at the same safeguards the competitive conditions in the market, the substantive and procedural anomalies pointed out in this study will require removal and solutions such as the ones proposed in this study, will require closer examination.

A. Introducing 'public interest' test into antidumping law:

5.3 The effect of antidumping duty is to transfer income from the rest of the community to the domestic producers of the like product. Economists argue that since consumption often exceeds output for an imported good, consumers lose more than what the producers tend to gain. Under competition law, consumer welfare is one of the main concerns. This can be incorporated into antidumping law by introducing the 'public interest' test such as a similar test used by the EC in its antidumping laws. Apart from the EC, countries like Brazil[138], and Korea[139] also have introduced the 'public interest' test in their respective antidumping laws. This would reintroduce competitive considerations into the antidumping process and change the general mode of practice of the national antidumping authorities. Contrary to antidumping law's supposed primary objective of protecting producers, the "public interest" clause is interpreted as covering user and consumer interests, thus causing the protectionist element of antidumping actions to decline. A firm implementation of this clause could cause governments imposing antidumping duties to favour the broader interests of the economy. Therefore, introducing, extending, and reinforcing considerations of public interest would render antidumping determinations much more competitive.

5.4 In fact the WTO Antidumping Agreement also provides for the inclusion of such considerations while imposing antidumping duties. Article 6.12 of the WTO ADA states that

> *"The authorities shall provide opportunities for industrial users of the product under investigation, and for representative consumer organizations 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."*[140]

5.5 The Agreement however does not prescribe any detailed procedure for the implementation of this provision and it is left to the Member countries to incorporate this requirement in their domestic antidumping legislations in appropriate manner. One possible way to do this is by incorporating the 'public interest' test into domestic antidumping legislation. Many countries have already incorporated such a requirement in their domestic antidumping legislation. The Competition Act, 2002 as well as the erstwhile Monopolies and Restrictive Trade Practices Act, 1969 [141] while addressing the issue of price discrimination and restrictive business practices respectively prescribe the 'public interest' requirement. Further the Hon'ble Supreme Court of India had while addressing an allegation of international price predation in the case of Haridas Exports v. Float Glass Manufacturers Association[142] expressly stated that:

> *"Import of material at prices lower than prevailing in India cannot per se be regarded as being prejudicial to the public interest. If the normal or export price of any goods outside India is lower than the selling price of an indigenously produced item then to say that the import is prejudicial to the public interest would not be correct. The availability of goods outside India at prices lower than those which are indigenously produced would*

[138] See, "The use of Antidumping in Brazil, China, India and South Africa- Rules, Trends and Causes"- study by National Board of Trade, available online: htto://www.kommers.se
[139] See, Report of the Secretariat, Trade Policy Review Report of Korea, WT/TPR/S/137.
[140] Article 6.12, WTO Antidumping Agreement
[141] See, Section 12 A and 37, Monopolies and Restrictive Trade Practices Act, 1969.
[142] 2002 (145) E.L.T. 241 (S.C.), para 54.

encourage competition amongst the Indian industry and would not per se result in eliminating the competitor, as was sought to be submitted by the respondents"

5.6 Since antidumping law may also be invoked to address a situation of international price predation, the CCI may as part of its advocacy initiatives take up the matter of introducing the 'public interest' requirement under antidumping law at least with reference to situations of international price predation. However the practice in countries which have introduced this requirement in their respective antidumping laws shows that 'public interest' test is applied in all situation of international price discrimination irrespective of whether it is predatory or not. Thus the CCI may also consider taking up this issue with the Indian lawmakers as the means to address the competition concerns that may arise out of the use of antidumping duties in general. (**Annex XI** lists out the 'public interest' requirements as reflected under the antidumping laws in various jurisdictions).

B. Using Bilateral Trade Agreements to Address Competition Concerns:

5.7 Our study has shown that some countries have resorted to inclusion of specific provisions on competition in some of the free trade agreements with their trading partners. The inclusion of provisions on competition was preceded by removal of rules on antidumping. This may be one way in which competition concerns arising from the use of antidumping law and the protectionist elements in antidumping laws that could harm competition in markets in India could be addressed. The CCI may as part of its advocacy initiative consider recommending an examination of whether India's future free trade agreements merit the introduction of such a mechanism.

References:

Books:

1. Bork, R.H, The Antitrust Paradox, Free Press, New York, 1993
2. Duggar S. M., Commentary on MRTP Law, Competition Law and Consumer Protection Law, Wadhawa Publishers, 2006.
3. Joelson Mark R., An International Antitrust Primer, Kluwer Law International, 2006.
4. John A. Ragosta and John R. Magnus, Antidumping and Antitrust Reform in the NAFTA: Beyond Rhetoric and Mischief, in Michael Hart (ed.), Finding Middle Ground: Reforming the Antidumping Laws in North America, Ottawa: Centre for Trade Policy and Law, 1997.
5. Korah Valentine, An Introductory Guide to EC Competition Law and Practice, Hart Publishers, 2004.
6. Massimo Motta, Competition Policy – Theory and Practice, Cambridge University Press, 2004.
7. Matsushita Mitsuo, Shoenbaum Tomas J. and Mavroidis C. Petros, The World Trade Organisation Law, Practice and Policy, Oxford University Press, 2006.
8. P. Warner, Canada-United States Free Trade: The Case for Replacing Antidumping with Antitrust, Law and Policy in International Business, v 23, no 4, 1992
9. Pigou A.C., Economics of Welfare, (first edition), London, McMillan, 1920
10. Simon Bishop and Mike Walker, The Economics of EC Competition Law, Sweet & Maxwell, Second Edition, 2002
11. Stigler G. J., The Theory of Price, Macmillan Company, New York, 1987
12. Vermulst Edwin, Competition and anti-dumping: continued peaceful co-existence? Vermulst & Waer, 24 September 1999.
13. Viner J, Dumping: A Problem in International Trade, University of Chicago Press, 1923

Articles:

1. Agarwal Aradhana, Anti-dumping Law and Practice: an Indian Perspective, Working Paper No. 85, ICRIER, April 2002.
2. Agarwal Aradhana, Patterns and Determinants of Antidumping: a Worldwide Perspective, Working Paper No. 113, Indian Council for Research on International Economic Relations, 2003
3. Armstrong Mark, Price Discrimination, Department of Economics, University College London, October 2006
4. Bergh, Van den Roger and Cayseele Van Patrick, Antitrust Law, available online: encyclo.findlaw.com/5300book.pdf
5. Bhtaacharjea Aditya, Trade and Competition Policy, Working Paper No. 146, ICRIER, 2004.
6. Cadot Oliver, Grether Jean-Maries and Melo de Jaime, Trade and Competition Policy: Where do we stand? Journal of World Trade, Vol. 34, No. June, pp 1-20.
7. Clifford Jones, Foundations of Competition Policy in EU and USA: Conflict, Convergence, and Beyond. In H. Ullrich, Ed., The Evolution of European Competition Law-Whose Regulation, which competition? 17 Edward Elgar Publishing, 2006.

8. Devault James, The Administration of US Antidumping Duties: Same Empirical Observations, 13 World Economy, 75, 1990.

9. Eugene R. Quinn, Jr, Antitrust Law Basics, available online: www.ipwatch.com

10. Finger Michael J., Origins and Evolution of Antidumping Regulation, Policy, Research and External Affairs Working Papers, WPS 783, World Bank, 1991

11. Finger, J. Michael, Editor, Antidumping How It Works and Who Gets Hurt, Ann Arbor, University of Michigan Press, 1993

12. Fox, Eleanor M., Antitrust Law on a Global Scale: Races UP, Down and Sideways, Working Paper 3, Public Law and Legal Theory Working Paper Series, New York University School of Law, 1999

13. Fox, Eleanor M., Competition Law and the Millennium round, Journal of International Economic Law, (1999), 665-679

14. Guasch, J. L. and Rajapatirana, S., Antidumping and Competition Policies in Latin America and the Caribbean, the World Bank, Policy Research Working Paper 1958, Washington D.C. August, 1998.

15. Hindley, Brian and Patrick A. Messerlin, Antidumping Industrial Policy, Washington, D.C.: AEI Press, 1996

16. Hoekman Bernard and Holmes Peter, Competition Policy, Developing Countries and World Trade Organisation, Policy Research Working Papers, The World Bank

17. Hoekman, Bernard M. and Michael P. Leidy, Dumping, Antidumping and Emergency Protection, 23 J.W.T. 27 (1989, No. 5)

18. Hoekman, Bernard, Free Trade and Deep Integration: Antidumping and Antitrust in Regional Agreements,, World Bank and CEPR, 1998

19. Holden Merle, A Reaction to Trade Liberalization or Anti-competitive? School of Economic and Management, University of Natal, Durban.

20. Hufbauer, Gary Ciyde, Diane T. Berliner, and Kimberly Ann Elliott, Trade Protection in the United States: 31 Case Studies, Washington, D.C., 1986

21. Ivan R. Feltham, Stuart A. Salen, Robert R. Mathieson and Ronald Wonnacott, Competition (Antitrust) and Antidumping Laws in The Context of The Canada-U.S. Free Trade Agreement, a study for the Committee on Canada-United States Relations of The Canadian Chamber of Commerce and The Chamber of Commerce of The United States, Exposure Draft, 19/12/1990

22. Knorr Andreas, Anti-dumping rules versus Competition rules, Institute of World Economics and International Management., Universitat Bremen

23. Levinshon James, Competition Policy and International Trade, Working Paper No. 4972, National Bureau of Economic Research, December 1994.

24. N Gregory Mankiw and Phillip L Swagel, Antidumping: The Third Rail of Trade Policy, Foreign Affairs, July/August 2005

25. Passmen Berend R., Multilateral Rules on Competition Policy: An Overview of the Debate, Comercio Internacional Serie 2, International Trade Unit, Santiago, Chile, December 1999

26. Raj Krishna, Antidumping in Law and Practice, World Bank Policy Research Working Paper No. 1823

27. Roberts Simon, The role of competition policy in economic development, Trade and Industrial Policy Strategies, Working Paper 8-2004

28. Shanker Singham, A General Theory of Trade and Competition - Trade Liberalisation and Competitive Markets, Cameron May, 2007

29. Skyes A.O., Antidumping and Antitrust: What Problems Does Each Address?, In R.Z.Lawrence ed Brookings Trade Forum 1998

30. Suranovic M. Steven, Trade Policies with Market Imperfections and Distortions, International Trade Theory and Policy

31. Tavares Jose de Araujo Jr., Legal and Economic Interfaces Between Anti-dumping and Competition Policy, Serie 24, Comercio Internacional, Satiago, Chile, 2001.

32. Willig Robert D., Economic Effects of Antidumping Policy, Brookings Trade Forum, 1998.

33. Wooton Ian, Zanardi Maurizio, Trade and Competition Policy: Antidumping versus Anti- Trust, University of Glasgow, Department of Economics, U.K., October 2002.

Annexure:

Annex I: Objectives of Competition Law:

1. Competition law has historically evolved to form an important part of the larger framework of economic laws. After starting as a tool to regulate only cartels, today over 100 countries have adopted competition law to suit their country-specific economic and political needs. In the course of the 20th century, competition law has evolved into an effective tool to address situations such as: the abuse of dominant position, (including predatory pricing[143]), anti-competitive agreements, anti-competitive mergers etc. The objectives for which countries have introduced competition legislation vary from nation to nation in accordance with its priorities and perceived need for sanction. India too has chosen to formulate and implement its competition laws in a unique historical context, in order to achieve a particular set of policy objectives.

2. The objectives and principles of competition laws across different jurisdictions under study can be broadly categorized as following:

a. Promotion of competition and prevention of anti-competitive practices

b. Protection and promotion of consumer interest

c. Achieving economic efficiency

d. Geographic/ regional integration

e. Public interest

f. Competition advocacy

a. Promotion of competition & prevention of anti competitive practices:

3. Competition laws are supposed to promote and protect competition. They promote faith of economic agents in markets by promoting economic efficiency and ensuring consumer welfare by regulating abusive conduct of market players. The prevention of anti competitive practices generally entails penal or criminal measures against the violations of competition policy. Promotion, on the other hand, is more proactive in nature, as opposed to being reactive.

4. **The US**: It is a basic principle of US antitrust law that antitrust laws should protect competition, not competitors. The mere fact that a particular competitor is injured by a practice does not mean that the practice is or should be prohibited. In fact, it is inherent in the process of competition that some firms prosper and others do not. It is the process of competition that US law protects.[144] The historic goal of the antitrust laws is to protect economic freedom and opportunity by promoting competition in the marketplace.[145] The US antitrust regime aims at protecting the vitality of the market economy by imposing rules that assure that the competitive struggle will be fairly waged.[146] The decision of the US Supreme Court in the Northern Pacific Railway Company case most succinctly captures the objectives of the US antitrust law. While discussing the objectives of the primary antirust legislation in US i.e. the Sherman Act, the Supreme Court stated that[147]:

> *"The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, and lowest prices, the highest quality and the*

[143] Predatory pricing is a form of price discrimination, wherein a firm in a dominant position sells products at very low prices (below the cost of production, either average variable or marginal cost of production) with the intent either to drive competitors out of the market or to create barriers to entry into the market. The definition of 'predatory price' may differ from country to country. (See, Annex I for the definition of 'predatory pricing' in the subject jurisdictions).

[144] "*The Objectives of Competition Law and Policy and the Optimal Design of a Competition Agency*", Note Submitted by the United States, Global Forum on Competition, 2003 available online: http://www.oecd.org/dataoecd/57/62/2486358.pdf

[145] Eugene R. Quinn, Jr**, "***Antitrust Law Basics*", available online: http://www.ipwatchdog.com/antitrust.html

[146] Mark R. Joelson, "*An International Antitrust Primer",* 3rd ed. Kluwer Law International: Netherlands, 2006.

[147] See, decision of the US Supreme Court, Northern Pacific Railway Co. v. United States, 356 U.S. 1, 4 (1958)

greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions."

5. **Australia**: While the competition and consumer protection functions of the Act tend to operate discretely, the objectives are interrelated. For example, it is generally accepted that promoting competition between companies can be an effective way of protecting consumers in relation to matters such as pricing and consumer choice. The Preamble of the Australian Act states: "The object of this Act is to enhance the welfare of Australians through the promotion of competition." The Australian Act does not refer to prevention of anticompetitive agreements as an objective, with the only reference being the prevention of price exploitation.

6. **South Africa**: Section 2 of the Competition Act, 1998 states the purpose of the act to be the promotion of competition. The Act says:

"The purpose of this Act is to promote and maintain competition in the Republic in order-

a. to promote the efficiency, adaptability and development of the economy;

b. to provide consumers with competitive prices and product choices;

c. to promote employment and advance the social and economic welfare of South Africans;

d. to expand opportunities for South African participation in world markets and recognize the role of foreign competition in the Republic;

e. to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and

f. to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons."

7. In addition to promotion of competition as its objective, the preamble of the South African Act gives as a reason for the setting up of the competition commission, "restraining particular trade practices which undermine a competitive economy".

8. In **India**, the Preamble of the Competition Act, 2000, talks about this goal, when it says, "An Act …to promote and sustain competition in the markets...". With regard to prevention of anti-competitive practices, the Preamble to the Competition Act, 2002 provides: "An Act…to prevent practices having an adverse effect on competition…".

9. **EC**: The Treaty makes competition a principal goal, but it does not elaborate what the concept means. The activities prescribed for the Community institutions include several that directly implicate competition policy: to provide "an internal market characterised by the abolition, as between Member States, of obstacles to the free movement of goods, persons, services and capital," and "a system ensuring that competition in the internal market is not distorted." (Article 3) The Community and its Member States are to adopt a co-ordinated economic policy based on "an open market economy with free competition." (Article 4) These parts of the Treaty thus set out the goal of free and undistorted competition for the Community's internal market. The basic rules of Articles 81-87 do not limit the choice of policy goals. They make clear that the competition rules address government measures as well as private conduct[148]. In case prevention of anti-competitive practices, two prohibition rules are set out in the EC Treaty:

- First, agreements between two or more firms that restrict competition are prohibited by Article 81 of the Treaty, subject to some limited exceptions. This provision covers a wide variety of behaviours. The most obvious example of illegal conduct infringing Article 81 is a cartel between competitors (which may involve price-fixing or market sharing); for more information on cartels see the cartels section.

[148] OECD Review, "*European Commission - Peer Review of Competition Law and Policy*", 2005 available at: http://www.oecd.org/dataoecd/7/41/35908641.pdf

- Second, firms in a dominant position may not abuse that position (Article 82 of the EC Treaty). This is for example the case for predatory pricing aiming at eliminating competitors from the market[149].

b. Consumer welfare and other allied interests, example: fairness

10. It is essential to encourage the competitive process so as to maximize consumer welfare and to protect consumer interests. The benefits from competition in economic growth and in enhancement of consumer welfare are self evident and widely recognized. An important aspect of consumer welfare is offering wider choice to consumers at lower prices. In common parlance, competition in the market means sellers striving individually for buyer's patronage to maximize profit or other business objectives. Such competition makes enterprises more efficient and innovative and consequently the consumers are benefited.150

11. The **US** competition policy derives from statutes enacted at different times in the US history and therefore the goals of these statutes are not identical. Overall, US antitrust policy is primarily designed to protect consumer welfare (i.e. produce a variety of products at reasonable prices), with modest elements of fairness (right of firms to be free of coercion) and of hostility to vast concentrations of economic power. Sophisticated economic analysis is a centrepiece of American antitrust enforcement. "Industrial policy", that is, overt efforts to strengthen domestic firms to serve goals other than competition and efficiency, such as successfully competing in global markets, has not had much influence in US antitrust law. Occasionally, industrial policy concerns such as promoting research and development influence competition rules, but those concerns rarely trump antitrust policy entirely. Fundamentally, competition has been the industrial policy of the United States.

12. While economics has a role in **EC** analysis, it is much less centre stage than in the US. The EU is concerned about the competitive opportunities for small and medium size firms, raising the economic level of worse off nations and general notions of fairness. There is also a sense in the EU that joint ventures, mergers and other collaborations may be necessary to enhance technological development and therefore to allow European firms to compete effectively in global markets. Article 85(3) of the EC Treaty of Rome embodies these notions, providing that otherwise void agreements or combinations mat be exempted where they "contribute to improving the production or distribution of goods or to promoting technical or economic progress…" as long as consumers enjoy a fair share of resulting benefits. While hard to judge, the language of EC Treaty of Rome and EU enforcement policy seems to accept a larger element of "industrial policy" and of "fairness" than is accepted in the US

13. Section 2 of **Australia's** Trade Practices Act, 1974 states consumer welfare as one of its objectives. The Preamble further states that, "The object of this Act is to enhance the welfare of Australians through the promotion of competition and fair trading and provision for consumer protection."

2.12 The **Indian** Competition Act, in its Preamble, states "…to protect the interests of the consumers…" as one of the objectives of the Competition Policy of India.

14. The **South African** Competition Act talks about "balancing the interests of workers, owners and consumers" in its preamble, and further, one of the stated objectives of the Act is seen to be to "provide for markets in which consumers have access to, and can freely select the quality and variety of goods and services they desire". It is thus evident that consumer interest plays an important role in South Africa as well.

c. Geographic integration:

15. Integrated markets have not been the role or the mainstay of competition policy as such. With the aid of free trade agreements or regional co-operation, ease of trade has been achieved. Further, countries such as India, the US etc have had integrated markets throughout history and so the competition law has never given much consideration to the aim of geographic integration. However, this

[149] http://ec.europa.eu/comm/competition/antitrust/overview_en.html
[150] Gupta Ayush, *"Social Objectives of Competition Law"*, available online: http://consumer.indlaw.com/search/articles/?bc731f51-b84c-4142-b625-c00aea7d59bf.

aspect is different in the EU, where the thrust of regulations has always been the consolidation of the EU common market, and this is reflected in the competition policy as well.

16. In the EU, economic integration of the various member nations was a dominant objective of competition policy. The common market evolved from a perceived need to break down trade barriers between European nations, and Community policy therefore reflects as a cardinal principle the desirability of free movement of goods and people across member state lines. By contrast, the free movement in the United States was achieved through a favourable interpretation of the commerce clause provisions of the US Constitution that effectively demolished local or regional preferences and state barriers.[151]

17. Competition policy represents one of the pillars on which rest the action of the European Commission in the economic field. This action is inspired by the principle, set out in the Treaty, of "an open market economy with free competition". This acknowledges the fundamental role of the market and of competition in guaranteeing consumer welfare, in encouraging the optimal allocation of resources, and in granting economic agents the appropriate incentives to pursue productive efficiency, quality, and innovation.[152]

d. Public Interest:

18. **South Africa**: The concept of public interest is woven into the fabric of the Act. Even in the preamble, it is noted that, given the injustices of the past, the objectives of the Act include providing all South Africans equal opportunity to participate fairly in the economy and regulating the transfer of economic ownership in keeping with the public interest. This is reaffirmed in section 2 which states that the purpose of the Act is to promote and maintain competition in the Republic in order inter alia to promote employment and advance social and economic welfare of South Africans; to enable small and medium sized enterprises to participate in the economy; and to promote a wider ownership spread, particularly in relation to historically disadvantaged persons.[153] The concept of public interest is carried through into the prohibited practices provisions, where one of the grounds for exempting otherwise anticompetitive conduct from the provisions of the Act is that it promotes the ability of small businesses, or firms controlled or owned by historically disadvantaged persons, to become competitive.[154]

19. Public interest has always been one of the guiding principles behind Australian competition law. The Australian Act states in its preamble that "The object of this Act is to enhance the welfare of Australians…". Australian competition policy recognises that the public interest may not always be met by the operation of competitive markets. Both the competition law and other elements of National Competition Policy in some cases require an assessment as to whether particular conduct or arrangements are in the public interest.

20. Public welfare has not been mentioned in the Indian Act, and thus does not seem to be the focus of the Indian Act. Similarly, EU and US legislations seem to give more focus and attention to the fact of consumer welfare as opposed to public welfare as such.

e. Economic Efficiency:

21. Enhancing efficieny in relevant markets is one of the two central goals of competition law and competition policy. The two broadly accepted concepts of efficiency in the domain of competition are allocative efficiency and dynamic efficiency. Allocative efficiency (a static notion) implies that firms produce what buyers want and are willing to pay for. Allocative efficiency is at its highest in a perfectly competitive market. Dynamic efficiency is achieved through inventions, diffusion of new products that enhance social welfare

[151] Clifford Jones, "*Foundations of Competition Policy in EU and USA"* available online: http://books.google.com/books?id=sDEUTDdd0ywC&pg=PA17&lpg=PA17&dq=usa+competition+policy&source=web&ots=FjAhLJvQyC&sig=YujCoAXfmvl_SxJGwGt_DPlxJDk

[152] Ibid

[153] Lesley L. A. Morphet., "*South Africa: South African Competition Law And Public Interest"*.

[154] Roberts Simon, "*The role of competition policy in economic development*", Trade and Industrial Policy Strategies, Working Paper 8-2004, available online: http://www.idrc.ca/uploads/user S/11798701451The_Role_of_Competition_Policy_in_Economic_Development.pdf

22. An interesting conflict can also take place between consumer welfare and allocative efficiency if consumer welfare is understood in a competition regime as maximization of consumer surplus. Such a definition implies that a pre-eminent objective of competition law is to prevent increases in consumer prices. Such a definition has no basis in welfare economics and can be justified only on grounds of equity. In such a scenario if allocative efficiency does not increase consumer surplus then consumer welfare is not said to be achieved and this could be regarded as failure of the antitrust intervention.

23. But in many instances such as mergers (especially in the case of pharmaceutical companies), allocative and dynamic efficiency could be at crossroads. In such instances, competition authorities are seen to prioritize allocative efficiency over dynamic efficiency on the basis that material results pertaining to allocative efficiency are visible immediately after arresting anti-competitive behaviour whereas visibility of dynamic efficiency is not guaranteed even in the long run.

24. **The US**: The Anti-trust Law in the US places efficiency and maximisation of consumer welfare as its primary objectives. The modern consensus is that the objective of antitrust policy is to maximise consumer welfare and promote economic efficiency through the optimal allocation of resources in a competitive market context. As the 1995 DOJ/FTC Antitrust Enforcement Guidelines for International Operations explain, "[f]or more than a century, the U.S. antitrust laws have stood as the ultimate protector of the competitive process that underlies our free market economy. Throughout this process, which enhances consumer choice and promotes competitive prices, society as a whole benefits from the best possible allocation of resources."

25. In the competition law of **South Africa**, too, the concept of economic efficiency has a large role to play. Article 2 of the South African Competition Act notes that the Act is targeted to "promote the efficiency, adaptability and development of the economy".

26. Economic Efficiency has not been referred to in the **Australian** Trade Practices Act, 1974, and does not seem to be the thrust or intent of the competition law.

27. Similarly, in **India**, it is not mentioned specifically anywhere. However, the fact that it was implicit while drafting the Act can be observed for example in Section 3 of the Act, where there is an exception provided to the prohibition against anti competitive agreements, "provided that nothing contained in this subsection shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services". So while it might be the consequence or the rationale behind some of the stated objectives, it itself is not what the Acts refer to as an objective or goal.

f. Competition advocacy:

28. Competition Advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.[155]

29. **India**: the Competition Act, 2002 expressly mandates that 'competition advocacy' is one of the functions of the Competition Commission of India ('CCI') and the CCI is required to take suitable measures for the promotion of competition advocacy and for creating awareness and imparting training about competition issues in India[156].

30. It is clear from the above discussion that the objectives and goals of competition laws differ from country to country and tend to reflect the specific socio-political and economic needs of each country.

[155] "Advocacy and Competition Policy", Report prepared by Advocacy Working Group, International Competition Network Conference, 2002, available online: http://www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/advocacyfinal.pdf

[156] Section 49 (3), Competition Act, 2002

Annex II: Objectives of Antidumping Law:

1. In the previous section, we have observed how different countries adapt their competition laws to reflect their specific policy objectives and needs. Similarly, notwithstanding the fact that there is an internationally accepted framework for antidumping laws (GATT Article VI and the WTO Antidumping Agreement), each country may enact its own antidumping laws with its variances, provided they do not contradict the provisions of the international agreements. In this section we shall therefore discuss the objectives as reflected in the respective antidumping legislations of the subject jurisdictions in order to finally determine whether there are any overlaps in terms of the objectives of the competition and antidumping laws.

2. Dumping is, in general, a situation of international price discrimination, where the price of a product when sold in the importing country is less than the price of that product in the market of the exporting country157. If a company exports a product at a price lower than the price it normally charges in its own home market, it is said to be "dumping" the product into the commerce of another country.

a. WTO Antidumping Agreement:

3. The law as laid down in the WTO Antidumping Agreement does not disapprove of the practice of 'dumping' per se. Dumping is condemned only if it causes or threatens to cause material injury to a domestic industry in the importing country or materially retards the establishment of a domestic industry. Thus the prime objective of the antidumping rules as enshrined in GATT Article VI and the WTO Antidumping Agreement is to remedy the 'injury' to the domestic industry.

4. The underlying motive behind the WTO rules on antidumping disapproving the practice of such 'dumping' which results in or is likely to result in injury to the domestic industry in the importing country is primarily to preserve the conditions of competition in the importing market. It is based on the presumption that such a practice, since it causes injury to the domestic injury is 'unfair' and may result in decreased economic welfare. Continuous and sustained injury to the domestic industry because of dumped imports can in the long-run force the enterprises out of the domestic market, which will result in decreased economic welfare and thus antidumping measures are justified as a tool to protect the domestic industry against 'unfair' trade practices such as dumping.

b. USA:

5. The first antidumping law of 1916 in the US was enacted in the post World War I scenario with the objective of preventing German enterprises from indulging in exports at substantially low prices in order to capture the export markets, which they could do because of their economies of scale. Thus the 1916 Act made it illegal to import goods at a price substantially below the 'actual market value' in the producing country or in countries to which they were commonly exported providing there was an intent to injure, destroy, or prevent the establishment of an industry in the United States or to restrain competition. The 1916 Act sought to target a practice (predatory pricing) and the underlying economic rationale was that 'predatory pricing' may be injurious to the domestic injury and thus the domestic industry needs to be protected against such practices.

6. However, with changing economic scenarios, the US antidumping law of 1916 was soon revised in 1921 through the Antidumping Act of 1921 as an indication of the changing objectives behind the law itself. The enactment of the 1921 statute reflected a shift from using antidumping duties to address predatory pricing alone, to a wider objective of regulating all imports at "dumped prices" which caused injury to the domestic industry, even if such imports were not always at predatory prices. The 1921 Act addressed itself to sales made at 'less than fair value.' It removed the requirement showoff proving that dumping was done with a predatory intent and replaced it with the requirement that for a successful action under the antidumping law it was adequate to prove that prices are either below cost or below the price charged for a similar item in a firm's home market. Thus by changing the standard of proof (removal of the intent to injure) for the successful imposition of antidumping measure the 1921 Act changed the

[157] See, WTO-Technical information on antidumping, available online: http://www.wto.org/english/tratop_e/adp_e/adp_info_e.htm

nature of the antidumping law from a law to regulate practice of 'predatory pricing' to a general law to regulate imports.

c. European Communities:

7. The European Communities' antidumping regulations have been amended on various occasions. Currently they are contained in Commission Decision (ECSC) 2277/96 - applying to coal and basic iron and steel products-, adopted under ECSC treaty, and in Council Regulation (EC) 384/96, which applies to 'any product', adopted under the EC treaty. Dumped imports from all third countries not member of the EC are subject to Basic Regulation 384/96 and Decision 2277/96/ECSC. As a consequence of the Agreement establishing the European Economic Area (EEA) no antidumping measures can be applied to the parties in economic sectors where the 'Community aquis' had been implemented sufficiently.

8. Under the EC laws on antidumping, a measure can be taken only when it is proved that there is an occurrence of dumping, that such dumping leads to the causation of material injury to the Community industry, and that the antidumping measures are consistent with the 'Community interest'. The Community interest rule states that measures can only be imposed where the Commission determines that imposing them is not against the wider interest of the EU economy, including the interest of the other industrial users and consumers of the product alleged to be dumped.

9. The EC rules on antidumping seek to serve two primary objectives: (i) protection of the 'community interest' against cheaper imports from countries where producers may enjoy unfair advantage over the Community producers because of lack of competition and/ or state inference in the production process that allows them to artificially lower the export price; and (ii) at the same time promote deeper integration of the community market, since EC rules on antidumping do not seek to address the possible instances of intra-EU dumping.

d. South Africa:

10. Antidumping measures in South Africa are governed by the Customs and Excise Act and the Board on Tariffs and Trade Act. The regulations in these acts have been amended from time to time particularly in order to comply with the requirements of the WTO agreements on antidumping. AD investigations are currently conducted in terms of the International Trade Administration Act, 71 of 2002 (the ITA Act), and the Antidumping Regulations (ADR).

11. The South African law on antidumping duties shall be understood in the backdrop of the peculiar economic conditions prevalent in South Africa. With the strategy of inward-looking development South Africa has succeeded in developing a medium-sized economy with a substantial and diversified manufacturing capacity. The manufacturing sector produces the majority of non-durable and semi durable consumer goods and also has very large, capital-intensive firms in the chemical, steel and engineering and paper sub-sectors. Because of a relatively closed economy, South African manufacturing is also characterized by high levels of concentration and a lack of competition. An explanation for the South African law on antidumping possibly lies in this economic set up. The rationale is clear, which is to protect the domestic industry from foreign competition and the legislation can be said to drive its legitimacy in the political economy of South Africa.

e. Australia:

12. The principal Australian laws relating to antidumping measures are contained in the Customs Act 1901 ("Customs Act") and the Customs Tariff (Antidumping) Act 1975 ("Dumping Duty Act"). The evolution of Australia's antidumping law is largely the result of Australia's obligations as a WTO Member.

13. The Australian antidumping law which provides for the imposition of antidumping duties only when the domestic industry suffers from material injury due to dumping and shall also be analysed in light of Australia's trade policy and the nature of its economy. Australia in general maintains very low tariffs, this coupled with the relatively small market and geographical location, makes the Australian manufacturers more vulnerable to the price discriminatory practices of the exporters. Thus protection of the domestic industry seems to be the possible rationale for the Australian antidumping laws also.

f. India

14. In India, the law authorizing anti dumping measures is contained in Section 9A of the Customs Tariff Act, 1975. The Indian law on antidumping clearly seeks to address only those situations of price discrimination which cause or are likely to cause injury to the domestic industry.

15. The Indian law on antidumping is also to be analyzed in light of its trade regime. Prior to 1991, India had a highly restrictive trade regime. In concurrence with the objective of attaining self-reliance, the domestic industry was given a high level of protection through import controls and high duties. However after India's accession to the WTO and the subsequent reduction of tariffs and elimination of import quotas, the domestic industry was suddenly exposed to increased foreign competition. In this backdrop the antidumping law seeks to protect the domestic industry from injury caused from dumped imports.

16. It is clear from the above discussion on the objectives of the antidumping laws in the subject jurisdictions, that they are primarily aimed at protecting the domestic industry against cheaper imports from other countries which may result in injury to them.

Annex III: Various Forms in Which Price Discrimination Can Take Place under Competition law , their Economic Rationale & Effects:

1. 'Price discrimination' is one of the more difficult areas to address under competition laws. There could be several reasons for this. First, the concept of 'price discrimination' covers many different practices, such as discounts and rebates, tying, selective price cuts, discriminatory input prices set by vertically integrated companies etc. Therefore from the point of view of competition law analysis, it is difficult to classify these practices under a coherent analytical framework. Second, there seems to be little consensus among economists on the issue of welfare effects of 'price discrimination' and it is difficult to gauge whether a particular kind of price discrimination increases or decreases welfare[158].

2. Price discrimination occurs when a firm charges a different price to different customers for the sale of similar products with similar marginal costs. A wider definition has been proposed by Stigler[159]: "*A firm price discriminates when the ratio of its prices is different from the ratio of marginal costs for the goods offered*". Various economic definitions of price discrimination explicitly exclude price differences due to differences in costs i.e. if cost differences are being passed-on to consumers, then there is no price discrimination[160].

3. The primary motive behind price discrimination is that firms are able to extract consumer surplus and hence increase their profits. When customers have different valuations for the product or when there are different groups of customers with identifiable sensitivity to prices (i.e. price elasticity), price discrimination allows a firm to exploit these differences to increase profits. The degree to which firms are able to extract consumer surplus, depend on the information available on consumer preferences.

4. All types of price discrimination therefore, do not have a single predetermined effect on competition and the impact of price discrimination on competing firms and consumers may vary depending on the type of price discrimination and the way that it is used. Since the implications of price discrimination may vary from case to case, any analysis of whether such price discrimination should be regulated by competition law should be based on an evaluation of all these factors. This calls for a cautious case-by-case approach while determining whether price discrimination affects the competitive process in the market adversely and certainly not all forms of price discrimination warrant a *per se* ban. Therefore it is important to look into the various types of price discrimination and their impact on competition.

a. First, Second and Third Degree of Price Discrimination

5. With regard to various forms of price discrimination, Pigou[161] has classified price discrimination into: (a) "first degree" price discrimination (where each customer is charged a price equal to its willingness to pay[162]); (b) "second-degree" price discrimination (when customers are offered menus to select from and the unit price paid by each customer will depend on quantities purchased[163]); and (c) "third-degree" price discrimination (where different prices are charged to groups of customers that can be identified). This classification has generally been useful to analyze the consumer welfare effects of price discrimination in a monopoly setting.

6. In first degree price discrimination, the firm in question is able to charge the maximum each consumer is willing to pay for a given product or service, it is in a position to extract all consumer surplus. Thus, first degree price discrimination enhances total welfare (i.e., the sum of producer and consumer

[158] The answer to this may depend upon the welfare standard (total or consumer) either prescribed in the competition legislation itself or adopted by concerned judicial bodies. See, Petit Nicolas and Prof. Geradin Damien, *"Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach*", The Global Competition Law Working Paper Series, Working Paper 07/05

[159] Stigler G. J., "*The Theory of Price"*, Macmillan Company, New York, 1987

[160] Penelope Papandropoulos, *"How should price discrimination be dealt with by competition authorities*?" *Concurrences* N° 3-2007 available online: http://ec.europa.eu/dgs/competition/economist/concurrences_03_2007.pdf

[161] Pigou A.C., *Economics of Welfare*, (first edition), London, McMillan, 1920

[162] Such price discrimination is unsurprisingly rather rare as it requires a significant amount of information on each customer. However, it constitutes a useful benchmark to assess the welfare effects of price discrimination in its most "extreme" form.

[163] Second-degree price discrimination occurs when companies have no information on customer types and induce customers to reveal their type by their choice of menu or purchasing patterns.

welfare). On the other hand, it decreases consumer welfare as consumer surplus is totally absorbed by the producer.

7. Since the concept of 'first degree price discrimination' has limited practical applicability[164], the welfare effects of first-degree price discrimination are of limited significance with specific regard to competition law. In those limited situations where a firm has the ability to exercise first degree price discrimination, a competition authority would decide, whether or not to attach a sanction with the first degree price discrimination on the welfare standard it chooses to use, namely – producer or consumer welfare[165].

8. On the other hand, the welfare effects of second and third degree price discrimination require a greater degree of attention[166]. Second and third degree price discrimination particularly increase welfare when they allow a firm to supply a group of consumers, which would not be supplied in the absence of price discrimination. For instance with regard to second degree price discrimination in the form of quantity rebates the European Commission and other European Community Courts have generally considered that quantity rebates reflecting costs of efficiencies resulting from larger amounts of quantity sold are not discriminatory[167]. Third degree price discrimination taking the form of different tariffs for peak and off-peak train travel may, for instance, allow price sensitive consumers that would not be able to use the train service under a uniform price to gain access to that mode of transportation. A similar result can also be achieved through second degree price discrimination taking the form of rebates as such rebates may allow new categories of consumers to buy a product which they could not have afforded under a uniform price.

9. Second and third degree price discrimination can also be alibis to execute predatory pricing[168]. Indeed, it can reduce the costs of the (elimination of competition) strategy and therefore, make it profitable to predate when it would not be profitable if the dominant firm could not price discriminate. For example a dominant firm serves two market segments and a new firm enters only one of the segments. In such a case by selectively offering predatory prices to customers in the segment facing entry, the costs of the strategy would be lower than if the predatory price had to be charged across the board, to both segments. In some instances, the ability to target price cuts could reduce the costs of predation enough to be outweighed by the long-run benefits of impeding entry. Hence, there may be situations in which, predation would not be profitable if price discrimination was impossible. Yet, even in this case, it is not price discrimination as such that may lead to anti-competitive effects but the predatory strategy. A similar conclusion is warranted in the case of bundling strategies. By charging different prices to different customers (depending on whether they buy one product or more), exclusionary effects may arise if competitors are marginalized and forced to exit when bundling induces customers to purchase less from a new entrant, thus jeopardizing its prospect to reach minimum viable scale (when there are fixed costs to recover). Again, the analysis of the foreclosure effect of bundling practices would consider the market

[164] Most economists agree that 'first degree price discrimination' can be observed in practice in limited situations as intrinsic in the concept of 'first degree price discrimination' is the assumption that the firm has perfect knowledge of its customers' willingness to pay, an assumption which is unlikely to be met in most markets. See Massimo Motta, *Competition Policy – Theory and Practice*, Cambridge University Press, 2004, at 493-94 as quoted in Petit Nicolas and Prof. Geradin Damien, "*Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach"*, The Global Competition Law Working Paper Series, Working Paper 07/05

[165] See Simon Bishop and Mike Walker, *The Economics of EC Competition Law*, Sweet & Maxwell, Second Edition, 2002, at 196 as quoted in Petit Nicolas and Prof. Geradin Damien, "*Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach"*, The Global Competition Law Working Paper Series, Working Paper 07/05. Also, see, Armstrong Mark, "*Price Discrimination*", Department of Economics, University College, London, 1996.

[166] See generally, Simon Bishop and Mike Walker, *The Economics of EC Competition Law*, Sweet & Maxwell, Second Edition, 2002, at 196 as quoted in Petit Nicolas and Prof. Geradin Damien, "*Price Discrimination under EC Competition Law: The Need for a Case-by-Case Approach"*, The Global Competition Law Working Paper Series, Working Paper 07/05. Also, see, Armstrong Mark, "*Price Discrimination*", Department of Economics, University College, London, 1996.

[167] See Commission Decision 97/624 of 14 May 1997, *Irish Sugar plc.*, OJ L 258 of 22 September 1997, pp.1-34 at §153.

[168] Predatory pricing is one of the forms of price discrimination, wherein a firm indulges in the practice of selling goods or providing services at very low prices (generally below average variable cost or marginal cost of production) with the intent of driving out competitors from the market. Price discrimination is a broader concept and refers to the practice of selling goods or providing services at different prices irrespective of whether such sale or provision of services is below the cost of production or not.

circumstances and the likelihood that entrants or competitors are marginalized to the expense of final consumers[169].

b. Direct and Indirect Price Discrimination

10. Different classifications of price discrimination have also been suggested more recently. MacAfee[170] classified price discrimination into: (a) direct price discrimination (where the price depends on customer characteristics) and (b) indirect price discrimination (where a menu of options at different prices is offered and customers self-select).

11. When a firm faces two groups of customers with different valuations for its product (high and low), under uniform pricing it may or may not price below the willingness to pay of the low valuation group (depending on whether a high price and sales to high valuation customers only leads to higher profits than a lower price and sales to both customer groups). If only high valuation customers purchase the product under uniform pricing, price discrimination could also "open" the market to low valuation customers (i.e. by charging a high price to the high valuation segment and a low price to the low valuation segment) who were initially not purchasing the product. Without output expansion, price discrimination hurts consumers and benefits the firm; thus total welfare can increase or decrease. With output expansion, consumers may also benefit (but the effect depends on consumer demand).

12. The anti-competitive effects in direct price discrimination are to be understood in light of the 'exclusionary effects' of such a practice as discussed in para 2.8. If a firm chooses to selectively exercise price discrimination on the basis of consumer characteristics with intent to eliminate competition, it warrants consideration from competition law. Similarly, an act of indirect price discrimination in the form of bundling products to exert adverse effect on competitive process has attracted provisions in competition regimes.

c. Static and Dynamic Price Discrimination

13. Armstrong[171] has defined price discrimination as (a) static price discrimination to final customers; (b) dynamic price discrimination to final customers and (c) price discrimination to downstream customers by an upstream supplier. Static price discrimination occurs when the conditions characterizing uniform pricing are relaxed. Under uniform pricing, the price is (a) anonymous (i.e. independent from customer identity); (b) there are no intra-product discount (i.e. no quantity discount) and (c) no "inter-product" discount (i.e. discounts offered for purchasing several products). When these conditions are relaxed, Armstrong defines three types of "static" price discrimination: non-anonymous price discrimination (covering first- and third-degree price discrimination), quantity discounts (e.g. second-degree price discrimination) and bundling discounts. Price discrimination can also be "dynamic" when firms adapt their pricing over time. Dynamic pricing can take two forms: inter-temporal price discrimination (when the price of a good changes over time – such as books) and behavioural price discrimination (when the price charged to customers varies according to their purchasing behaviour over time – such as personalized vouchers to supermarket customers).

14. While the effects of non-anonymous price discrimination in the forms of first and third degree price discrimination have been discussed above in paras 2.7 and 2.8, additional insights arise when firms engage in mixed bundling. Competition can either be intensified or softened depending on the possibility to be more or less aggressive by bundling depends on the characteristics of consumer demand172. Price discrimination can also be the manifestation of exclusionary pricing. When firms can price discriminate, they can implement "targeted" predatory pricing (e.g. only implement selective and predatory price cuts in the customer segment where the firm faces entry) and mixed bundling or tying strategies become possible. In the context of vertically integrated firms, price discrimination can be a tool to raise rivals' costs

[169] See generally, Penelope Papandropoulos, *"How should price discrimination be dealt with by competition authorities*?" *Concurrences* N° 3-2007 available online: http://ec.europa.eu/dgs/competition/economist/concurrences_03_2007.pdf

[170] Preston McAfee, "*Price Discrimination"*, in Issues in Competition Law and Policy, ABA, available online: http://vita.mcafee.cc/PDF/ABAPriceDiscrimination.pdf

[171] Armstrong Mark, "*Price Discrimination",* Department of Economics, University College London, October 2006, available online: http://else.econ.ucl.ac.uk/papers/uploaded/222.pdf

[172] Ibid

and exclude downstream competitors. Through discriminatory pricing, firms may therefore also implement exclusionary strategies and harm consumers.

15. From the point of view of competition law, the distinctions between static and dynamic price discrimination as well as pricing to final customers and downstream customers are important in particular to understand the consequences of banning price discrimination or having a tough policy towards discriminatory pricing. The important distinction between static and dynamic price discrimination is that firms may not be able to commit to future prices in the case of dynamic price discrimination and this has implications for the welfare consequences of price discrimination. A ban on "dynamic" price discrimination under competition law offers a commitment device, which typically leads to higher prices. The distinction between price discrimination to final customers and downstream firms is also important due to the nature of pricing in supplier / downstream customer relationships. Contracts and pricing structures between upstream and downstream firms most often take the form of personalized (and secret) contracts. A ban on price discrimination may lead to overall higher prices to downstream customers.

16. An area in which price discrimination as such can have exclusionary effects relates to the specific situation when a "dominant supplier sells to downstream consumers" and the issue at stake is the "pricing of inputs". In such circumstances, a crucial distinction arises whether the dominant firm is vertically integrated or not. In fact, whereas price discrimination may constitute a device to exclude downstream rivals by an integrated supplier, the opposite situation arises when the supplier is not vertically integrated. Indeed, a non-integrated supplier would in fact benefit from a ban under competition law in price discrimination as pricing to intermediaries is often the result of bilateral negotiations (rather than posted prices). Indeed, it is important for a competition regime to see if price discrimination is possible in the context of secret negotiations, each downstream firm will ask for secret price cuts. Taking the other contracts as given, the supplier and each downstream firm will maximize their joint profit and this will lead to efficient pricing (as in the case of vertical integration).

17. Price discrimination can assume variety of forms and exert both positive as well negative impact on market players and consumers. While the positive effects are known to be desirable, the adverse affects of certain types of price discrimination practices have attracted attention from lawmakers. Thus, competition law regimes in different countries have understood and reflected the economic theory of price discrimination to capture those forms of price discrimination, which have an adverse impact on competition such as predatory pricing.

18. From the above analysis, it is clear that there are various forms of price discrimination each of which may depend on factors such as the identity of the customer who pays the price, the time within which the price is paid or the quantum of price discrimination However, not all forms of price discrimination exert adverse effects on market players and consumers. Predatory pricing is one such form of price discrimination, which admittedly has harmful effects on competitive conditions in a marketplace. Since both antidumping law and competition law, address themselves to removing price discrimination in its various forms, it is essential to understand the economic rationale for each such form of price discrimination under both antidumping as well as competition law, which the next section will attempt to do.

Annex IV: 'Price Discrimination' as understood under Antidumping Law & its Economic Rationale & Effects:

1. The literature on antidumping is replete with differing definitions of the word 'dumping'[173]. However, central to all these definitions is the concept of 'price discrimination' in different markets. In other words in antidumping law 'price discrimination' is synonymous with 'dumping'. Jacob Viner[174] defined dumping as "price discrimination between national markets." In international trade dumping is said to occur when the sale of products for export is at "prices lower than those charged to domestic buyers, taking into account the conditions and terms of sale." The phenomenon of dumping takes place when a firm sells a product abroad at a price, which is below its fair value[175]. Loosely defined dumping occurs when similar products are sold by a firm in an export market for less than what is charged in the home market, duly adjusted for all justifiable costs at the ex-factory level. Alternatively it may occur if the export price of the product is less than total average costs or marginal costs.[176] A more pragmatic definition of dumping is given by Finger, who defines it as "whatever you can get the government to act against under the antidumping law"[177]. According to Article VI, GATT 1994, a product is said to be dumped when its export price is less than its normal value, that is, less than the sale of a like product in the domestic market.

2. Economists have debated whether, and if so, under what circumstances does dumping take place. Viner identifies three types of dumping situations: sporadic dumping, short-run or intermittent dumping and long-term or continuous dumping. In the case of sporadic dumping the motivation is to dispose of goods for a short-run to get rid of surplus stock. Short-run or intermittent dumping is not continuous and is motivated by entering into a new market, retaining the market share or driving away the competitors from the market. Long-term or continuous dumping is motivated by the intent to reach or maintain full production in large scale economies. Sporadic dumping is likely to result only in damage to the exporting or the importing country. Short-run dumping also does not necessarily hurt.[178] Indeed the WTO Agreement requires that dumping be over a period of not less than six months and allows for dumping during the start up phase of a plant[179].

3. Dumping has been classified into two types on the basis of the intent or the reason for which it is practiced- monopolizing and non-monopolizing[180]. There are two sources of monopolizing dumping namely strategic and predatory. Monopolizing dumping can take the form of predatory pricing or strategic dumping and is generally regarded as causing loss in welfare. Non-monopolizing dumping (consists of market expansion, cyclical and state trading) may not necessarily be detrimental to aggregate welfare in the importing country. The table below summarizes the various forms in which dumping can take place under the two broad categories of monopolizing and non-monopolizing[181].

a. Monopolizing Dumping:

[173] See Raj Krishna, "*Antidumping in Law and Practice"*, World Bank Policy Research Working Paper No. 1823. Available at SSRN: http://ssrn.com/abstract=604967, 1998.

[174] Viner J, "*Dumping: A Problem in International Trade,"* 1922.

[175] Devault James, "*The Administration of US Antidumping Duties: Same Empirical Observation"s*, 13 World Economy, 75, (1990)

[176] Hoekman, Bernard M. and Michael P. Leidy, *"Dumping, Antidumping and Emergency Protection"*, 23 J.W.T. 27 (1989, No. 5)

[177] Finger, J. Michael, *Editor, "Antidumping How It Works and Who Gets Hurt"*, Ann Arbor" University of Michigan Press, 1993

[178] See Raj Krishna, "*Antidumping in Law and Practice"*, World Bank Policy Research Working Paper No. 1823. Available at SSRN: http://ssrn.com/abstract=604967, 1998.

[179]The WTO Antidumping Agreement does not expressly make a distinction between short run and long run dumping. However the Committee on Antidumping Practices has recommended that the appropriate period of data collection for dumping investigations normally should be twelve months and in any case no less than six months. Most WTO Member countries including India have accepted this recommendation. Thus in effect short run dumping is excluded from the purview of antidumping investigations.

[180] Willig Robert D., "*Economic Effects of Antidumping Policy"*, Brookings Trade Forum, 1998

[181] Holden Merle, "*A Reaction to Trade Liberalization or Anti-competitive?"* School of Economic and Management, University of Natal, Durban.

Category of Dumping	Description	Identification	Impact
Strategic Dumping	Exporting from a protected home market in an industry with high sunk costs enjoying economies of scale	➢ Protected home market of exporter; ➢ Economies of scale; ➢ Large protected home market adversely affects rivals because they can not enjoy economies of scale	➢ Limits the size of the market for rival suppliers; Raises costs in the importing country; ➢ Inhibits competition at home; ➢ Leads to market domination and abuse of market power; ➢ Negative effects in importing nation are likely to outweigh the positive benefits to the exporting country.
Predatory-pricing dumping	Low priced exports to drive rivals out of business to gain monopoly power.	➢ Below cost pricing that: ➢ endangers the ability of domestic firms to remain in market; ➢ captures a market that is presently concentrated; ➢ Collusion is aided among dumping exporters; ➢ Operates in a market with high entry and re-entry barriers.	Anti competitive effects in the importing market because foreign suppliers can exercise monopoly power over domestic consumers by raising the price after destroying alternative domestic sources of aupply.

b. Non-monopolizing Dumping:

Category of Dumping	Description	Identification	Impact
Market Expansion	Expansion of sales by price discrimination based on different elasticity of demand in the home and foreign market.	Export price less than normal value. Home market bias leads to lower elasticity of demand in the home market, while export market has many competing alternatives sources of supply.	➢ Impacts adversely on consumers in the exporting country who pay higher prices. However to the extent exporters expand, and growth ensues these consumers will also benefit; ➢ Benefits consumers in importing country and harms producers.

Category of Dumping	Description	Identification	Impact
Cyclical dumping	Exports priced at very low prices in the presence of excess capacity due to depressed demand	➢ Export price below "full cost"; ➢ and low marginal cost	➢ Enables home country to cover average variable costs and maintain employment; ➢ Benefits consumers in importing country but may harm producers.
State Trading	Exports from state owned industries in economies with inconvertible currencies.	➢ Export prices below cost based on constructed values; ➢ Sometimes third country prices also are used	➢ Earns 'hard' currency for the non-market economy country; ➢ Benefits consumers in the importing country but harms producers in the importing country.

4. It is clear from the above discussion that 'dumping' and consequently 'price discrimination' can take different forms and depending upon its specific form it may cause injury to the domestic producers or consumers in the importing country. Economists have however argued that not every instance of 'dumping' or 'price discrimination' is inimical to economic welfare. Economists argue that the practice of 'price discrimination' in itself is not wrong and thus should not be subject to any form of sanctions. 'Price discrimination' according to economists is a normal commercial practice and as such cannot be treated as an 'unfair trade practice'. Modern economic theory suggests that the first objective of firms is to maximize profits in the long term. In accounting terms, producing an extra good should yield at least the extra costs of producing that extra good: the so-called 'marginal cost of production'. As long as marginal costs are covered, producing at a price where at least some of the fixed costs are recouped can therefore be considered rational and sound business.

5. As discussed above only 'monopolizing' dumping (i.e. strategic dumping or predatory pricing dumping) can necessarily be said to have negative impact on welfare and thus should attract sanctions. However the law on antidumping *does not differentiate* between different forms of 'price discrimination' and attaches sanctions to every instance of 'price discrimination' (differential pricing between two different geographic markets,) which can be shown to cause injury to the domestic industry irrespective of whether it enhances welfare or not and has pro-competitive effects or not[182].

6. It is important therefore to understand why countries apply their antidumping laws in such a manner (i.e. without any regard to the economic effects of the imposition of the duty), despite their being limited economic justification for it. It may however be noted that an antidumping investigation does entail an economic analysis while examining whether 'dumping' and 'injury' exists and the investigating authorities may take account of the possible economic effects of the imposition of antidumping duty to determine whether it will remedy the injury to the domestic industry or not[183].

7. The next section shall briefly discuss the various arguments adopted by countries to support and continue with the use of antidumping measures irrespective of the form in which 'price discrimination' takes place.

[182] The only exception is the 'short term' dumping, i.e. for a period less than six months.

[183] In EC however, in built in the 'community interest' test which involves examination into the effects of the imposition of antidumping duty on consumers and other users of the product is the requirement that investigating authorities take into account economic effects of the imposition of the duty.

Rationale for the use of antidumping measures irrespective of the form in which 'price discrimination' takes place:

8. The rationale for providing selected protection to the domestic producers, for instance in the form of antidumping duties arises in the presence of imperfectly competitive markets and/or market distortions. Economists argue[184] that in imperfectly competitive markets as opposed to perfect competition, it is possible to show that an appropriately targeted trade policy can raise aggregate economic efficiency and that free trade need not always be the best policy choice for maximizing national welfare. Antidumping measures, which essentially are in the nature of 'tariffs' derive their legitimacy from this presumption that in imperfectly competitive markets government intervention in a selected manner can raise economic efficiency and gains from trade. Some of the arguments for the use of antidumping measures regardless of the form of 'price discrimination' are discussed below.

a. Consumer Welfare Argument:

9. Even though antidumping law does not differentiate between different forms of 'price discrimination', it does address the situations wherein exporters may use the strategy of predatory pricing to drive out other exporters and the domestic firms in a given market to obtain monopoly position[185]. In the short run, this may be beneficial to consumers in the form of reduced prices, however in the long run it can be detrimental to consumer welfare because of reduced choices and increased prices (a monopoly firm may abuse its dominant position in the market and charge higher prices). [186]. Thus the use of antidumping measures is justified for regulating the conduct of exporters in order to protect and promote consumer welfare.

b. Optimal Tariff Argument:

10. As discussed above, in imperfectly competitive markets selective protection may lead to increased economic welfare. Economists have justified the use of antidumping measures (tariffs) when imposed upto an *optimal level*[187] in a country which is large in international import market. The argument suggests that if the country has important internal markets then it might force exporters to diminish their price by imposing a small tariff. The foreign exporters may absorb most of the increase in the prices to keep their share in such an important market and the country imposing the tariff could gain more than it loses[188]. However increase in welfare by imposing a tariff can occur only when the *terms of trade* gains exceed the total *deadweight losses*[189]. This argument that a tariff can increase welfare is valid only under two conditions: firstly, that the tariff imposing country should be a large importer; and secondly the increase in tariff should be small[190]. Thus if a country can satisfy these two conditions then it may gain from imposition of antidumping duty (tariff) upto an optimal level.

c. Strategic Trade Policy Argument:

11. The *'strategic trade policy argument'* is another justification given by economists for the use of antidumping measures on the presumption that selected intervention by the governments in imperfectly competitive markets can raise aggregate economic welfare. This argument suggests that in certain *strategic industries*, levy of import tariff against a foreign monopoly supplying the domestic market can effectively shift rents away from the foreign firms and despite there being increase in domestic prices,

---

[184] See, Suranovic M. Steven, "*Trade Policies with Market Imperfections and Distortions"*, International Trade Theory and Policy, available online: http://internationalecon.com/Trade/Tch100/T100-0.php

[185] It may however be noted that antidumping law does not expressly address the issue of 'predatory pricing' and also 'dumping' does not necessarily involve 'predatory pricing'.

[186] While looking at the historical development of antidumping laws in Canada and USA, Sykes finds that the justification for antidumping laws at the outset was to protect the competitive process and the cosumer from monopoly power. See, A.O. Sykes, "*Antidumping and Antitrust: What Problems Does Each Address*?" in R.Z. Lawrence ed. Brookings Trade Forum, 1998.

[187] See, Suranovic M. Steven, "*Trade Policies with Market Imperfections and Distortions"*, International Trade Theory and Policy, available online: http://internationalecon.com/Trade/Tch100/T100-0.php

[188] See, Aggarwal Aradhana, "*Antidumping Law and Practice: An Indian Perspective*", Working Paper No. 85, ICRIER, 2002

[189] The net loss in economic welfare that is caused by a tariff or other source of distortion, defined as the total losses to those who lose, minus the total gains to those who gain.

[190] Also, there should be no possibility of retaliation from trading partners. See, Aggarwal Aradhana, "*Antidumping Law and Practice: An Indian Perspective*", Working Paper No. 85, ICRIER, 2002

there can be increase in national welfare. Similarly, export subsidies provided to domestic firms who are competing with foreign firms in an oligopoly market, may raise domestic firms' profits by more than the cost of the subsidy, especially if profits can be shifted away from the foreign firms. The strategic use of tariffs and export subsidies may help firms achieve significant economies of scale.

12. If the exporter's home market is foreclosed to foreign rivals and if each exporter's share of their home market is of significant size relative to their scale economies, the exporters will be able to have a significant cost advantage over foreign rivals. With access to both home and foreign markets, they therefore gain a cost advantage over domestic firms that are unable to compete abroad. This advantage which is contingent on the home market being sufficiently large, eventually gives the exporting firms market power and the ability to indulge in 'strategic dumping'[191]. If the domestic firms are unable to compete effectively, over time domestic firms may be injured by the exercise of market power by the exporting firms. In such situations economists justify the use of antidumping measures as a rational tool for the protection of domestic industry against strategic dumping.

d. Political Economy Argument:

13. As discussed earlier, there is very little economic theory to justify or explain the use of antidumping measures as they exist today as protectionist instruments. All the three arguments (consumer welfare, optimal tariff and strategic trade policy) supporting the use of antidumping measures have very limited application and can not rationally explain the levy of antidumping duties against the practice of all forms of price discrimination. The most plausible explanation therefore for the use of antidumping measures lies in the political economy of trade. The political economy argument suggests that antidumping measures are primarily in the nature of 'protectionist' tools used by governments due to pressures from various interest groups. For instance domestic producers in concentrated industries may lobby with their governments to use antidumping measures against imports to protect themselves from foreign competition[192].

14. It emerges from the above discussion that the rationale of antidumping laws revolves around two broad themes: One is that they are aimed at intervening on behalf of efficient domestic manufacturers facing competition from imports that are artificially under-priced, The other view is that the antidumping laws are inherently protectionist in nature and are aimed at protecting the domestic industry from any form of competition from imports.

15. To the limited extent that antidumping laws address the issue of and attach sanctions to 'price discrimination', which is monopolizing in nature, they help in protection and promotion of competition in markets, thereby increasing aggregate welfare. However, when antidumping laws are applied to attach sanctions to every form of 'price discrimination', including 'non-monopolizing' price discrimination, it may negatively affect conditions of competition in markets and thereby result in decreased aggregate welfare. In the next section we shall therefore analyze whether the manner in which antidumping law addresses the issue of 'price discrimination' conflicts with or complements the objectives of competition law (i.e. increasing aggregate welfare).

[191] See, Willig Robert D., "*Economic Effects of Antidumping Policy"*, Brookings Trade Forum, 1998

[192] Tharakan , as quoted in Aggarwal Aradhana, "*Antidumping Law and Practice: An Indian Perspective*", Working Paper No. 85, ICRIER, 2002

Annex V: Definition of 'Predatory Pricing'

1.1 'Predatory pricing' as understood under competition/antitrust laws is a kind of 'price discrimination'. This note seeks to lay down the definition and understanding on 'predatory pricing' under various jurisdictions.

Australia:

1.2 In Australia, the Trade Practices Act does not specifically mentions "predatory pricing", however, the said Act provides that a corporation, *that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained* ***period at a price that is less than the "relevant cost" to the corporation of supplying such goods or services***[193]*,* for preventing competition or otherwise deterring the entry of another person in any such way. The Courts have interpreted this provision to include in its ambit the prohibited act of predatory pricing. However, no statutory definition of "relevant cost" has been attempted. Therefore, again the Courts took up the task and define it to generally include *"cost below the* ***average variable cost****"*[194]*.* However, the Courts still retain their discretionary power in deciding as to what shall be the measure of "relevant cost" in each case. In Australia, the statute specifically prohibits selling below the relevant cost. Since the courts have included within this definition the concept of predatory pricing, therefore, it can be safely assumed that predatory pricing is an illegal act *per se* within the Australian markets.

South Africa:

1.3 Similarly in South Africa, though "predatory pricing" has not been explicitly mentioned in the Act, however, one of the sub-provision can be interpreted as prohibiting "predatory pricing"[195]. It prohibits *"…selling goods or services below their* ***marginal or average variable cost****"*. Therefore, it is a direct/statutory prohibition and it is not left to the discretion of the courts, making predatory pricing illegal *per se*.

United States of America:

1.4 Again, in the US as well, predatory pricing has not been directly dealt with in the Clayton Act. Like in Australia (where the term 'relevant cost' has been used), the Courts in US also have used an abstract concept of ***"****price below* ***appropriate measure of rival's cost*** *for the purpose of eliminating competitors in the short run and reducing competition in the long run"*[196]*.* But, the Courts have specifically provided that the *appropriate measure of cost* refers to **"average variable cost"**[197]**.** This is nothing but the concept of predatory pricing. Since this prohibition is seen as stemming from section 2 of the Clayton Act, which makes price discrimination as "unlawful" within the US markets, therefore, predatory pricing in US as well is an illegal act *per se.*

European Community:

1.5 In the EU as well, since the Treaty of the European Community does not specifically deal with the concept of price discrimination or predatory pricing, it was left to the ECJ/CJI over the years to determine what would constitute "predatory pricing". The Courts have construed it to be within the ambit of Art 82 of the Treaty, which prohibits abuse of dominance. According to the latest case law, *a price is predatory if, a) it is below* ***average variable cost****; or, b) if it is below* ***average total cost*** *and is part of an explicit plan to eliminate a competitor"*[198]*.* Since the act of predatory pricing is an abuse of dominant position, therefore, it is *per se* illegal in the EC.

India:

---

[193] Section 46(1AA) of the Australian Trade Practices Act, 1974.

[194] *Boral Besser Masonry Limited (now Boral Masonry Ltd) v Australian Competition and Cons,* [2003] HCA 5 (7 February 2003).

[195] Section 8(d)(iv).

[196] *Brooke Group Ltd. v. Brown and Williamson Tobacco Corp,* 509 U.S. 209 (1993).

[197] *Ibid.*

[198] *See, Compagnie Maritime Belge Transports SA v. Commission of European Communities*, [2000] EUECJ C-395/96. *See aslo, AKZO Chemie BV v Commission of the European Communities,* 1991 E.C.R. I-3359.

1.6 Under Section 4 of the Indian Competition Act, the definition of a price discriminatory conduct includes in itself "predatory pricing" for goods or services[199]. Further, unlike in other jurisdictions, the definition of "predatory pricing" has been statutorily provided within the same section as *"the sale of goods or provision of services, at a price which is below the "**cost"**, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors"*[200]. The Draft Rules of the Competition Commission define the word "cost" in the definition of "predatory pricing" as, *"cost means**… average variable cost** unless the Commission decides otherwise"*[201]. Therefore, again we come to the conclusion that predatory pricing is a *per se* illegal act in India as well.

Conclusion:

1.7 A reading of the concept of "predatory pricing" under various jurisdictions, either statutorily defined or explained by their Courts, shows that generally pricing below the "average variable cost" constitutes "predatory pricing". However, in the EU, an additional condition of "pricing below average total cost" is also considered if "it is done with the intent or planning to eliminate competition". In all countries discussed above, excepting India, predatory pricing has not been explicitly mentioned in the relevant statutes. Therefore, the Courts in these countries have wide discretion. But, the Courts have themselves laid "average variable cost" as guiding factor in all determinations of predatory pricing. The most important point to be noted is that predatory pricing is per se illegal in all jurisdictions. Though there might be exceptions to this general rule, however, it does not change the fact that barring those exceptions, predatory pricing is an illegal act *per se.* The basic provisions/premises on price discriminatory conduct or on predatory pricing under the laws in all jurisdictions discussed above construct it as an illegal conduct.

Components	Aus	SA	US	EU	India
(AVC) Average Variable Cost	Yes – [By Courts]	Yes – [By statute – also includes marginal cost	Yes – [By Courts]	Yes – [By Courts]	Yes
(ATC) Average Total Cost	No – [Courts Discretion]	No	No	Yes – [intention is a requisite]	No
Relevant Cost/Appropriate Measure of Cost – [providing the courts with discretion]	Yes – [relevant cost]	No	Yes – [price below appropriate measure of rival's cost]	No	No

[199] Section 4(2)(1)(a) of the Indian Competition Act, 2002.
[200] Explanation (b) to section 4 of the Indian Competition Act, 2002.
[201] Sub-regulation 4(4), Draft Rules, The Competition Commission (Determination of Cost of Production) Regulations, 200_, Regulations made under powers conferred by Section 64(2) (a) of the Competition Act, 2002 (No.12 of 2003).
Further, *"Average variable cost" means "total variable cost" divided by total output during the period of alleged predation,* under sub-regulation 4(3) of the Draft Regulation. Under sub-regulation 4(2) *"total variable cost" means the "total cost" referred to in sub-regulation(1) minus the fixed cost and share of fixed overheads, if any, during the period of alleged predation;*
Finally, under sub-regulation 4(1), *"Total cost" means the actual cost of production including the finance, administrative, selling and distribution overheads attributable to the product during the period of alleged predation.*

Annex VI: Definition of 'Dumping'

1.1 Most WTO Member countries define 'dumping' in a manner similar to the definition of 'dumping' as contained in the WTO Antidumping Agreement. Article 2.1 of the WTO AD Agreement defines dumping as:

> *Dumping is the introduction of a product into the commerce of another country at less than its normal value, if the export price of the product exported from one country to another is less than the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country.*[202]

Australia:

1.2 *"Dumped goods"* under Australian Customs Act, 1901 means any goods exported to Australia that the Minister has determined, under section 269TACB, to be dumped.

1.3 Section 269 TACB deals with the question that whether dumping has occurred and what are the levels of dumping. It says that when an application is made for a dumping duly notice and the export prices of goods is determined under section 269TACB and normal value in respect of like goods is established in accordance with the provisions of section 269TAC, it is the job of the minister to determine whether dumping has occurred or not by comparison of export prices with the normal value. Subsection (4) states that when minister is satisfied with the comparison prescribed under sub-section (2) that the *weighted average export prices over a period is less than the weighted average of corresponding normal values over that period, then the good exported during that period to Australia are considered to be dumped. The dumping margin in such case is the difference between those weighted averages.* Subsection (5) states that when the Minister finds out that the *export price for the investigation period is lesser than the corresponding normal value*, *the goods exported to Australia in that particular transaction are considered to be dumped. The dumping margin in such case is the difference between the export price and normal value.* Another scenario is provided under sub-section (6). If the Minister is satisfied that *export prices in respect of a particular transaction during the investigation period is less than weighted average of corresponding normal values during that period, then the goods exported to Australia in each such transaction are considered to be dumped. The dumping margin in such case is the difference between each relevant export price and weighted average of corresponding normal values.*

South Africa:

1.4 Under the International Trade Administration Act 2002 "dumping" is defined as the *introduction of goods into the commerce of the Republic or the Common Customs Area at an export price contemplated that is less than the normal value as defined in section 32 (2), of those goods."*

1.5 It is opined that such a definition of dumping is incomplete. This is based on the premise that no where the impact of material injury on domestic industry is mentioned under the International Trade Administration Act. The requirement of a causal link between the dumping and injury as laid down by the WTO's definition is also absent in this case.

United States of America:

1.6 The U.S. Anti-Dumping law is designed to counter international price discrimination, commonly referred to as "**dumping**." The "Import Administration Antidumping Manual" states that generally*, dumping occurs when a foreign firm sells merchandise in the U.S. market at a price lower than the price it charges for a comparable product sold in its domestic market.* Under certain circumstances, dumping may also be identified by comparing the foreign firm's U.S. sales price to the price it charges in other export markets or to the firm's cost of producing the merchandise, taking into account the firm's selling, general, and administrative expenses, and profit. Finally, where the producer is located in a non-market economy country (NME), a comparison is made between U.S. prices and a "surrogate" country. The difference between a company's U.S. sales price and the comparison market price or cost is called the dumping "margin" which is often expressed as a percentage of the U.S. sales price.

[202] Article 2.1 of WTO Antidumping Agreement

1.7 Dumping occurs when imported merchandise is sold in, or for export to, the United States at less than the normal value of the merchandise. The dumping margin is the amount by which the normal value exceeds the export price or constructed export price of the subject merchandise. The weighted-average dumping margin is the sum of the dumping margins divided by the sum of the export prices and constructed export prices.

European Community:

1.8 Council Regulation (EC) No 384/96 states that dumping must be distinguished from simple practices of low-price sales resulting from lower costs or greater productivity. The key criterion in this respect is not, in fact, the relationship between the price of the exported product and that on the market of the country of import, but the relationship between the price of the exported product and its normal value. Thus according to Article 1(2) of the regulation, *a product is considered to be dumped if its export price to the Community is less than the comparable price for a like product established in the ordinary course of trade within the exporting country.*

1.9 Article 1 of the regulation states that antidumping duty is laid down on any dumped product whose free circulation in the community causes injury. Article 2 of the regulation deals with determination of dumping. The factors that are considred for this purpose are *normal value, export price, comparison and dumping margin.*

India:

1.10 The definition of dumping under Indian Law is covered under Regulation 10 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995.

1.11 In Indian scenario *an article is considered to be dumped if it is exported from a country or territory to India at a price less than its normal value.* It is the job of the designated authority to determine normal value, export price and margin of dumping while referring to the principles laid down in Annexure 1 to the Customs Tariff Rules, 1995. Annexure 1 says that while determining the margin of dumping, a fair comparison shall be made by the designated authority between the export price and the normal value. This comparison is to be made at the same level of trade, normally at the ex-factory level, and in respect of sales that are made at the same time. *In the cases where export prices is a constructed one, the comparison shall be made only after establishing the normal value at equivalent level of trade.* Margin dumping during the investigation phase is established on the *basis of comparison of a weighted average normal value and export prices on a transaction-to-transaction basis.*

Conclusion:

1.12 The definition of 'dumping' under various jurisdictions shows that they all contain the same elements and reflect the definition as contained in the WTO Anti-Dumping Agreement. With minor digressions from the standard definition provided by WTO, the definition under varied jurisdictions are based on the premise provided by WTO. The table hereunder provides various constituent element of the definition of dumping as laid down under antidumping laws across nations.

Components	US	AUS	SA	EU	India
Introduction of good into the commerce of another country	Yes	Yes	Yes	Yes	Yes
At export price of product less than the comparable price	Yes	Yes	Yes	Yes	Yes
In ordinary course of trade	Yes	Yes	Yes	Yes	Yes

For like product when destined for consumption in exporting country	Yes	Yes	Yes	Yes	Yes

Annex VII: Definition of 'Unfair' or Discriminatory Pricing'

1.1 The definition of and understanding on 'unfair' and 'discriminatory pricing' under the subject jurisdictions is provided below:

Australia:

1.2 Under the Australian Trade Practices Act of 1974, an undertaking in a dominant position has been termed as a corporation having a "substantial degree of power", which has now been subsequently replaced with "substantial share of the market"[203] by the 2007 Amendment to the Act. The Act provides that, *"A corporation that has a substantial share of a market must not supply, or offer to supply, goods or services for a sustained period at a price that is less than the relevant cost to the corporation of supplying such goods or services*"[204]. It is seen that there is no direct or general clause regarding price discrimination.

South Africa:

1.3 The South African Competition Act, prohibits price discrimination and mentions the conditions, fulfillment of which would make the conduct of the firm fall under the prohibitory clause[205]. The Act states that, *"An action by a dominant firm, as the seller of goods or services is prohibited price discrimination, if … it involves discriminating between those purchasers in terms of – the price charged for the goods or services"*[206]. As in Australia, the South African statute as well does not have a general prohibitory clause against price discrimination. Instead, it mentions the conduct which shall amount to price discrimination. Section 9(1)(b) and (c) prohibits price discrimination for "like goods" and "equivalent transactions".

United States of America:

1.4 However, the US law does contain a general clause prohibiting price discrimination as a conduct. The Clayton Act as amended by the Robinson-Patman Act, 1936, read as, *"It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality … and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them"*[207]. Unlike in the two jurisdictions stated above, the US law provides, firstly, a further condition in addition to the general prohibitory clause stating the provision applies to "goods of like grade and quality" like in South Africa, and secondly, it conjoins the "effect" of a price discriminatory conduct along with the said provision.

European Community:

1.5 Similarly, the Treaty of the European Community categorically mentions that an undertaking could abuse of dominant position in the market by, *"…directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions…"*[208]. The words used here are "*unfair* purchase or selling prices".

India:

1.6 Under the *Indian Competition Act*, a corporation is said to be committing price discriminatory conduct if it, *"directly or indirectly, imposes unfair or discriminatory prices, either by, i) condition in purchase or sale of goods or service; or, ii) price in purchase or sale (including predatory price) of goods or service"*[209]. It refers to the imposing of "unfair or discriminatory prices" either on sale or purchase.

Conclusion:

[203] By the 2007 Amendment Act to section 46 of the Australian Trade Practices Act, 1974.
[204] Section 46(1AA) of the Act.
[205] Section 9 of the South African Competition Act, 1999.
[206] Section 9(1)(c)(i) of the Act.
[207] Section 2(a) of the US Clayton Act, 1914. The provisos to the section lay down the exceptions to this rule.
[208] Article 82 (a) of the Treaty of the European Community
[209] Section 4(2)(1)(a) of the Indian Competition Act, 2002.

1.7 Thus, we see that the laws in various jurisdictions have differently dealt with the concept of "unfair and discriminatory" pricing. In fact, only in India, as compared to the other jurisdictions above, the provision includes in itself both, "unfair and discriminatory" price and "direct or indirect" conduct. It is also seen that legislations in certain jurisdictions provide a general prohibition over price discriminatory conduct, while others deal with it under the list of prohibited conducts. Moreover, the US law differs from others as it mentions the effects in relation to such a conduct and it specifically mentions that the provision applies only to goods of "like grade and quality" like in South Africa.

Components	**India**	**EU**	**SA**	**US**	**AUS**
Direct or indirect imposition	Yes	Yes	No	Yes	No
Of Unfair	Yes	Yes	No	No	No
Or Discriminatory Price	Yes	Yes	Yes	Yes	No
On goods of like grade and quality	No	No	Yes	Yes	No
Having anti-competitive effects	No – [included in section 4(2)(b), (c) and (d) as separate criteria for abuse of dominant position].	No [Talks about prejudice to consumers]	Yes	Yes	Yes

Annex VIII: Test for 'Likeness'

1.1 Most WTO Member countries define 'like product' in a manner similar to the definition of 'dumping' as contained under article 2 of the WTO Antidumping Agreement. Article 1(4) of the WTO Antidumping Agreement defines 'like products' as:

> *"Like product" ("produit similaire") shall be interpreted to mean a product which is identical, i.e. alike in all respects to the product under consideration, or in the absence of such a product, another product which, although not alike in all respects, has characteristics closely resembling those of the product under consideration.*

Australia:

1.2 Under the Customs Act 1901, 'like goods' means goods that are identical in all respects to the goods under consideration or that, although not alike in all respects to the goods under consideration, have characteristics closely resembling those of the goods under consideration.

South Africa:

1.3 Section 771(10) of the International Trade Administration Act 2002 defines the domestic like product as ``*a product which is like, or in the absence of like, most similar in characteristics and uses with, the article subject to an investigation under this title*." Thus, the reference point from which the domestic like product analysis begins is ``the article subject to an investigation," i.e., the class or kind of merchandise to be investigated, which normally will be the scope as defined in the petition.

United States of America:

1.4 The **similar foreign like product** is merchandise that is produced by the same manufacturer in the same country as the subject merchandise, and which, in order of preference, is either (1) similar to the subject merchandise in component materials, use, and value, or (2) similar in use to, and reasonably comparable to, the subject merchandise. (Section 771 (16) of the Tariff Act of 1930). See also Identical Merchandise and Foreign Like Product.

Identical Merchandise

1.5 The Department prefers to compare U.S. sales to sales of foreign sales of identical merchandise. Identical merchandise is merchandise that is produced by the same manufacturer in the same country as the subject merchandise, and which the Department determines is identical or virtually identical in physical characteristics with the subject merchandise, as imported into the United States. (See also Similar Merchandise and Foreign Like Product.)

Similar Merchandise

1.6 For market economy cases, in deciding which sales of the foreign like product to compare to sales of the subject merchandise, the Department first seeks to compare sales of identical merchandise. If there are no sales of the identical foreign like product, the Department will compare sales of the foreign like product similar to the subject merchandise.

European Community:

1.7 The European Stand on Like Products is based on the same line as laid down by Article 1(4) of the WTO Antidumping Agreement. In a *proposal for council regulation terminating the partial interim review of the anti-dumping measures applicable to imports of certain tube or pipe fittings, of iron or steel, originating, inter alia, in Thailand* prepared by Commission of European Communities, it is laid down that like products are to be considered within the meaning of Article 1(4) of the basic Regulation.

1.8 Under Article 1(4) of the WTO Antidumping Agreement, like product is a product which is identical or alike in all respects to the product under consideration or in absence of such is a product which closely resembles the characteristics of the product in consideration.

India:

1.9 Under Regulation 2(d) of Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules. 1995 a *like article* is defined as *an article which is identical or alike in all respects to the article under investigation for being dumped in India or in the absence of such an article, another article which although not alike in all respects, has characteristics closely resembling those of the articles under investigation.*

Conclusion:

1.10 The definition of 'like product' under various jurisdictions shows that they all contain the same elements and reflect the definition as contained in the WTO Anti-Dumping Agreement. The table hereunder mentions the various points that need to be considered while determining whether a particular product is a like product or not.

Components	**US**	**AUS**	**SA**	**EU**	**India**
Alike in all respects to the product under consideration	Yes	Yes	Yes	Yes	Yes
If not alike in all respects, has characteristics closely resembling those of the product under consideration.	Yes	Yes	Yes	Yes	Yes
Article/Product subject to an investigation	Yes	Yes	Yes	Yes	Yes

Annex IX: Definition of 'Normal Value'

1.1 Most WTO Member countries define 'normal value' in a manner similar to the definition of 'normal value' as contained in the WTO Antidumping Agreement.

Australia:

1.2 The Australian Customs Act of 1901, defines normal value as *"the price paid or payable for like goods sold in the ordinary course of trade for home consumption in the country of export in sales that are arms length transactions by the exporter or, if like goods are not so sold by the exporter, by other sellers of like goods"*[210]. This definition does not include the words "comparable price", however, subsection (9) of the section 269 TAC of Customs Act of 1901 speaks about comparable price in terms of export price in relation to "adjustments" to be made if any.

South Africa:

1.3 The definition of "normal value" in South Africa, as contained in section 32(2) (b) of the International Trade Administration Act, 2002 (ITA Act), includes all standard elements as in the WTO definition. It reads as, *"normal value in respect of any goods, means – the comparable price paid or payable in the ordinary course of trade for like goods intended for consumption in the exporting country or country of origin".*

United States of America:

1.4 The US antidumping law[211] defines 'normal value' as, "*the price at which the foreign like product is first sold (or, in the absence of a sale, offered for sale) for consumption in the exporting country, in the usual commercial quantities and in the ordinary course of trade and, to the extent practicable, at the same level of trade as the export price or constructed export price"*. However, as can be seen, this definition does not talk about "comparable price as such". Nonetheless, subsection (7A) of the Tariff Act, 1930, on 'additional adjustments', talks about price comparability. Actually, the definition in section 773, defines each element separately.

European Community:

1.5 The EC definition on normal value states that it "*shall normally be based on the prices paid or payable, in the ordinary course of trade, by independent customers in the exporting country. However, where the exporter in the exporting country does not produce or does not sell the like product, the normal value may be established on the basis of prices of other sellers or producers*[212]*".* Like in the case of US and Australia, the AD law in EC does not mention 'comparable price' in the definition of normal value and rather deals with it in separate section.

India:

1.6 The definition of normal value under Indian law under the Customs Tariff Act is almost a mirror image of the WTO definition, and reads, *"normal value, in relation to an article, means – the comparable price, in the ordinary course of trade, for the like article when meant for consumption in the exporting country or territory as determined in accordance with the rules made under sub-section (6).*[213]

Conclusion:

1.7 A closer look at the definition of 'normal value' under various jurisdictions shows that they all contain the same elements and reflect the definition as contained in the WTO AD Agreement. However, it is to be noted that even though there might be slight variances in the language, the essential components as contained in the definition under the WTO AD Agreement do get reflected under all the laws of all the countries under study. For instance, the EU and the US definitions seem to deviate from the WTO definition, however, a complete reading of the regulations or the statute shows that they reflect all the

[210] Section 269TAC(1), Customs Act, 1901
[211] 773(1A) and (1B), Tariff Act, 1930
[212] Article 2 A (1), EU [COUNCIL REGULATION (EC) No 384/96 of 22 December 1995
[213] Section 9A, Customs Tariff Act, 1975

constituent elements. The table below provides a summary of various constituent elements in the definition of normal value as reflected in the antidumping laws across various jurisdictions.

Components	**US**	**AUS**	**SA**	**EU**	**India**
Comparable Price	Yes	Yes	Yes	Yes	Yes
In the ordinary course of trade	Yes	Yes	Yes	Yes	Yes
For Like Products	Yes	Yes	Yes	Yes	Yes
Destined for consumption in exporting country	Yes	Yes	Yes	Yes	Yes

Annex X: Definition of 'Injury'

1.1 Under the WTO Anti-Dumping Agreement, *"a determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the **volume** of the dumped imports and the **effect** of the dumped imports on prices in the domestic market for like products, and (b) the consequent **impact** of these imports on domestic producers of such products"*[214]. Any determination of "injury" within this WTO text includes "material injury to a domestic industry", "threat of material injury to a domestic industry" or "material retardation of the establishment of such an industry" [215]. The various considerations to be had and the requirements to be followed in the determination/evaluation of these three kinds of "injuries" have been laid down in the provision.

Australia:

1.2 In contrast the Australian law is framed in a substantially different manner. In determining, in relation to dumping duties, whether "material injury" to an Australian industry has been or is being caused or is "threatened" or would or might have been caused, or whether the establishment of an Australian industry has been "materially hindered", because of any circumstances in relation to the exportation of goods to Australia from the country of export, the Minister must, have regard to certain factors[216]. These factors, as mentioned within the provision do not separately deal with the different types of injuries.

1.3 The first factor marked under the Australian law is the *"the size of the dumping margin, or of each of the dumping margins, worked out in respect of goods of that kind that have been exported to Australia and dumped"*[217].

1.4 Regarding the criteria of the "volume" of the goods dumped, section 269TAE(1)(a), (b), and (c) together provide that the Minister must have regard to, *"the quantity of goods of that kind that, during a particular period, have been or are likely to be exported to Australia from the country of export; and (b) any increase or likely increase, during a particular period, in the quantity of goods of that kind exported to Australia from the country of export; and (c) any change or likely change, during a particular period, in the proportion that:(i) the quantity of goods of that kind exported to Australia from the country of export and sold or consumed in Australia; or (ii) the quantity of goods of that kind, or like goods, produced or manufactured in the Australian industry and sold or consumed in Australia; bears to the quantity of goods of that kind, or like goods, sold or consumed in Australia"*.

1.5 This means that the Minister must not only have regard to the quantity of goods dumped/exported or likely to be dumped/exported into Australia, but also consider the increase/likely increase and the change/likely change in the quantity of the goods exported into Australia and subsequently sold and consumed in Australia. The "quantity" referred to above must not be a "negligible quantity" within the meaning of section 269TDA(4), i.e. less than *3 percent* of the total Australian import volume.

1.6 In addition to the above conditions, the provision also deals with the "effect" on prices within the domestic industry of like goods. The provision says that, firstly, the export price paid or likely to be paid shall also be a factor for consideration[218], and secondly, the difference in price between the like good produced or manufactured in Australia and the like-good exported into Australia[219] shall determine the difference in prices or whether "price undercutting" is occurring or not. Such effect or likely effect shall be investigated only if *"the dumping margin worked out under section 269TACB for the exporter for each of the exportations is at least 2% of the export price or weighted average of export prices used to establish that dumping margin"*[220], and the quantity under investigation should be above the "negligible quantity" criteria as mentioned above. Though not expressly provided, but the determination on "volume" and "price" is done to investigate whether there has been a suppression/ depression of prices in the Australian Industry.

---

[214] Article 3.1 of the WTO Ant-Dumping Agreement, Agreement on Implementation of Article VI of the GATT, 1994.
[215] Article 3, *ibid, fn* 9.
[216] Section 269TAE(1) of the Australian Customs Act, 1901.
[217] Section 269TAE(1)(aa) of the Act.
[218] Section 269TAE(1)(d).
[219] Section 269TAE(1)(e).
[220] Section 269TAE(2C)(c).

1.7 The "impact" of the difference in price needs to be studied in light of

a. *"effect on the price paid for goods of that kind, or like goods, produced or manufactured in the Australian industry and sold in Australia"*[221] as compared to the price of the goods exported into Australia, and;

b. *"on the relevant economic factors in relation to the Australian industry"*[222]. Further, *"it is appropriate to consider the cumulative effect of those exportations, having regard to,*

(i) the conditions of competition between those goods; and

(ii) the conditions of competition between those goods and like goods that are domestically produced"[223].

Any evaluation of the impact as discussed above shall be done having regard and in reference to – "the quantity of goods of that kind, or like goods, produced or manufactured in the industry; and

c. the degree of utilization of the capacity of the industry to produce or manufacture goods of that kind, or like goods; and

d. the quantity of goods of that kind, or like goods, produced or manufactured in the industry:

(i) for which there are sales or forward orders; or

(ii) which are held as stocks; and

e. the value of sales of, or forward orders for, goods of that kind, or like goods, produced or manufactured in the industry; and

f. the level of profits earned in the industry, that are attributable to the production or manufacture of goods of that kind, or like goods; and

g. the level of return on investment in the industry; and

h. cash flow in the industry; and

i. the number of persons employed, and the level of wages paid to persons employed, in the industry in relation to the production or manufacture of goods of that kind, or like goods; and

j. the share of the market in Australia for goods of that kind, or like goods, that is held by goods of that kind, or like goods, produced or manufactured in the industry; and

k. the ability of persons engaged in the industry, to raise capital in relation to the production or manufacture of goods of that kind, or like goods; and

l. investment in the industry"[224].

1.8 In making a determination in relation to the exportation of goods to Australia, the Minister must consider whether any injury to an industry, or hindrance to the establishment of an industry, is being caused or threatened by a factor other than the exportation of those goods such as: *"*

a. the volume and prices of imported like goods that are not dumped; or

b. the volume and prices of importations of like goods that are not subsidised; or

c. contractions in demand or changes in patterns of consumption; or

[221] Section 269TAE(1)(f).
[222] Section 269TAE(1)(g)
[223] Section 269TAE(2C)(e).
[224] Section 269TAE(3).

d. restrictive trade practices of, and competition between, foreign and Australian producers of like goods; or

e. developments in technology; or (f) the export performance and productivity of the Australian industry; and any such injury or hindrance must not be attributed to the exportation of those goods"[225].

1.9 Thus, we see that under the Australian law, neither have the different types of injuries been separately dealt with, nor is the "causal-link" between dumping and material injury. Instead, all these factors have been conjointly meshed into a single provision where the conditions for each criteria of determination for each type of injury have been discussed together. The Australian law deals with all the factors as mentioned under Article 3 of the WTO AD Agreement, however, the manner of the dealing is quite distinct.

South Africa:

1.10 The South African Anti-Dumping Regulations lay down the rules regarding determination of injury. However, unlike in Australia, the South African AD Rules deal with "material injury", "threat of material injury", and "material retardation" separately.

> *"In determining material injury to SACU industry the Commission shall consider whether there has been a significant depression and/or suppression of SACU industry's prices"*[226]. Furthermore, *"in its determination of material injury the Commission shall further consider whether there have been significant changes in the domestic performance of the SACU industry in respect of the following injury factors – a) sales volume; b) profit and loss; c) output; d) market share; e) productivity; f) return on investments; g) capacity utilization; h) cash flow; i) inventories; j) employment; k) wages; l) growth; m) ability to raise capital or investments; and, n) any other relevant factors placed before the Commission"*[227].

1.11 The requirement for claiming "threat of material injury" states that *"it should be based on facts and not merely allegation, conjecture, or remote possibility. The change in the circumstances which would create a situation in which dumping would cause material injury must be clearly foreseeable and imminent"*[228]. Other relevant factors which need to considered in determining whether a threat of material injury lies or not, include *"a) significant rate of increase in dumped imports into domestic market of SACU; b) sufficiently freely available, or a imminent substantial increase in the capacity of the exporter; c) availability of other export markets to absorb additional export volumes; d) whether products are entering or will be entering the SACU at prices that will have a significant depressing or suppressing effect on SACU prices; and, e) the exporter's inventories of the product under investigation"*[229].

1.12 The conditions regarding "material retardation" mandate that investigation under this head would be done only if *"the industry or the proposed industry has supplied the Commission with a comprehensive business plan indicating the establishment of such industry in absence of dumping"*[230].

1.13 In order to prove that the alleged dumping is having injurious effects on the South African domestic industry (SACU industry), certain factors need to be shown to the Commission. These include, *"the change in the volume of dumped imports, whether absolute or relative to the production or consumption in the SACU market; the price-under-cutting experienced by the SACU industry vis-a-vis the imported products;*

United States of America:

1.14 There is no express definition of 'injury' under the United States Import Administration Antidumping Manual. However the determination of injury is covered under Article 3 of the Antidumping Agreement. A definition of the term 'material injury' is provided. It says that "*harm which is not*

[225] Section 269TAE(2A).
[226] Section 13.1 of the South African Anti Dumping Regulations, 2003
[227] Section 13.2.
[228] Section 14.1.
[229] Section 14.2.
[230] Section 15.1.

inconsequential, immaterial, or unimportant" would constitute a material injury. The areas of inquiry that need to be considered for determination of material injury are threefold. Firstly, the volume of imports and any increase in their volume, either in absolute terms or relative to domestic production are considered. Secondly, the effect of imports on U.S prices, in particular price underselling or price suppression is considered. Thirdly, the impact of imports on domestic industry in terms of all relevant economic factors is taken into account. Several factors are assessed to determine the actual impact of unfair imports on domestic industry. These factors include *actual and potential decline in output, sales, market share, profits, productivity, returns on investment and capacity utilization*. The ITC also considers *the negative effect of imports on cash flow, inventories, employment, wages, growth, investment and the ability to raise capital.* The International Trade Commission (ITC) is also charged with the role of considering the margin of Dumping while assessing the actual and potential negative effects on existing development.

1.15 The standard for material injury is based on the premise that *there is a reasonable indication that the domestic industry is injured by the goods sold at a price less than fair value*. The ITC shall first determine whether a U.S Industry is materially injured or threatened with any possibility of material injury. It is to be ascertained whether the establishment of the industry is materially retarded. It is also to be determined that whether there is any causal link between injury and imports that are sold at a price less than the fair value. A reasonable indication of material injury is construed in cases where the facts indicate that any industry in United States is possibly suffering from material injury. It has been held by Courts that 'resonable indication' standard is more than a mere possibility. In instances "*where the information available to ITC is inconclusive that a negative determination is warranted, the ITC can continue its investigation and make a final material injury determination*."

European Community:

1.16 Article 3 of Regulation 394/96 deals with 'Determination of Injury'. Injury under the EC laws means a material injury to the community industry, threat of a material injury to the community industry or material retardation of establishment of such industry. These factors are to be assessed in relation to the provisions of the above stated article.

1.17 Determination of injury shall be on a basis of positive evidence and shall comprise of an objective examination of the volume of dumped imports and their effect on prices in community market on like products. The consequent impact of those imports on the community industry is another factor that needs to be looked into. The significant increase in volume of dumped imports, whether in absolute or relative terms of production is another factor that demands observation. The effect of the dumping has to be seen in relation to price undercutting, depression of prices and prevention of price increase which would have occurred to a significant degree.

1.18 The determination of threat of material injury shall be based on facts and not on allegation, conjecture or remote possibility. The situations in which dumping would cause injury shall be foreseeable and imminent. When determining threat of material injury reliance shall be placed on significant increase of dumped imports into community market, their capability in influencing price depression or price rise by any significant degree, any imminent and substantial increase in freely disposable capacity of the exporter indicating the likelihood of the increase in dumped products to the community and inventories of the product.

India:

1.19 Regulation 11 of the Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995 lays down that injury comprises of material injury, threat of material injury, material retardation and a causal link between dumped products and injury. The relevant facts that are taken into account are volume of dumped imports and their effect on price in the domestic market and domestic producers. In certain cases, the designated authority may determine injury even when a substantial portion of domestic industry is not injured. Such would happen when there is a concentration of dumped imports into the isolated markets and such is causing injury to almost all production within such market.

1.20 Annexure-II to 1995 Rules deal with principles for determination of injury. Clause (i) says that determination of injury would require an objective examination of the volume of dumped imports and their

consequent impact on prices in domestic market and on producers in the market. Any significant increase in the dumped imports, either in absolute or relative terms to production or consumption needs to be considered. The designated authority is to determine whether there is an instance of price undercutting or whether such imports intend to depress prices to a certain degree or prevent price increase which could have happened in the absence of such dumping in first place.

1.21 There are 15 economic indicators which form the threshold for determination of injury in India. In almost all of these 15 cases, *price and profitability have shown downward movement while volume and share of imports have gone up.* These 15 indicators comprise of *Price, Profitability, Volume of Sales, Market Shares, capacity utilization, return on investment, employment, loss of contract productivity, growth of domestic industry, return on capital employed, wage trade, share of imports and closing stock.* In most cases of injury assessment factors like employment, growth of domestic industry, return to investment, productivity and wage rates are not considered.

1.22 The injury can be analysed in terms of volume effect and price effect of dumped exports. The 15 parameters mentioned hereinbefore are of such nature where they have a bearing upon the state of *industry as the magnitude of dumping, and the decline in sales, selling price, profits, market share, production, utilization of capacity etc.*

Conclusion:

1.23 On a close observation, it becomes clear that the definition of 'injury' under various jurisdictions is carved out along the same line. These definitions are in consonance with the WTO Antidumping Agreement. With slight variance, the factors determining the injury are based on similar parameters under varied jurisdictions. For instance, the EU parameter for definition of injury is not clearly laid down. However it reiterates the threshold that is laid down by WTO and followed by different countries with minor digressions. The two tables hereunder deal with the definition of injury and determining grounds for such injury under different regimes.

Table I: Definition of Injury

Components	Australia	South Africa	USA	European Commission	India
Material Injury	Yes	Yes	Yes	Yes	Yes
Threat of Material Injury	Yes	Yes	Yes	Yes	Yes
Material Retardation/Hindrance	Yes	Yes	Yes	Yes	Yes
Domestic Industry Injured	Yes	Yes	Yes	Yes	Yes
Causal Link between Dumping and Injury Caused	Yes	Yes	Yes	Yes	Yes

Table: II Factors Considered for Determination of Injury

Components	Australia	South Africa	USA	European Commission	India
Effect on Price	Yes	Yes	Yes	Yes	Yes

Decline in Output	Yes	Yes	Yes	Yes	Yes
Volume of Sales	Yes	Yes	Yes	Yes	Yes
Market Shares	Yes	Yes	Yes	Yes	Yes
Profits	Yes	Yes	Yes	Yes	Yes
Productivity	Yes	Yes	Yes	Yes	Yes
Returns on Investment	Yes	Yes	Yes	Yes	Yes
Capacity Utilization	Yes	Yes	Yes	Yes	Yes

Annex XI: 'Public Interest' requirement in various Antidumping Legislations:

1.1 Article 21 of the E.U. antidumping legislation states the famous "Community interest" clause. It tries to ensure that antidumping measures are in the broad interest of the Community where a decision is made based on "an appreciation of all the various interests taken as a whole, including the interests of the domestic industry and users and consumers."[231]

1.2 Canada introduced the public interest clause into the Special Import Measures Act (SIMA) of 1984.[232] It is the only national law that has a procedure for inquiry into the public interest before assessing antidumping duties. It shows between 1984 and 2000, 11 inquires on public interest were initiated out of 315 antidumping initiations, and 4 of the 11 resulted in antidumping duty reduction.[233]

1.3 Singapore law has a unique feature. The Antidumping Legislation requires consideration of the "public interest" factor by the Minister of Trade and Industry, the antidumping authority, before an investigation is initiated.[234]

1.4 Lithuania introduced its antidumping law in 1998 and placed its authority in the same agency responsible for consumer protection.

1.5 In a communication to the WTO in 1999, Mexico presents "some practical examples of the way in which certain basic concepts of competition policies could be used to improve the antidumping rules."[235]

1.6 China has incorporated public interest into its Antidumping Regulation of 2001.[236] Article 33 authorizes the MOC to terminate an antidumping process as a result of an acceptable price undertaking, which is in the "public interest and Article 37 states "the imposition of antidumping duty should be in accordance with public interest."[237] Like most countries, no procedures on examining public interest are elaborated in the Chinese legislation.

[231] Article 21, Council Regulation 3283/94.
[232] R.S.C. 1985, c. S-15 .
[233] The cases were *grain corn* (1987), *re beer* (1991), *iodinated contrast media* (2000) and *prepared baby food* (2000).
[234] L Hsu, "The New Singapore Law on Antidumping and Countervailing Duties", *Journal of World Trade,* v 32, no 1, 1998, pp 121-145.
[235] WT/WGTCP/W136, 15/07/1999.
[236] Antidumping Regulations (hereinafter ADR 2001), State Council Decree No. 328, 26/11/2001.
[237] Article 33, 37, ADR 2001.

Annex XII: Definition of 'Domestic Industry'

WTO Antidumping Agreement:

1.1 Under the WTO Anti Dumping Agreement, the term "domestic industry has been defined as referring to, *"…the domestic producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion of the total domestic production of those products, except that:*

(i) *when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term "domestic industry" may be interpreted as referring to the rest of the producers;*

(ii) *in exceptional circumstances the territory of a Member may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if:*

a. the producers within such market sell all or almost all of their production of the product in question in that market, and

b. the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the territory. In such circumstances, injury may be found to exist even where a major portion of the total domestic industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such market"[238].

Exception (ii) in the provision above allows for consideration of a "regional industry" or an industry in a specific region of a jurisdiction to be considered as a "domestic industry" within the meaning of this provision subject to the fulfillment of the conditions (a) and (b) above.

(iii) *An application for investigation of dumping can be made by the constituents of this "domestic industry" acting on its behalf. However, this right is again subject to the condition that, "the application shall be considered 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 50 per cent of the total production of the like product produced by that portion of the domestic industry expressing either support for or opposition to the application. However, no investigation shall be initiated when domestic producers expressly supporting the application account for less than 25 per cent of total production of the like product produced by the domestic industry"*[239].

Australia:

1.2 The Australian anti-dumping laws term a "domestic industry" as an "Australian Industry" which *"comprises all producers of like goods wholly or partly manufactured in Australia*[240]*. The only exception occurs where the like goods are considered to be close processed agricultural products*[241]*. In which case the Australian industry also includes the producers of the raw agricultural goods"*[242]. Evidence is required that at least *one substantial process in the manufacture of the goods is carried out in Australia.* Interestingly, there are no provisions in the Customs Act to exclude an Australian producer/manufacturer that is related to an exporter, or that is itself an importer of allegedly dumped goods from the definition of Australian industry. Further, there are no provisions regarding "regional industries" as well.

[238] Article 4.1 of the WTO Ant-Dumping Agreement, Agreement on Implementation of Article VI of the GATT, 1994.
[239] Article 5.4 of the Agreement.
[240] Section 269T(4) of the Australian Customs Act, 1901.
[241] Section 269(4A) of the Act.
[242] *Anti Dumping Booklet,* Australia's Anti-Dumping and Countervailing Administration, Australian Customs Service, Government of Australia, http://www.customs.gov.au/webdata/resources/files/AntiDumpingBooklet.pdf.

1.3 The Australian requirement upon "standing" for filing of an application requires, *"…that persons (including the applicant) who produce or manufacture like goods in Australia and who support the application: (a) account for more than 50% of the total production or manufacture of like goods produced or manufactured by that portion of the Australian industry that has expressed either support for, or opposition to, the application; and (b) account for not less than 25% of the total production or manufacture of like goods in Australia[243]",* can file an application for an investigation of dumping.

South Africa:

1.4 Under the South African ITA Act, domestic industry, or "SACU industry" is said to mean, *"…the domestic producer in SACU as a whole of like products or those of those whole collective output of the products constitutes a major proportion of the total domestic production of those outputs"[244].* The exceptions to this general definition have been provided further in the statute. They read as, *"where a SACU producer is – a) related to an importer, exporter or foreign producer; or, b) itself an importer of goods under investigation, then the term SACU industry may be interpreted as referring to rest of the producers"[245].* The South African laws do not deal with "regional industries" as compared to the WTO definition.

1.5 The requisite condition for standing for filing an investigation application reads as, *"An application shall be regarded as brought by or on behalf of the SACU industry if – (a) at least 25 percent of the SACU producers by domestic production volume support the application; and, (b) of those producers who express an opinion on the application, at least 50 percent by domestic production volume support the application".*

United States of America:

1.6 According to the US Tariff Act "industry", *"means the producers as a whole of a domestic like product, or those producers whose collective output of a domestic like product constitutes a major proportion of the total domestic production of the product"[246].* The exception, as envisaged in the WTO AD Agreement has also been supplied in this statute. However, unlike in the WTO text and in other jurisdictions, the provision has been negatively worded as, *"If a producer of a domestic like product and an exporter or importer of the subject merchandise are related parties, or if a producer of the domestic like product is also an importer of the subject merchandise, the producer may, in appropriate circumstances, be excluded from the industry"[247].*

1.7 The Act also defines "regional industries" in relation to domestic industries as well. It reads as, *"In appropriate circumstances, the United States, for a particular product market, may be divided into 2 or more markets and the producers within each market may be treated as if they were a separate industry if,(i) the producers within such market sell all or almost all of their production of the domestic like product in question in that market, and (ii) the demand in that market is not supplied, to any substantial degree, by producers of the product in question located elsewhere in the United States"[248].* This provision is extremely similar to the WTO definition in the Anti Dumping Agreement.

1.8 Guidelines for determination of industry support for consideration of application for investigation of dumping is laid down in the Act as, *"(i) the domestic producers or workers who support the petition account for at least 25 percent of the total production of the domestic like product, and (ii) the domestic producers or workers who support the petition account for more than 50 percent of the production of the domestic like product produced by that portion of the industry expressing support for or opposition to the petition"[249].*

---

[243] Section 269TB(6)(a) of the Australian Customs Act, 1901.

[244] Section 1 of the South African Anti Dumping Regulations, 2003, (definitions clause) under the South African International Trade Administration Act, 2002.

[245] Section 7.2 of the Regulations.

[246] Section 771(4)(A) of the US Tariff Act, 1930 as amended.

[247] Section 771(4)(B)(i) of the Act.

[248] Section 771(4)(C) of the Act.

[249] Section 702(c)(4)(A) of the Act.

European Community:

1.9 The EC Council Regulation on Anti-Dumping, defines the concept of "Community Industry" as, *"For the purposes of this Regulation, the term 'Community Industry' shall be interpreted as referring to the Community producers as a whole of the like products or to those of them whose collective output of the products constitutes a major proportion, as defined in Article 5 (4), of the total Community production of those products, except that:*

a. when producers are related to the exporters or importers or are themselves importers of the allegedly dumped product, the term 'Community industry' may be interpreted as referring to the rest of the producers;

b. in exceptional circumstances the territory of the Community may, for the production in question, be divided into two or more competitive markets and the producers within each market may be regarded as a separate industry if:

(i) the producers within such a market sell all or almost all of their production of the product in question in that market; and

(ii) the demand in that market is not to any substantial degree supplied by producers of the product in question located elsewhere in the Community. In such circumstances, injury may be found to exist even where a major portion of the total Community industry is not injured, provided there is a concentration of dumped imports into such an isolated market and provided further that the dumped imports are causing injury to the producers of all or almost all of the production within such a market"[250].

1.10 This definition is in all ways a reproduction of the WTO definition and includes in it the exception of "related parties" and the concept of "regional industries".

1.11 The regulation on the requisite "standing" regarding the validity of an application on anti-dumping mentions that, *"the complaint shall be considered to have been made by or on behalf of the Community industry if it is supported by those Community producers whose collective output constitutes more than 50 percent of the total production of the like product produced by that portion of the Community industry expressing either support for or opposition to the complaint. However, no investigation shall be initiated when Community producers expressly supporting the complaint account for less than 25 percent of total production of the like product produced by the Community industry"*[251].

India:

1.12 The definition of "domestic industry" as supplied by the Indian Customs and Tariff Act means, *"means the domestic producers as a whole engaged in the manufacture of the like articles and any activity connected therewith or those whose collective output of the said article constitutes a major proportion of the total domestic production of that article, except when such producers are related to the exporters or importers of the alleged dumped article or are themselves importers thereof in which case such producers may be deemed not to form part of domestic industry"*[252].

1.13 The Rule further provides that, *"in exceptional circumstances referred to in sub-rule (3) of Rule 11, the domestic industry in relation to the article in question shall be deemed to comprise two or more competitive markets and the producers within each of such market a separate industry, if - (i) the producers within such a market sell all or almost all of their production of the article in question in that market; and (ii) the demand in the market is not in any substantial degree supplied by producers of the said article located elsewhere in the territory"*[253]. The exceptional circumstances as referred in sub-rule (3) of Rule 11 are, *"(i) there is a concentration of dumped imports into an isolated market, and (ii) the*

[250] Article 4 of the EC Regulation on Antidumping, Council Regulation (EC)No 384/96, 22 December 1995.
[251] Article 5(4) of the Regulations.
[252] Rule 2(b) of the Indian Anti-Dumping Rules, Customs Tariff (Identification, Assessment and Collection of Antidumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995. See also, section 8B(6)(b) of the Indian Customs Tariff Act, 1975.
[253] Proviso to Rule 2(b).

dumped articles are causing injury to the producers of all or almost all of the production within such market".

1.14 As regards the requirement of standing, the Rules provide that, *"… the application shall be deemed to have been made by or on behalf of the domestic industry, if it is supported by those domestic producers whose collective output constitute more than fifty per cent 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"*[254]. The same provision also provides that, *"… no investigation shall be initiated if domestic producers expressly supporting the application account for less than twenty five per cent of the total production of the like article by the domestic industry".*

Conclusion:

1.15 In sum, it can be said that the definition of "domestic industry" either in the WTO Anti-Dumping Agreement or in the various jurisdictions discussed above, the primary factor is that the producers within this category must be "domestic producers", i.e. producers within the territory and jurisdiction of the state. However, this factor is further qualified by the requirement that they must be producing "like goods" in comparison to the alleged dumped goods. Further, these producers together must together comprise the major portion of the total output in the market. These basic conditions are present in the laws of all jurisdictions discussed above.

1.16 While considering the other factors, it is interesting to note that all countries, excluding Australia, provide an exception regarding "related parties", whereas such a provision is absent in Australia. Similarly, the South African and the Australian definitions do not mention anything about "regional industries". The qualifications for filing an application for dumping investigations on or behalf of the domestic industry is more or less same in content. All countries require that producers constituting no less than 50 percent of the total output of production of the like good either support or oppose the application. However, there is no possibility of investigation if producers with less than 25 percent of the total output of production expressly support the application.

[254] Explanation to Rule 5.

Annex XIII: Costing Formats Required by the Indian Antidumping Authority

APPENDIX-8
STATEMENT OF COST OF PRODUCTION

Particulars	**Previous Accounting Year**				**Investigation Period**			
Installed/ Rated Capacity (Quantity)								
Production (Quantity)								
Capacity Utilisation (%)								
Sales (Quantity)								
	Qty.	Rate	Value	Cost per unit	Qty.	Rate	Value	Cost per unit
Manufacturing expenses Raw Materials (specify the major raw materials) Consumable stores & spares Utilities(Power , Fuel, Steam etc.,) Direct Labour Manufacturing Overheads Depreciation Others (please specify the nature of expenditure)								
General and Administrative Overheads								
Selling Expenses								
Financial Expenses								
Less: Misc. Income (from product concerned)								
Total Cost to make and sell								
Selling Price								
Profit/Loss								

Note: Please specify the unit, wherever applicable
The information in this format to be certified by practising Accountant.

APPENDIX- 8A
FACTORY COST AND PROFIT OF EXPORTS TO INDIA

Grade _____
Period from _____to _____

	Unit	Qty.	Rate	Value

Materials:
(specify each raw material and its ratio in the final product)
1.
2.
3.
4.
5.
Consumable stores & spares
Direct labour Utilities (such as power, water, gas, oil, etc.)
Overheads
• Manufacturing overheads
• Depreciation
• Financing costs
• Interest costs
• Packing costs
• Other costs, if any,
• Selling and administration costs

Ex-factory Cost
(in case it includes taxes, specify the same and furnish the break-up thereof)
Net profit/Loss before tax
Unit selling price (ex-factory)

---

1. A separate schedule should be prepared for each grade.
2. Denote currency and indicate the applicable rate of exchange with US $.
3. Taxes such as excise, turnover or production tax etc. excluded from the costing may be indicated in terms of rate and value.
4. Direct or indirect subsidies given by the Government, if any, on production, procurement, sale, and transportation of raw materials, utilities, finances etc. if excluded may be indicated showing import on cost of production per unit.
5. Describe the system of cost accounting used.

APPENDIX-8B
FACTORY COST AND PROFIT OF DOMESTIC SALES

Grade _____
Period from _____to _____

	Unit	Qty.	Rate	Value
Materials:				
(Specify each raw material and its ratio in the final product)				
1.				
2.				
3.				
4.				
5.				
Consumable stores & spares				
Direct labour Utilities (such as power, water, gas, oil, etc.)				
Overheads				
• Manufacturing overheads				
• Depreciation				
• Financing costs				
• Interest costs				
• Packing costs				
• Other costs, if any,				
• Selling and administration costs				
Ex-factory Cost				
(in case it includes taxes, specify the same and furnish the break-up thereof)				
Net profit/Loss before tax				
Unit selling price (ex-factory)				

---

1. A separate schedule should be prepared for each grade.
2. Denote currency and indicate the applicable rate of exchange with US $.
3. Taxes such as excise, turnover or production tax etc. excluded from the costing may be indicated in terms of rate and value.
4. Direct or indirect subsidies given by the Government, if any, on production, procurement, sale and transportation of raw materials utilities, finances, etc. if excluded may be indicated showing impact on cost of production per unit.
5. Describe the system of cost accounting used.

APPENDIX-8C
FACTORY COST AND PROFIT OF EXPORTS TO COUNTRIES OTHER THAN INDIA

Grade _____
Period from _____to _____

	Unit	Qty.	Rate	Value
Materials:				
(specify each raw material, and its ratio in the final product)				
1.				
2.				
3.				
4.				
5.				
Consumable stores & spares				
Direct labour Utilities (such as power, water, gas, oil, etc.)				
Overheads				
• Manufacturing overheads				
• Depreciation				
• Financing costs				
• Interest costs				
• Packing costs				
• Other costs , if any,				
• Selling and administration costs				
Ex-factory Cost				
(in case it includes taxes, specify the same and furnish the break-up thereof)				
Net profit/Less before tax				
Unit selling price Ex-factory				

---

1. A separate schedule should be prepared for each grade.
2. Denote currency and indicate the applicable rate of exchange with US $.
3. Taxes such as excise, turnover or production tax etc. excluded from the costing may be indicated in terms of rate and value.
4. Direct or indirect subsidies given by the Government, if any, on production, procurement, sale, and transportation of raw material utilities, finances etc. if excluded may be indicated showing impact on cost of production per unit.
5. Describe the system of cost accounting used.