

EFFECTS OF ANTI-DUMPING: WITH SPECIAL REFERENCE TO PHARMACEUTICAL INDUSTRY

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Introduction

Health has been acknowledged as a fundamental right of the people. This has been echoed in International Conventions on human rights. The World Health Organisation, as an organ of the United Nations, is doing its job to upgrade the quality of human life around the globe. However for Indians, the best of health concerns lies in the provision of Article 21 of the Constitution of India. When a person falls sick it is his fundamental right to seek medical treatment. It is his personal choice whether he goes for allopathy, homeopathy, or ayurvedic medicine. Since human body is very much personal, any form of violation can be treated as human rights violation. During treatment and procedures proper respect for individual patients must be shown irrespective of his status. The patient, first of all, is human being and the dignity that, a human being deserves must be upheld. To maintain good health he may deem to live in a pollution free environment. It is necessary that the Government, the industry and citizens work together¹.

In a historic judgment in *Consumer Education and Research Center v/s Union of India*², the Supreme Court held that the right to health and medical care is a fundamental right under Article 21 of the Constitution of India. "Right to life" includes protection of the health and strength of the worker. The expression "life" does not connote mere animal existence. This expression has much wider meaning which includes right to livelihood, better standard of life, hygienic conditions in workplace and leisure.

The Pharmaceutical Industry is one of the World's most research intensive industries, generating a continuing stream of new products that saves life and raises the quality of life. It is, therefore, hardly surprising that the pharmaceutical industry in advanced nations has been a major lobbyist for the Trade-related Intellectual Property Rights Agreement, stipulating a strong patent protection. In so far as it stimulates research and development and promotes the discovery of new drugs worldwide and encourages their immediate launch in developing countries such as India, one may perhaps be tempted to make a prima facie case for better access to new drugs in these countries as a result of the Trade Related Intellectual Property Rights Agreement³.

The global scenario of pharmaceutical industry has witnessed unprecedented changes in terms and technological developments, size, structure, market innovations, business environment etc. Global operations are now being streamlined, barriers are falling apart, and a large and integrated pharmaceutical supply chain is emerging all over the world. The Indian pharmaceutical industry is one of the largest among the developing countries. In terms of volume, it ranks 4th in the global market. However, in terms of value,

it is only the 13th largest in the world. With the General Agreement on Tariffs and Trade declaration hanging over the head signs of fear, gloom and despondency engulfed the Indian pharmaceutical industry and dramatic changes took place in vision of pharmaceutical sector⁴.

This article focuses on effects of dumping of medicines in India. Broadly speaking a product is said to have been dumped if it is introduced into the domestic market of another country at less than the normal value of the product and it causes or threatens material injury to an established industry of the country. The concept of dumping and subsidisation has long been known. Rapid industrialisation has resulted in large-scale production and in this situation dumping enables the producer to establish a dominant position in the market. It is common in international commercial practice for export prices to be lower than the domestic ones so there is, as such, nothing inherently illegal or immoral about the practice of dumping. However, when dumping causes or threatens to cause, material injury to the domestic industry it is viewed seriously. Anti-dumping is against “unfair pricing” by Foreign Producers – charging higher price in home market and exporting at lower price⁵.

The entire history of pharmaceutical industry in the country divided into three phases. The first phase is up to the early 1970s, the second phase covers the late 1970s through the 1980s and the third phase refers to the period since the 1990s. In India, ancient civilization allowed India to develop various kinds of medical and pharmaceutical systems. In addition to the allopathic system, which is prevalent in the United States, Japan, and Europe; Ayurvedic, Unani, Siddha, and Homeopathy medical and pharmaceutical systems are used by the Indian people⁶.

The pharmaceutical company faced a challenge as against the favorable climate in 1970. Under new industrial policy launched on July 24, 1991 in the Parliament, a programme of macro-economic stabilization and structural adjustments supported by International Monetary Fund and Industrial Bank for Reconstruction and Development (IBRD) was initiated. The New Industrial Policy and Government commitment under World Trade Organisation Agreement led to the policy changes, which posed changes to pharmaceutical company in the foreign trade⁷. The Indian pharmaceutical industry showed a positive balance of payment throughout the period after globalization. This tremendous growth has been mainly due to the change in the track of the Indian pharmaceutical company from the traditional marketing methods to new ones in order to compete the Multi- National companies.

The 2011 Annual report of the International Narcotics Control Board (INCB) released globally in Vienna recently describes the growth of illegal internet pharmacies. The report explicitly mentions India as the leading country of origin for internationally controlled substances including prescription medicines being sold globally. “The most worrying part is that the World Health Organisation has found that over half of the medicines being supplied through illegal online pharmacies are counterfeit”, Cristina Albertin Representative, Regional UNODC office, said. Internationally, the International Narcotics Control Board collects information on seizures of internationally controlled substances sent via mail including those ordered via internet⁸.

Health in currently developed countries improved largely due to higher incomes and consequent improvements in nutrition, sanitation and water supplies. In 1986, Fogel finds that half of the decline in standardized British death rates and 79% of the decline in standardized American death rates between 1900

and 1980 occurred before 1911, in an era with few effective medicines. However, modern medical technologies allow tremendous improvements in health even at low income levels⁹.

The Indian pharmaceutical industry registered strong growth during the Ninth and tenth five year plan periods and has emerged as an area of strength especially in generics. The adoption of world class patent laws for pharmaceutical products with effect from January 1, 2005, pursuant to obligations under World Trade Organisation agreement, has not dampened the robust growth but has improved the overall Intellectual property rights environment. The turnover of industry was Rs. 72000 crore during 2006-07, having risen by more than 12 times since 1990. India has become one of the leading global pharmaceutical industry. India is one of the signatories of World Health Organisation certification scheme on quality of pharmaceutical products moving in International commerce. World Health Organisation GMP certificate is granted after inspection by Central Drugs Standard Control Organisation and the state licensing authority.¹⁰

Legislative Provisions

Article VI of the General Agreement on Tariffs and Trade established the framework for the law of dumping and anti-dumping, which has remained unchanged for the decades. Article VI accepts the proposition that dumping is unfair trade, it defines the term, and it commits the determination of dumping to the authorities of the importing state. Further, Article VI states that the remedy against dumping is an anti-dumping duty, which is to be imposed only upon a finding of injury caused by dumping imports.¹¹

The World Trade Organisation Anti-dumping Agreement (ADA) relies on the basic principles enunciated in General Agreement on Tariffs and Trade (1994) and elaborates procedures to be followed for initiating and conducting antidumping investigations. According to Article VI of the General Agreement on Tariffs and Trade (1994), the following conditions have to be met before Antidumping duties can be imposed. These conditions are as follows:

- (i) dumping occurs and
- (ii) dumping has caused or is threatening to cause material injury
- (iii) Injury caused to the domestic industry.

A product is to be considered as being dumped, i.e. introduced 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.¹²

Margin of dumping refers to the difference between the normal value of the like article and the Export Price of the product under consideration. When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, and such sales do not permit a proper comparison, then the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin and a reasonable amount for administrative, selling and general costs and for profits.¹³

The principle of imposition of anti-dumping duties was propounded by the Article VI of General Agreement on Tariffs & Trade 1994 of Uruguay Round. The Indian legislation in this regard is contained in Section 9A and 9B of the Customs Tariff Act, 1975. Further regulations are contained in the Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995]. The provisions of Section 9A and 9B of the Customs Tariff Act, 1975 and the Anti-Dumping Rules [Customs Tariff (Identification, Assessment and Collection of Anti-Dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995] are as follows:

“Dumping” means export of goods by one country or territory to the market of another country or territory at a price lower than the normal value. If the export price is lower than the normal value, it constitutes dumping. Thus, there are two fundamental parameters used for determination of dumping, namely, the normal value and the export price. Both these elements have to be compared at the same level of trade, generally at ex-factory level, for assessment of dumping.

The “margin of dumping” is the difference between the normal value and the export price of the goods under complaint. It is generally expressed as a percentage of the export price¹⁴.

Anti-dumping, anti-subsidies & countervailing measures in India are administered by the Directorate General of Anti-dumping and Allied Duties (DGAD) functioning in the Department of Commerce in the Ministry of Commerce and Industry and the same is headed by the “Designated Authority”. The Central Government may, by notification in the Official Gazette, appoint a person not below the rank of a Joint Secretary to the Government of India or such other person as that Government may think fit as the Designated Authority¹⁵.

In India, there is a single authority-Directorate General of Anti-dumping and Allied Duties designated to initiate necessary action for investigations and subsequent imposition of anti-dumping duties¹⁶. The Designated Authority is a quasi-judicial authority notified under the Customs Act, 1962. A senior level Joint Secretary and Director, four investigating officers and four costing officers assist the Directorate General of Anti-dumping and Allied Duties.

Dumping of Medicines

From time to time various medicines dumped into India. These dumped medicines create hardships for the domestic pharmaceutical industry. Most of the medicines dumped into India are from China. Other countries are Japan, United States of America, Thailand, Russia, Singapore etc. Medicines which dumped into India from different countries of the world are paracetamol, penicillin, lovastatin, acetone, vitamin A, vitamin C, vitamin A palmitate, analgin, trimethoprim etc.

From Korea, large quantity of phosphoric acid dumped into India. The petition filed by *Gujarat Alkalies & Chemicals Ltd.*, and *Solaris Chemtech*, the Finance Ministry of India has levied anti-dumping duty of US\$221.64 tone on phosphoric acid from South Korea. The duty shall be applicable for five years from June 22, 2010. The main question arises that the South Korean phosphoric acid producer is granting unfair competition to domestic producers in the Indian market. Possible outcome of dumping duty in such a case may be increased input cost for domestic producers of the user pharmaceutical industries¹⁷. Hydroxyl Amine Sulphate (HAS) dumped into India from United States of America, Japan, Germany, United Kingdom and Netherlands. It is a basic inorganic Chemical and widely used in production of Sulpha

Methaxazole Cloazaciline Sodium and Rantidine. These products are widely used in production of anti-bacterial, anti-biotic and anti-nuclear drugs. On an application filed by *M/s. Deepak Nitrite Limited*, anti-dumping investigation was initiated into the alleged dumping of Hydroxyl Amine Sulphate.

Dumping of lovastatin in India is being from China. It is a bulk drug and is used for controlling cholesterol level. It reduces the risk of coronary heart disease and cardiac failure. On an application filed by *M/s. Artemis Pharmaceutical*, anti-dumping investigation was initiated into the alleged dumping of Lovastatin¹⁸. In an attempt to protect the domestic polypropylene industries, the government is recommending a provisional anti-dumping duty on polypropylene imported from Saudi Arabia, Oman and Singapore. This follows an appeal by Reliance Industries, supported by Haldia Petrochemicals Ltd. (HPL), the only two producers of polypropylene in the country. As a result of this duty, the companies from these countries selling the product at cheap rate in India will be discouraged. Trade liberalisation and use of tariffs to protect domestic consumers are to be used to promote competition and not stifle it by using non-tariff measures such as anti- dumping¹⁹.

Large portion of Acetone dumped into India from Thailand and Japan. Acetone mainly used in the formation of medicines. To protect a domestic players India has imposed anti-dumping duty of up to \$94.96 per ton on imports of acetone from Japan and Thailand. The anti-dumping duty will be levied for a period of five years starting from 9 April 2010, the date that the provisional anti- dumping duty was imposed. The Indian Ministry of Commerce had recommended the imposition of the duty after a probe found that the domestic industry has suffered on account of dumped import of the Acetone from Japan and Thailand²⁰.

Trimethoprim is being dumping into India from United States of America and China. Trimethoprim is an organic chemical. It is a bulk anti-bacterial drug. Formulation of Trimethoprim is used in the combination of sulphamethoxazole. Trimethoprim is produced from 3,4,5, Trimethoxy Benzaldehyde. It is classified under chapter 29 of Customs Tariff Act, 1975. The anti-dumping investigation was initiated on the basis of an application of *M/s. Alpha Drugs India ltd. and M/s. Inventa Chemicals ltd*²¹. An investigation into importation of amoxicillin from China and India has been initiated. The investigation relates to tri-hydrated amoxicillin, taking account of the differences between sterile and non-sterile amoxicillin. The Chinese respondents are Harbin Pharma Group Co Ltd, Hebei Zhongrun Co Ltd, Wenda Co Ltd and Zhuhai United Laboratories Co Ltd. The named Indian respondents are Aurobindo Pharma Ltd, Elder Pharmaceuticals Ltd, Nectar Life sciences Ltd, Parabolic Drugs Ltd, Surya Pharmaceutical Ltd and Unimark Remedies Ltd²².

In free trade, firms are allowed to charge different rates in different markets. The result would be that firms would charge lower prices in foreign markets and higher prices in domestic markets, leading to material injury to the domestic producers. In India, the government would have intervened to stop consumer exploitation by enforcing an Act similar to the Monopolies Restrictive Trade Practices Act. Hence, in the international context, it is anti-dumping duty that protects the domestic producers initially and consumers in the long run. Once these firms are forced out of the market as a result of dumping by exporters, it is very difficult for them to restart when the same exporters raise prices. Usually, the intentions of charging such low prices to foreign consumers is to be able to wipe out the domestic industries and eventually acquiring monopoly power in the foreign market.²³

Criticism of Anti- Dumping Duties

There are different views on the imposition of an anti-dumping duty. Some of the economists are not in favour of imposition of anti-dumping duty, while others are in favour of its imposition. But in case of pharmaceutical industry, imposition of anti-dumping duty is justified on the ground that this duty protects the domestic pharmaceutical industry from unfair competition which created due to dumping of medicines.

Dumping or anti-dumping law as a special kind of protectionism, dispensing with the constraints of most favoured nation treatment and of bound duties generally applicable. Emphasis on injury as a condition to imposition of anti-dumping measures, while mitigating the effect of condemnation of price discrimination, supports the view that anti-dumping laws are essentially protectionist, made more important as traditional barriers to trade come down. Defenders of anti-dumping legislation, national and international respond that dumping is basically unfair, because it distorts or masks the element of comparative advantage that ought to determine movement of goods and services across international frontiers²⁴

Trade and Competition frictions after the Uruguay Round in International Trade and Investment Division, Organization for Economic Cooperation and Development, 1996 generally take the view that frequent use of anti-dumping action cannot be justified as necessary to prevent predatory pricing²⁵.

From jurisprudential point of view, anti-dumping is not justified. From a rights standpoint, anti-dumping laws prevent consenting adults from entering into contracts at a mutually agreed upon price. Anti-dumping laws cannot be justified by any theory of liberal democracy. They are not utilitarian because they do not result in providing the greatest good for the greatest number. Indeed, they provide well for the minority i.e. producers at the expenses of the greatest number i.e. consumers. They reduce rather than enhance social cooperation and harmony. They violate rights. Even redistributionist's would argue against them because they redistribute income in the wrong direction from the poor and middle classes to the rich. It has been argued that imposition of anti- dumping duties makes little economic sense as it is sort of protection provided to domestic industry against competition from outside rather than action against unfair trade²⁶.

Thus existence of anti-dumping law hurts competition both ways, one by forcing exporters to sell at higher prices and other by providing the domestic producers the freedom to charge higher prices than what would be otherwise possible. Thus inherently anti-dumping 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. Very often firms misuse anti-dumping 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 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. Moreover, studies have shown that once an anti-dumping investigation is initiated it invariably results in imposition of anti-dumping duty.²⁷

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. 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. Anti- dumping investigations take 10 to 12 months

for its completion. Such time gap of one year is sufficient for the foreign companies to damage the domestic pharmaceutical industry by way of dumping of medicines.

Suggestions

Governments must attempt to dismantle the anti-dumping mechanism and merge it with the competition policy. While this would be preferable, it may not be feasible in practice to pursue it unilaterally. It could be pursued through bilateral agreement or in the context of plurilateral arrangements. Co-operation of the countries is essential for the proper implementation of the anti-dumping legislations.

Lack of Advisors and Consultants is a major hindrance for the effective implementation of anti-dumping measures. Indian Exporters who have actually not indulged in dumping face anti-duties merely because of lack of advisors. Being a new branch of Law that is related to International Trade Indian Industry suffers from paucity of consultants.

Lawyers and Trade Specialists must be inducted and a panel created. We must use the expertise of this panel and differentiate Chalk and Cheese; identify between genuine allegation of dumping and mere apprehensions. Further, many propositions laid out in the Anti-dumping agreements are not yet case hardened, both in India and abroad. In consultations with the persons in the know of the subject, this cell could also prepare guidelines for those gray areas.

The Designated authority in the Ministry of Commerce, namely the Anti-dumping Directorate is found to be quick to respond to the domestic industry's needs for investigation, but government not provides an adequate support to the Indian exporters. Indian Exporters always find themselves without adequate governmental support. The Indian Government does, not effectively use the consultative process available under the World Trade Organisation framework to settle the issue amicably without investigation etc. Prohibitive cost of defending cases in developed countries is also a major problem for Indian Exporters.

The Indian government gives some proposals for modification of anti-dumping agreement. These proposals are as follows:

- i. Developed countries initiate repeated investigations on exporters from developing countries. India demands that a minimum of 365 days must elapse from the date of finalisation of a previous investigation resulting in non-imposition of duties. Currently there is no restriction for such repeated investigations. Article 15 of the Agreement on Implementation of Article VI provides for constructive remedies before anti-dumping duty is applied. However, in practice members have bypassed this requirement in the levy of the anti-dumping duty, as this is currently a best endeavor clause. Hence, the provisions of Article 15 need to be made mandatory.
- ii. The existing de minimis-dumping margin of 2 per cent of export price below which no anti-dumping duty can be imposed, needs to be raised to 5 per cent for developing countries. The threshold volume of dumped imports, which shall normally be regarded as negligible, should be increased from the existing 3 per cent to 5 per cent for imports from developing countries.
- iii. The clause providing for the levy of the anti-dumping duty for aggregation of Imports from countries less than 3% individually but aggregate to over 7% or more need to be deleted. The lesser duty rule should be made mandatory-while imposing an anti-dumping duty. Thus anti-dumping measures can have the effect of extinguishing the comparative advantage of developing countries.
- iv. According to Article 2.1 a product is to be considered as being dumped, i.e introduced 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. Article VI lays down more transparent and detailed norms with regard to all the three stages of anti-dumping procedures, i.e

the establishment of the existence of dumping, demonstration of injury caused by dumping and the causal relationship between the two. The text also has diminishing provisions. The text also provides for the possibility of one country asking another to start anti-dumping procedures on imports from a third country, on the ground that these are damaging its own exports.

- v. Anti-dumping mechanism stipulated under General Agreement on Tariffs and Trade is that at the very initiation of the anti-dumping action, damage is inflicted on exports, irrespective of the outcome of the investigation. Provisional duties can be introduced quickly. When there is negative finding, all that happens is duties levied provisionally are refunded.
- vi. The Dispute Settlement Undertaking will be applicable to consultations and settlements of disputes under the anti-dumping agreement vide Article 17.1. The Common dispute settlement procedure will not apply. A member dissatisfied with the levy of an anti-dumping duty, can refer the matter to Dispute Settlement Body and Dispute Settlement Body will establish a panel to examine the issue, the panel shall interpret the relevant provisions of the Agreement in accordance with customary rules of interpretation of public international law. The new regulation will also not remain subject to discretionary power of the settlement board.²⁸

Conclusion

Anti-dumping laws protect the competitive process and the consumers from the monopoly power of the foreign exporters. Most vital role played by the anti-dumping laws is that these prevent from predatory pricing. The predation involves efforts to achieve or exploit monopoly power, restricts competition in domestic markets and injures the consumers. So, it is important to disclose that anti-dumping laws create fair trade environment and an exception to free trade. If these laws implemented effectively then it curbs anti-competitive practices by foreign firms and deterring the predatory pricing.

India has specially undertaken to bring its anti-dumping legislation in conformity with the anti-dumping agreement. However, it would still require drafting of regulations to fill gaps in the anti-dumping agreement, to address issues where the agreement explicitly offers members choices between different approaches. These are for instance, treatment of various adjustments, definition of control, consumer interest, and review mechanism and so on. Several ambiguities in the legal provisions such as a number of allowable adjustments with limited interpretation; the use of constructed normal and export values and unrealistic adjustments, use of surrogate country methodology for non-market economies, asymmetrical comparisons between the export and normal values introduce bias in favour of finding positive dumping margins.

India has great potential for industrial growth and strong infrastructure for pharmaceutical business environment. The object of Indian pharmaceutical industry should be not only to grow in the Indian market but also to build a strong global presence by penetrating the new markets. So there is a need of investment in drug discovery, diversification into health care and allied areas. If anti-dumping laws properly applied, country gains and improving the national welfare. However, it is possible that domestic producers use the anti-dumping laws to protect themselves from the foreign competition. Most of the anti-dumping investigations have taken place in the chemical industries. In the earlier year, to encourage the growth of domestic pharmaceutical industry, government of India had laid down policies for regulating and protecting the industry. Patent laws and high import tariffs protected the industry from unfair competition from foreign countries.

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