

Anti-Dumping Duties & Countervailing Provisions in Digital Trade

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Abstract

With the technological advancement in the world, in recent years, the rapid growth of digital trade has presented new challenges for anti-dumping duties and countervailing provisions in India. Digital technologies have reshaped the global commerce which includes cross-border data flows and Intellectual Property Rights (IPR) considerations and this has posed various complexities as traditional trade regulations struggle to adequately address these complexities of digital trade. The objective of this paper is to investigate the implications of anti-dumping duties and countervailing provisions in digital trade as well as identify if there is any need for updating the regulatory frameworks in Indian trade laws.

The problem arises from the intersection of digital trade and anti-dumping measures, where the digital economy presents essential constraints to traditional methods for evaluating market inefficiencies and establishment of fair market value. Similarly, particular issues of data flow and IPR are associated with digital product and services which introduce unique challenges, such as difficulty and quantifying intangible assets and addressing virtual market manipulations.

This paper will deal with such types of specific challenges posed by the digital economy in India, including identification of digital trade-related market inefficiencies and shortcoming of existing anti-dumping provisions. Through an examination of recent cases and industry examples this study will provide practical suggestions which aims to bridge the gap of regulatory framework and foster a fair and competitive digital trade environment.

In summary, this research paper examines the implication of digital trade such as data flows & IPR on the anti-dumping duties and countervailing measures and whether there is a need for any update in the regulatory framework in Indian trade regulations.

Keywords: Digital trade, Anti-Dumping duties, Countervailing provisions, Global Commerce, Market inefficiencies, Digital economy, Cross-border data flow, Intellectual Property Rights, Indian Trade Laws.

I. Introduction

Anti-dumping duties and countervailing provisions are critical aspects of international trade law as these duties or measures are designed to protect domestic industries from unfair trade practices that are caused by the importation of goods at cost of below fair market value. The rapid evolution of digital technologies in the global commerce has driven digital trade into a transformative role in global trade which has presented novel challenges for traditional anti-dumping duties and countervailing provisions in India. This evolution of digital technologies has introduced complexities in applying of anti-dumping duties and countervailing provisions on subject-matters that falls under the preview of digital trade. This study will facilitate with the understanding of these types of anti-dumping duties and digital trade by providing an

overview to the matter in hand. Furthermore, this paper will analyze the implication of Digital trade on anti-dumping policies and whether there is a need for updating the regulatory framework of India by providing the cases and examples of the subject-matter.

Overview of Digital Trade and Anti-Dumping & Countervailing Measures

Digital trade, to put it in the simplest terms possible, refers to commercial transactions facilitated through electronic medium, which encompasses of digitally-enabled transactions of trade in goods and services. Although a widely recognized and accepted definition of digital trade remains unclear an increasing number of stakeholders agree that it encompasses transactions involving consumers, businesses, and governments that are facilitated by digital technology and involve the exchange of products and services, which may be delivered digitally or physically. In other words, although digital technologies facilitate every type of digital trade, not all digital trade is executed in a digital format. As an illustration, digital trade encompasses transactions involving products and services that are physically delivered despite being digitally enabled. This includes activities like reserving an apartment through a matching application or purchasing a book through an online marketplace.¹

The significance of digital trade in the global economy is very profound. It has reduced the costs of engaging in international trade, facilitated the coordination of global value chains and helped in the connection of greater number of consumers and businesses worldwide.² It has also contributed to the dynamism of sectors such as digital payments and cross-border data flows, which have become particularly important in the wake of events like the COVID-19 pandemic.³ Now digital trade continues to grow and has represented almost 25% of total trade in the global economy in 2020.⁴

If any organization exports its goods or services at a price lower than the price it actually charges in its domestic market, such phenomenon is referred as “dumping” the goods or services. Many governments, thus takes defensive actions against these dumping in order to protect their domestic markets. Anti-dumping duties are type of custom duty that are imposed on the imports that safeguards against the dumping commodities at a price far below their normal value. These are the protectionist tariffs that a domestic government imposes on imports from foreign countries that are priced fair market value.⁵ Similarly, the countervailing measures are trade import duties that are imposed to neutralize the negative effects of the subsidies. These duties are also known as “anti-subsidy duties” that are customs levy on things that have received subsidies in the originating or exporting country.⁶

Context of the Study: Indian Perspective

Anti-dumping measures are established within the framework of the World Trade Organisation (WTO) in accordance with Article VI of the General Agreement on Tariffs and Trade (GATT) 1994. This framework enables nations to initiate measures in response to dumping incidents that cause significant harm to the domestic industry of competitors in the importing country.⁷

Various countries might enact legislation and enforce regulations that are consistent with the principles of the WTO. In the context of India, the legal framework for anti-dumping investigations and the imposition

¹ OECD, "Digital Trade," available at: <https://www.oecd.org/trade/topics/digital-trade/>

² OECD, "Key Issues in Digital Trade," available at: <https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf>

³ Supra

⁴ Supra note 2

⁵ Investopedia, "Anti-Dumping Duty," available at: <https://www.investopedia.com/terms/a/anti-dumping-duty.asp>

⁶ USA Customs Clearance, "Antidumping and Countervailing Duties," available at: <https://usacustomsclearance.com/process/antidumping-and-countervailing-duties/>

⁷ Blog Ipleaders, "Anti-Dumping Measures and the International Trade Law," available at: <https://blog.ipleaders.in/anti-dumping-measures-and-the-international-trade-law/>

of anti-dumping duties is established by the Customs Tariff (Identification, Assessment and Collection of Anti-dumping Duty on Dumped Articles and for Determination of Injury) Rules, 1995, in conjunction with Sections 9A, 9B, and 9C of the Customs Tariff Act, 1975, as amended in 1995.⁸ In India, the Directorate General of Trade Remedies (DGTR), is the apex national authority responsible for the administration of these duties and ensuring the alignment of the regulations with the WTO's regulations.⁹ Consequently, the analysis of digital trade within the framework of anti-dumping regulations has gained increasing significance. Traditional business procedures have been fundamentally altered by the wide range of digital trade activities, which now includes cloud computing services and e-commerce.¹⁰ The expansion of digital trade presents novel obstructions for anti-dumping policies due to the blurring of boundaries between products and services and the frequent incorporation of intricate pricing structures, which can be challenging to evaluate in terms of dumping activities.¹¹ Hence, it is critical to comprehend the intricacies of digital commerce in order to effectively implement anti-dumping measures and maintain their applicability in the digital age.

II. Implications of Digital Trade on Anti-Dumping & Countervailing Policies

The implications of digital trade in anti-dumping measures are multifaceted and complex. Digital trade has significantly increased in volume and importance in recent years and made a significant growth. This increase in digital trade has presented new challenges and considerations for anti-dumping measures. Digitalization has altered the manner and subject matter of international commerce by causing costs to be reduced to an unprecedented degree. It has enabled the expansion of "smart" connected products and digitally delivered services, with an increase in the volume of data crossing international borders. The domestic regulatory environment that underpins digital trade is now becoming increasingly restrictive which makes it more difficult for consumers and businesses to seize new opportunities.¹² Similarly, with the growth of digital trade it can be asserted that traditional anti-dumping measures may not be as effective in the context of digital trade. For example, it can be very challenging to determine the 'normal value' of digitally delivered services or to assess the cost structures of digital products.¹³ The implementation of anti-dumping duties within the context of digital trade may yield both advantageous and detrimental consequences. While safeguarding domestic industries against unfair competition, it might additionally prevent the importation of quality, more affordable goods from abroad, which could have adverse effects on societal welfare.¹⁴

⁸Sikkim Industries Department, "Anti-Dumping & Anti-Subsidy Measures: FAQs," available at: https://industries.sikkim.gov.in/wp-content/uploads/2017/05/Anti_Dum.pdf

⁹ Anti-Dumping & Anti-Subsidy measures: FAQs <https://commerce.gov.in/>

¹⁰Department of Commerce, Government of India, "Anti-Dumping Cases," available at: https://www.unescap.org/sites/default/d8files/event-documents/OECD_presentation_on_digital_trade.pdf

¹¹ Supra note 7

¹² United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP), "OECD Presentation on Digital Trade," available at: <https://www.oecd.org/trade/OECD-key-issues-in-digital-trade.pdf>

¹³Cambridge University Press, "Are Digital Trade Disputes Trade Disputes?," available at: <https://www.cambridge.org/core/books/artificial-intelligence-and-international-economic-law/are-digital-trade-disputes-trade-disputes/>

¹⁴Ishak Mohammed et al., "The Positive and Negative Effects of the Use of Anti-dumping Policy in Developing Countries," available at: https://www.researchgate.net/profile/IshakMohammed/publication/296706115_The_positive_and_negative_effects_of_the_use_of_Anti-dumping_policy_in_developing_countries/links/585e7ce308ae8fce49017abd/The-positive-and-negative-effects-of-the-use-of-Anti-dumping-policy-in-developing-countries.pdf

Impact of Data Flows in Digital Trade

International trade is rapidly evolving due to the global expansion of and increased use of data flows by businesses as well as consumers for various purposes such as communication, e-commerce and as a source of information and innovation. Data flows play a crucial role in the world of digital trade as they significantly impact market dynamics and influence strategies for pricing in various complex ways. Firstly, the widespread availability of data allows organizations to obtain up-to-date market information, which in turn helps them make quick and flexible decisions and implement adaptable pricing plans. For example, e-commerce platforms utilise data analytics to adaptively modify prices according to demand patterns, rival actions, and even specific customer behaviours. This pricing strategy maximises income and market share by adapting to changes in the market. However, the dependence on data-driven pricing techniques presents difficulties for regulators responsible for evaluating equitable market value and identifying pricing distortions. Traditional approaches to establish a standard value in anti-dumping inquiries may encounter difficulties in accommodating the complexities of digital trade, where pricing algorithms and personalized pricing models make the assessment of pricing practices more complicated.

Intellectual Property Rights (IPR) and Market Distortions

Intellectual Property Rights (IPR) are crucial in digital trade as they have a significant impact on market dynamics and competitiveness. IPR infringements, within the framework of anti-dumping proceedings, can worsen market distortions and unfairly harm domestic industries. For instance, instances of patent infringement or unauthorised utilisation of copyrighted material, which can undermine the market standing of lawful enterprises, so distorting market competition.

In addition to this, the changing environment of digital products and services poses various difficulties for anti-dumping authorities which necessitates sophisticated approaches to tackle market distortions relating to intellectual property rights. Incorporating intellectual property issues into anti-dumping investigations is crucial for safeguarding market integrity and promoting fair competition in digital trade.

III. Need for Updated Regulatory Frameworks

Challenges Posed by Digital Economy

With rapid growth of digital trade, it is crucial to prioritise the identification and resolution of market inefficiencies in order to promote equitable competition and sustainable development. Market distortion is the term used to describe any form of interference that has a major impact on prices or the behaviour of a market, causing it to deviate from the natural dynamics of supply and demand. Market distortions can arise from multiple sources, such as government rules, subsidies, monopolistic behaviours, and technological domination. However, these distortions have significant repercussions on digital economies. Governments have a crucial influence on market dynamics by implementing regulations and providing subsidies. Although laws are often designed to protect consumer interests and maintain market stability, they can unintentionally cause distortions by changing price mechanisms and impeding competition. For example, when subsidies are given to specific industries like agriculture, they can artificially increase prices, encouraging excessive output and disrupting the balance of the market. Government interventions, although having the capacity to correct market faults and maintain public welfare, require a careful balance between regulatory effectiveness and market efficiency.

Hence, there are various limitations of existing anti-dumping regulations in addressing digital trade Issue:¹⁵

Regulatory Scope: The existing anti-dumping and countervailing measures generally applies to tangible goods and services and the classification of digital trade is not easily defined due to its involvement in the exchange of data and digital items. The fundamental basis for anti-dumping measures is the recognition of price discrepancies between the export and domestic markets of a commodity, usually known as "dumping." However, in the domain of digital trade, where transactions are frequently intangible and unrestricted by borders, traditional pricing discrepancies may not sufficiently include the complexities of unjust competition. Digital items and services, which are easy to copy and distribute, may not follow the usual pricing patterns in the market, making it difficult to analyse them using traditional anti-dumping methods.

Methods of determining prices: Assessing their value and determining the cost of digital goods and services can be intricate because of their intangible characteristics. This poses a difficulty in evaluating and substantiating the act of dumping or unfair subsidies in the digital domain. The recommended procedures for calculating dumping margins and determining injury to domestic sectors are primarily designed for physical commodities and traditional market structures. Quantifying the practice of dumping and its impact on domestic companies is intrinsically problematic in the digital sphere, where value creation is often driven by data, algorithms, and network effects. In addition, the standards for commencing anti-dumping inquiries and determining the connection between dumping and harm may fail to consider the complexities of digital markets, where competitive dynamics are influenced by factors other than price disparities, such as innovation, user involvement, and network effects.

Transparency and Enforcement: The Anti-Dumping Agreement of the WTO provides specific guidelines for commencing and carrying out anti-dumping investigations. However, its relevance to digital commerce situations is still unclear. The lack of transparency in digital transactions, along with the global reach of digital platforms, presents significant obstacles to the successful implementation of anti-dumping regulations. In addition, the necessary transparency and collaboration among member countries, which are essential for enforcing anti-dumping legislation, may be hindered by complicated jurisdictional issues and differing regulatory frameworks that govern digital trade.

Jurisdictional Challenges: Digital trade frequently surpasses geographical boundaries, posing difficulties in the enforcement of national legislation. Indian authorities may have limited jurisdiction when the parties engaged in digital transaction are situated in separate countries.

Rapid Technological Changes: The rapid rate at which technology is advancing in the digital industry can surpass the slower process of creating laws, resulting in legislation that are already outdated when they are put into effect. The emergence of e-commerce requires a reassessment and updating of current anti-dumping rules to be in line with the characteristics of the digital economy. In light of the limitations of traditional price-based evaluations, it is imperative for policymakers and regulatory authorities to investigate new metrics and approaches to evaluate unfair competition in digital markets. This involves creating innovative methods for measuring market dominance, evaluating the negative effects of competition, and developing specific solutions that are customised to the complexities of digital trade.

Evolving Business Models: The emergence of new business models in the digital economy, such as freemium services, subscription models, and platform-based commerce, may not necessarily be compatible with the basic assumptions of classic anti-dumping and countervailing frameworks.

International Cooperation: International cooperation is necessary to properly address digital trade challenges. This entails harmonising rules, which can be difficult due to the varying interests and legal systems of different countries. To overcome the shortcomings of current anti-dumping policies in the

digital domain, it is necessary to engage in collaborative multilateral endeavours that focus on aligning regulatory frameworks and fostering collaboration among member nations. The WTO's negotiations on e-commerce serve as a platform for discussing the difficulties presented by digital trade and creating comprehensive and flexible regulatory solutions. Through the facilitation of discussions, dissemination of effective methods, and encouragement of alignment in regulations, multilateral organisations can aid in the creation of a strong and adaptable regulatory structure that can effectively tackle the changing obstacles of digital trade.

Policy Recommendations for Regulatory Reforms

The consequences of digital trade on anti-dumping tariffs and countervailing measures in India necessitate targeted policy recommendations and regulatory adjustments to effectively tackle the problems provided by the digital economy.

Proposed updates to anti-dumping provisions to accommodate digital trade complexities

The rapid development of digital trade requires revisions to anti-dumping regulations in order to adequately tackle the intricacies of the digital economy. More specifically, policymakers should take into account the following changes:

Methodology Adaptation: Creation of novel approaches to evaluate the equitable market value in digital transactions with taking into account of dynamic pricing models and data-driven pricing strategies commonly used in e-commerce.

Integration of Data Analytics: Incorporate data analytics techniques into anti-dumping investigations to strengthen market surveillance and identify cases of price manipulation or unfair competition assisted by digital technologies.

Enhanced transparency prerequisites: Due to the cross-border nature of digital trade, it is important to have increased transparency and cooperation between regulatory bodies and industry parties. It is crucial for policymakers to give high importance to creating global norms and protocols to deal with the issue of dumping in digital markets. This can be achieved by promoting collaboration and exchange of information among member countries, in order to effectively counteract unfair competition that occurs across borders.

Flexibility and adaptability: Flexibility and adaptability are crucial in anti-dumping legislation to address the fast speed of technical innovation and shifting business models in the digital economy. These regulations should be able to accommodate emerging trade practices. Regulatory frameworks should include mechanisms for regular evaluation and revisions to ensure their relevance and efficacy in tackling emerging forms of unfair competition in digital marketplaces.

Capacity Building and Awareness: In order to ensure adherence to revised anti-dumping regulations, governments should allocate resources towards capacity building programmes and awareness campaigns aimed at enterprises involved in digital trade. Stakeholders can utilise training programmes, workshops, and educational materials to effectively traverse the intricate regulations and implement optimal strategies for fostering equitable competition in digital markets.

Clarification of Digital Trade Practices: Due to the intangible character of digital products and services, it is crucial to clarify the extent of prohibitions against unfair pricing in the context of digital trade. Regulatory authorities should establish precise definitions and standards for evaluating the act of dumping in digital marketplaces, considering variables like data localization, intellectual property rights, and platform dominance.

The purpose of these modifications is to enhance the efficacy of anti-dumping measures in addressing unfair trade practices in the digital domain, while also fostering market transparency and equitable competition.

Importance of international cooperation and standards in regulating digital trade

Due to the worldwide scope of digital trade, it is crucial to have international collaboration and agreement on regulatory standards in order to properly govern transactions that occur across borders. Some important suggestions are:

Harmonization of Regulations: To achieve harmonisation of regulations, it is important to cooperate with international trade organisations like the World Trade Organisation (WTO). This collaboration should focus on creating standardised rules for digital trade regulations, which should include provisions to prevent anti-dumping practices.

Knowledge sharing and optimal methodologies: Promotion of the sharing of information and the exchange of best practices between nations to strengthen regulatory capabilities and tackle new difficulties in digital commerce can be recommended.

Mutual Recognition Agreements (MRAs): For the facilitation of frictionless digital trade across border negotiation of mutual recognition agreements for data protection and intellectual property rights enforcement is necessary which thereby can promote confidence.

Cooperation on Cross-Border Data Flows: Cross-border data flows are crucial for the growth and effectiveness of digital commerce, allowing enterprises to reach international markets and foster innovation in the digital realm. It is crucial for policymakers to give top priority to establishing international frameworks for data governance and data protection. These frameworks will help ensure that cross-border data flows are both secure and transparent. This involves creating systems for data localization, data privacy, and data transfer agreements to guarantee the unrestricted movement of data while protecting privacy and security considerations.

Promotion of Open and Inclusive Digital Markets: The promotion of open and inclusive digital markets is essential for preserving competitive dynamics, encouraging innovation, and providing consumers with a wide range of choices. Competition policy plays a pivotal role in achieving these objectives. Policymakers should engage in cooperative efforts to establish shared principles and norms aimed at fostering competition in digital markets. These efforts should encompass steps to thwart anti-competitive practices, enhance market transparency, and guarantee fair competition for all market participants. Global collaboration on competition policy can effectively tackle developing issues including platform dominance and monopolistic conduct, thereby fostering equitable competition and enhancing market efficiency in the digital economy.

Enhanced Consumer Protection Measures: Implementing effective consumer protection measures is crucial for fostering trust and instilling confidence in digital marketplaces, which is vital for the prosperity of digital trade. Policymakers should give priority to the advancement of improved online consumer protection measures in order to tackle rising dangers and issues in the digital realm. This encompasses initiatives aimed at safeguarding consumers from deceptive practices, promoting openness and equity in digital transactions, and enhancing systems for resolving conflicts and providing compensation. By implementing more robust consumer protection measures, authorities can foster trust and assurance in digital markets, hence enabling increased consumer engagement in digital trade endeavours.

To establish an optimal environment for digital trade, policymakers should give priority to international collaboration and standardisation initiatives. They should also ensure that anti-dumping measures are strong and in line with global regulatory norms.

IV. Case Study: Anti-Dumping Investigation on Digital Offset Printing Plates in India¹⁵

Background:

Unfair trade practices, such as dumping in the digital trade sector, have presented issues for India and many other nations. The anti-dumping inquiry pertaining to imports of digital offset printing plates is one recent case that attracted notice. In the printing business, these plates are crucial parts, especially for offset printing, which is widely utilised for a variety of commercial printing applications.

Parties Concerned:

The investigation focused on the importation of digital offset printing plates from China PR, Japan, Korea RP, Taiwan, and Vietnam, among other nations. These nations export a large amount of printing supplies and machinery, making them important participants in the worldwide printing market.

Motive behind the investigation:

Allegations of dumping, or selling digital offset printing plates in the Indian market for less than their regular worth, prompted the investigation. By oversaturating the market with low-cost imports, these tactics have the potential to damage homegrown industries, hurting regional producers and skewing the competitive landscape.

The anti-dumping investigation was conducted in compliance with international trade rules and India's anti-dumping regulations, adhering to established procedures. The investigation's goals were to ascertain whether dumping was really taking place, estimate how much was being dumped, and evaluate the effects on domestic industry.

Important phases in the inquiry procedure were as follows:

Evidence gathering: In order to evaluate pricing strategies and market dynamics, authorities gathered information and proof from domestic producers, importers, and exporters.

Determining dumping margins: The price differentials between the imported digital offset printing plates and their typical value in the exporting nations were computed by the investigators.

Examining injury: The study examined how dumping imports affected the home industry, taking into account variables including employment, manufacturing capacity, market share, and financial performance.

Results:

The investigation's conclusions differed based on the particulars of each case. Anti-dumping charges may be placed on imported digital offset printing plates if it is determined that dumping is taking place and harming the home industry. This would level the playing field and safeguard home producers. An alternative would be for exporters to freely consent to change their prices in order to prevent levies from being imposed.

Implications:

To address unfair trade practices in the digital trade sector, strong trade remedies and regulatory frameworks are essential. This is demonstrated by the case of the anti-dumping inquiry involving digital

¹⁵ Directorate General of Trade Remedies, Government of India, "Anti-Dumping Investigation Concerning Imports of Digital Offset Printing Plates," available at: <https://www.dgtr.gov.in/anti-dumping-cases/anti-dumping-investigation-concerning-imports-digital-offset-printing-plates>

offset printing plates. Countries such as India can protect the interests of their domestic sectors and foster fair competition in the international market by enforcing anti-dumping measures when necessary. Furthermore, these research highlight the necessity of international coordination and cooperation in order to effectively address the issues associated with cross-border trade.

The case study concludes by highlighting the importance of anti-dumping laws in preserving fair competition for home industries and India's dedication to combating unfair trade practices in the digital trade sector.

V. Conclusion

The intersection of digital trade with anti-dumping tariffs and countervailing laws poses intricate issues and requires proactive regulatory adjustments. The effects of digital trade on market dynamics, pricing strategies, and intellectual property rights highlight the immediate requirement for revised regulatory frameworks that can adequately tackle rising market inefficiencies and guarantee equitable competition. With the research of specific case study on digital trade and anti-dumping measures clearly shows that traditional techniques have challenges in adapting to the complexities of the digital economy. The limits of present regulatory measures are highlighted by pricing inequalities, infringements of intellectual property rights (IPR), and the increase in cross-border e-commerce platforms.

In order to tackle these difficulties, policymakers should take into account the following suggestions:

1. Revise the Anti-Dumping Provisions: Create innovative approaches for evaluating equitable market value in digital transactions, integrating data analytics and transparency mandates for digital platforms.
2. Encourage international collaboration and build standardised regulations for digital trade by partnering with international trade organisations. This will enable the exchange of knowledge and the adoption of best practices among countries.

Ultimately, India can create a strong system that encourages equitable and competitive digital trade while protecting domestic businesses through the adoption of progressive regulatory reforms and the cultivation of international collaboration. The findings of this study highlight the significance of continuously adjusting to the changing digital commerce environment. It emphasises the need to maintain the effectiveness of anti-dumping and countervailing laws as regulatory measures for digital trade.