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IN INTERNATIONAL TRADE LAW (2020-2021).

THE STRATAGEMS OF PREDATORY PRICING UNDER ANTI-DUMPING LAW AND COMPETITION LAW

Under The Guidance and Supervision Of

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This is to certify that **GEETHU PRAKASH**, Reg. No: LM0220015 has submitted her Dissertation titled, "**THE STRATAGEMS OF PREDATORY PRICING UNDER ANTI-DUMPING LAW AND COMPETITION LAW**." in partial fulfilment of the requirement for the award of Degree of Master of Laws in International Trade Law to the National University of Advanced Legal Studies, Kochi under my guidance and supervision. It is also affirmed that, the dissertation submitted by her is original, bona-fide and genuine.

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I hereby declare that this dissertation titled, "**THE STRATAGEMS OF PREDATORY PRICING UNDER ANTI-DUMPING LAW AND COMPETITION LAW**" researched and submitted by me to the National University of Advanced Legal Studies in partial fulfillment of the requirement for the award of Degree of Master of Laws in International Trade Law, under the guidance and supervision of Dr. Athira PS, is an original, bona-fide and legitimate work and it has been pursued for an academic interest. This work or any type thereof has not been submitted by me or anyone else for the award of another degree of either this University or any other University.

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List of Abbreviations

AAC	Average Available Cost
AAI	Airports Authority of India
ADA	Antidumping Agreement
AMA	Antimonopoly Act
AMP	Administrative Monetary Penalties
APM	Administrative Pricing Mechanism
ASCM	Agreement on Subsidies and Countervailing Measures
ATC	Average Total Cost
AVC	Average Variable Cost
BIA	Bangalore International Airport Limited
CCI	Competition Commission of India
CMA	Competition and Markets Authority
DS	Disposable Syringe
FCC	Federal Communications Commission
FTA	Free Trade Agreement
Ed	Edition
GAFA tax	Google Apple Facebook Amazon tax
GATT	General Agreement on Tariffs and Trade
GDP	Gross Domestic Product
GHS	Ground Handling Services
i.e,	Id est (that is)
ICPA	The International Competition Policy Agreement
ILO	International Labour Organisation
IMF	International Monetary Fund
INZCO firm	Insulation New Zealand Company firm
IPEG	Intellectual Property Enforcement Guidelines
IPR	Intellectual Property Rights
ITO	International Trade Organisation

JFTC	Japanese Free Trade Commission
KEiSHU	Japanese Supreme Court Reports (criminal cases)
KIAB	Kempegowda International Airport at Bengaluru
MC	Marginal Cost
MLS	Multiple Listing Services
MNE	Multinational Enterprise
MRP	Maximum Retail Price
MRTP	Monopolistic and Restrictive Trade Practice
MRTPC	Monopolistic and Restrictive Trade Practice Commission
NAFTA	North Atlantic Free-Trade Agreement
NCA	National Court of Appeal
OECD	Organization for Economic Co-Operation and Development
PCT	Patent Cooperation Treaty
PP	Predatory Price
RPM	Resale Price Management
RTA	Regional Trade Agreement
SDP	Substantive Due Process
SIPP	Scheme for Facilitating Startups Intellectual Property Protection
TFEU	Treaty on Functioning of the European Union
TREB	Toronto Real Estate Board
TRIPS	Trade Related Intellectual Property Rights
UK	United Kingdom
UNCITRAL	United Nations Commission on International Trade Law
UNCTAD	United Nations Conference on Trade and Development
UNDROIT	International Institute for the Unification of Private Law
US	United States of America
USEN	US Embassy the Netherlands
USMCA	United States- Mexico- Canada Agreement
v.	versus
WIPO	World Intellectual Property Organization

WTO	World Trade Organisation

Journals

Admin. L. Rev	Administrative Law Review
AJIL	American Journal of International Law
Ala. L. Rev.	Alabama Law Review
All ER	All England Law Reports
Am. Econ. Rev.	American Economic Review
Am Pol.Sci. Rev.	American Political Science Review
Antitrust BULL	Antitrust Bulletin
Antitrust L.J	Antitrust Law Journal
Antitrust MAG	Antitrust Magazine
Arbitr. Int	Arbitration International
B.C.L. Rev.	Boston College Law Review
Berkeley Tech. L.J	Berkeley Technology Law Journal
Cambridge L.J.	Cambridge Law Journal
Can. Bar Rev.	Cannada Bar eview
Colum. L. Rev	Columbia Law Review
Competition Policy Int.	Competition Policy International
Cornell L. Rev.	Cornell Law Review
Curr Leg Probl	Current Legal Problems
Dalhousie J. Legal Stud.	Dalhousie Journal of Legal Studies
ECLR	European Competition Law Review
Econ J	Economic Journal
Econometrica	Econometrica
Econ Polit Wkly	Economic and Political Weekly
Emory L.J.	Emory Law Journal
Eur. compet. law annu	European Competition Law Annual
Eur. Intell. Prop. Rev.	European Intellectual Property Review
Fordham Int'l LJ	Fordham International Law Journal
Glob. Bus. Rev.	Global Business Review
Geo. L.J	Georgetown Law Journal

Geo. L. Rev.	Georgetown Law Review
Global Trade &Cust. J.	The Global Trade and Customs Journal
Harv. L. Rev	Harvard Law Review
Int Comp Law Q	International and Comparitive law Quarterly
Intl J.	International Journal of Law
Int. Leg. Mater	International Legal Materials
J Comp. L & Econ.	Journal of Competition Law and Economics
J. Econ. Theory	Journal of Economic Theory
J. Econ. Surv	Economic Survey Journal
J. Forensic Econ.	Journal of Forensic Economics
J. Legal Econ.	Journal of Law and Economics
Int. J. Bus. Law Res.	Journal of International Business and Law Research
J. Int. Trade Law Policy	Journal of International Trade Law and Policy
J. Polit Econ	Journal of Political Economy
J. World Trade	Journal of World Trade
KLI	Kluwer Law International
Law Contemp Probl	Law and Contemporary Problems
McGill LJ	McGill Law Journal
Mich. L. Rev.	Michigan Law Review
N.Y.U. L. Rev	New York University Law Review
New L.J.	New Law Journal
North. Ill. Law Rev.	Northern Illinois University Review
OHIO St. L.J	OHIO State Law Journal
Pap. Trade J	Paper Trade Journal
Rev Ind Organ	Review of Industrial Organization
Romanian J. Eur. Aff.	Romanian Journal of European Affairs
St. John's L. Rev	St John's Law Review
St. Louis U. L.J.	St Louis University Law Journal
Stan. L. Rev.	Stanford Law Review
Sw. L. J	Southwestern Law Journal
Tex. L. Rev.	Texas Law Review
Tulane Law Rev	Tulane Law Review
U Chi L Rev.	The University of Chicago Law Review
UKCLR	United Kingdom Competition Law Reports
US. Chin. Law Rev	US-China Law Review

U. Pa. L. Rev.	University of Pennsylvania Law Review
Util. Policy	Utilities Policy
Vand Rev. L.	Vanderbilt Law Review
W. Res. J. Int'l L.	Western Reserve Journal of International Law
W. Res. L. Rev.	Western Reserve Law Review
Wash. & Lee L. Rev.	Washington & Lee Law Review
WLNR	World Airline News
World Trade Rev.	World Trade Review
Wis.L.Rev	Wisconsin Law Review
WLR	Weekly Law Reports
World Trade Rev.	World Trade Review
Yale L.J.	Yale Law Journal

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Table of Contents

1. INTRODUCTION

In this era of globalization, trade and trade policies has become the lifeline of economies worldwide. The phenomenon of globalization has integrated the world economy to a large extend. It thereby facilitated better exchange of products across the borders without impediments. To safeguard the domestic industries and to protect the rights of people within their territory, numerous measures have been adopted by each of them[1]. The value of international trade, to a great degree, rests in acknowledging and appreciating creativity and innovation. The facilitation of knowledge-rich goods and services and its access has been the area of consideration in the formulation and development of trade related policies. Trade relations have become a critical component of economic development which paved the way for many developing countries to embrace new strategies and device their unique techniques for economic integration. Analysis of trade liberalizations' outcomes through recent years shows that the benefits created are meager and distributed unevenly across the countries[2]. The preamble of the World Trade Organization envisages that trade liberalization as a means to promote sustainable economic growth such that it ensures a secure share of growth in international trade in proportion with economic development. Even though the mandate was formulated since inception; the preoccupation of WTO neglected to develop trade liberalizations. The most difficult task of developing countries was to throw open their economy to the developed countries due to the bias of developed countries as they offer fertile ground as markets for the exports of developing countries. However, the trade barriers exist in these markets against the developing countries' exports like tariff peaks, agricultural subsidies, rules of origin, antidumping practices and contingent protection measures. Antidumping laws may be termed as the most egregious of them all, and there has been wide-scale reporting of such instances in the past twenty-five years, making it the most dreadful trade impediment[3].

Vital protection provided by the General Agreement on Tariffs and Trade (GATT) and WTO Framework is the antidumping measures along with the countervailing duties and safeguard

[1] For instance, certain policy measures like National Policy for India, 2016 which gave a roadmap of Intellectual Property Rights in India, Scheme for Facilitating Startups Intellectual Property Protection (SIPP) which ushered and empanelled 208 patent agents as facilitators by the Controller General of Patents can be rightly stated as a measures towards achieving a society that favours better protection of intellectual creations.

[2] Stiglitz, JE and A Charlton ,*" The Development Round of Trade Negotiations in the Aftermath of Cancun: A Report for the Commonwealth Secretariat*", COLUM. L. REV 87 90-93 (2004).

[3] International Trade Statistics 2005, World Trade Organisation, Geneva. https://doi.org/10.30875/00664196-en (last accessed on May 2nd 2021 at 5:30 pm).

protections. The developing countries remained at the receiving end till the 1980s and Antidumping measures remained with the developed economies. Consequently, it was accepted that improvisation of the Antidumping Agreement (ADA) would reduce the negative impact of tariff imposition is least felt on developing countries. A joint statement issued by the senior officials for the trade of several developing countries in Geneva, 2003, conceded that substantial results in the Anti-dumping negotiations are a vital component of overall market access liberalisation and are essential for the success of the Doha Development Agenda[4]. Amidst the use of Anti-dumping rules to a large extent, the justification of the tool is still unclear as the agreement is silent regarding this aspect and thus initiated a debate among the bureaucrats, legal experts and economists. The negotiating groups of rules started WTO negotiations concerning Anti-Dumping.

The concept of predatory pricing, borrowed from the Canadian domestic competition policy, is defined as the situation where a domestic form of prices below cost to drive competitors out of the market and acquire or maintain a position of dominance. It involves efforts to establish a monopoly over the domestic markets and thereby causes injury to the consumers in the long run. To preserve the competition level, the competition policies hinders predatory pricing by domestic firms. However, if the antidumping procedures are used efficiently, it can curb foreign firms' anti-competitive practices.

One of the essential precursors to the ascertainment of predatory pricing is the existence of international segmentation of markets or market structure characterised by imperfect competition in the firm's country carrying out the price discrimination[5]. If there were practically no trade barriers that impede the entry to markets, the price differences could be leveled by the import competition. The second aspect of affirming dumping to occur is the presence of imperfect home country markets distinguished by a large extent of the high degree of concentration, inadequate and unequal distribution of financial resources and substantial barriers to entry. The foreign markets find it difficult to flourish in an imperfectly competitive market, forcing the firms to charge higher prices in domestic markets. The rent thus generated could be used to price discriminate internationally. The credibility of the threat of predation is the center of all issues. Therefore if the threat is not credible enough, it cannot

[4] Ministry of Foreign Affairs of Japan, https://www.mofa.go.jp/policy/economy/wto/a_dump0302.html (last visited on April 4, 2021 at 5:30pm) These included Brazil, Chile, Columbia, Costa Rica, Hong Kong, China, Israel, Korea, Mexico, Singapore, the Separate Customs Territory of Taiwan, Thailand, Turkey. Also included the officials of developed countries, namely Japan, Norway and Switzerland.

[5] Tharakan PKM, *'Political Economy and Contingent Protection'*, 105 ECON J. 1550-1564 (1995).

be used as a useful signal to competitors and potential entrants in other markets not to enter or compete rigorously.

Anti-trust law is about competition. It aims at guaranteeing economic agents' freedom to compete as the best way to promote maximum social welfare. Simple as they may seem, these statements are far from undisputed or self-explanatory. Controversy about the meaning and goal of anti-trust law is as old as the law itself and even older, as it dates back to mid-nineteenth-century debates over the British common law restraints of trade. The ideal of freedom from market power is intimately related to neoclassical economics and its idea of competition as a state. Market power itself is a technical notion that economists measure regarding price/cost margins and market shares.

In the history of anti-trust law, freedom from market power has often been interpreted as freedom from economic power. By the latter term, it means a kind of power that trespasses upon the market and spreads its negative influence over society. A robust business in this sense is one capable of affecting a country's economy and its political and social life; a threat to democracy in its most basic nature of a system based on equal rights and duties. Anti-trust law has a long tradition of looking suspiciously at large concentrations of economic power, usually summarized in terms of sheer business size. Simplistic as it may be, the idea that big is wrong has been a driving force for much of the subject's history. As distinguished from market power, economic power is also the reason why even the notion of social welfare is problematic. Analytically, the idea may be interpreted in purely financial terms, such as allocative-efficiency or total surplus. Even broadening the analysis to encompass a dynamic setting to accommodate the long-run efficiencies generated by, say, product innovation leaves the basic theoretical framework unchanged. Setting social welfare as the goal of anti-trust law thus makes anti-trust itself a branch of economic policy that must be governed by financial analysis. All other concerns, such as fairness, the plight of small businesses or, crucially, the socio-political consequences of unbalanced economic power, become irrelevant. This is how modern anti-trust usually proceeds. However, when and if economic power is viewed as the primary foe, as it has often been throughout history, then the goal of anti-trust changes. It becomes the pursuit of marketplace egalitarianism, of a Jeffersonian ideal of an economy of "small dealers and worthy men[6]," none of whom are capable of coercing anyone else and, therefore, of negatively affecting a country's socio-political life. Social welfare then takes a

[6] Justice Peckham's formula in United States v. Trans-Missouri Freight Association, 166 U.S. 290 (1897).

broader, less rigorous meaning that transcends economics and even the law, in that neither discipline may adequately account for loose notions such as marketplace fairness or the protection of small businesses.

When an antitrust case involves a business practice characterized by the short-run/long-run trade-off, the court may reach a decision only by attributing weights to the practice's immediate and future welfare effects. The choice of weights may seem theoretically driven, but it is not. Economics often fails to provide objective grounds for the choice – by, say, proving that short-run effects always (or at least in this specific case) outweigh long-run ones, or vice versa. Assigning weights is frequently a normative operation even for the least ideologically oriented court. It is a peculiar, one-dimensional kind of normativeness, as it depends only on the court's preference for short- over long-run consequences. Still a normative judgment it is, one that analytical arguments cannot fully validate. Not only is Predatory Pricing exemplary of the short-run/long-run trade-off. The history of its law and economics also highlights the inevitably normative nature of the courts' choices in the face of that trade-off. For a considerable period of twentieth century, American courts emphasized predation's negative long-run effects over its positive short-run ones. The consequence was a strict enforcement of the per se prohibition of predatory behaviour. More recent Predatory Pricing case law has reversed this attitude, with courts giving decisive weight to the short-run gains guaranteed by any price cut, regardless of its possible strategic motivation and negative long run effects. The reversal mirrors the greater confidence of most contemporary courts in the spontaneous ability of free markets to deliver their efficient outcomes in the long run, without any specific intervention by the law or the state. Hence, it is believed that even successful predators will not enjoy their victory long because new competition will surely, and quickly, erode any market power they may have conquered. This belief is clearly a normative judgment that finds no analytical justification in modern economics, exception being made for the most idealized version of perfect competition. It is a judgment that is typical of many chapters of current antitrust case law besides Predatory Pricing but it is also one the true nature of which only PP reveals with both clarity and immediacy. If predatory behaviour symbolized the evil of giant business, then what courts had to do was "just" search for evidence about that very behaviour. Predatory pricing thus became a proxy which does not mean that Standard Oil or other large businesses that, over the decades, have been found guilty of predatory behaviour were actually innocent. Almost surely they were not. It is just to recognize the role that Predatory Pricing has played in supporting the antitrust fight against

economic, as distinct from merely market, power. As we said above, this was an eminently socio-political fight, aimed at preserving no less than American democracy, not just marketplace efficiency. The patterns of anti-Predatory Pricing enforcement that courts have applied over the years thus mirror the evolution of socio-political views about economic power at least as much as they track the progress of legal and economic thinking about exclusionary behaviour. Common law systems naturally lend themselves to an appreciation of the historical evolution of legal doctrines and enforcement practices. Due to the rule of precedent, entire areas of the law may be presided over by age-old principles. A few of these principles may sometimes have been inspired, either directly or indirectly, by economic reasoning. As a consequence, traces of old economic ideas may still survive in common law. This is clearly a boon for historians of economic thought. The law is one of those rare fields where historians have an edge with respect to theoretical or applied economists.

The concept of non-price predation or raising rivals' cost is raising concern in the global regime. Non-price predation involves the abuse of judicial or administrative process so as to interfere with the growth of domestic rivals along with other foreign competitors of the predator firm. Rules against predatory pricing and anti-dumping measures are often manipulated by the competitors to a large extend thereby phasing out smaller firms from the competition. Extra caution must be taken while formulating rules so that it will not broaden than what is necessary; rules which are wide off the mark can invite their misemployment for anti-competitive occasions. Another hidden pitfall in this ambit is that a when competitive pricing is misconstrued as predatory pricing, the price competition in the economy is being supressed. A misinterpretation of predation to be competitive pricing would promote higher prices from increased concentration in a long run. Thus the authorities should be careful enough to not initiate any action against predatory pricing unless it has been proved with high degree of accuracy. It can have more deleterious effect when tried to enforce mechanically.

The Competition laws of majority of the member nations of The World Trade Organisation has provisions to deal with dominance of market forces, monopolisation of market forces or price discrimination to injure the market stability of their country. Certain other category of member nations have additional legislations which prohibit sales below some cost floor without reference to market power or effect of price in competition. Such sale-at-a-loss prohibitions are also referred eventhough they are not considered as an issue of predation in

the normal parlance. Therefore the deductions drawn from the former rules would illuminate the former regulations.

1.1 STATEMENT OF PROBLEM

Anti-competitive practices often result in increasing the prices of commodities and reducing the choices to consumers which can detrimentally affect the growth of market. The domestic competition policy aims at enhancing the domestic firm rivalry and consequentially providing equitable opportunities of competition. But the domestic competition policies face severe impediment while considering the cross-border transit of goods as they cannot curb anti-competitive effects unless and until they can prove that the domestic firms are made to suffer huge loss. The aspects of predatory pricing are regarded differently across the world. The regulations imposed by WTO along with the domestic rules can potentially impede the trade relations between countries but due to continuous diplomatic negotiations between countries, it has been brought to a check that such regulations will not affect the trade relations between countries. Yet, the point long under consideration is the need to bring a double regulation both by the WTO and the Anti-dumping laws of the countries in determining the prices of different commodities.

1.2 SCOPE OF STUDY

The study aims to draw a parallel between the laws of predatory pricing in the perspective of antidumping laws of WTO. It tries to study the aspects of Competition Law that influence and regulate predatory pricing. It will also focus on analysing predatory pricing under the international regime and ascertaining India's position with a comparative focus on countries like Canada, USA, UK, Japan and India.

1.3 OBJECTIVES OF STUDY

1. To examine the effectiveness of predatory pricing regulations under antidumping laws of WTO and Competition Policies.
2. To analyse the efficiency of various domestic laws concerning predatory pricing across the globe.
3. To analyse the impact of predatory pricing in the Indian scenario.
4. To provide suggestions and solutions to the existing realm of predatory pricing.

1.4 RESEARCH PROBLEMS

1. Whether the antidumping measures of WTO are within the scope of its Competition policies?

2. Whether The Competition Act, 2002 addresses the issues of antidumping and predatory pricing?

3. Whether the domestic predatory pricing mechanisms under various jurisdictions are effective?

1.5 RESEARCH HYPOTHESIS

1. Probability of predation is accelerated with the depreciation of costs and increase of dominance in the market.
2. The competition law in India is more effective than antidumping laws exercised by WTO.

1.6 RESEARCH METHODOLOGY

The researcher intends to conduct a doctrinal study in her topic. Primary sources relied upon by the researcher includes various legislations pertaining to the topic like the Antidumping laws and Competition laws of different countries. Secondary data sources include the various juristic articles elucidating the judgments, opinions of experts of the field. The study involves a comparitive analysis of jurisdictions like Canada, USA, UK, Japan and India by analysing the provisions of their competition laws and antidumping legislations formulated to stabilise their markets. Critical analysis of cases of these jurisdictions is also employed in relation to the topic of study. Legal reports, articles and research papers on predatory pricing useful is intended to be referred from journal sites like Westlaw, Jstor, Heinonline and Kluwer databases. The research would be concluded by proposing methods to safeguard the consumers through the lens of Competition Law and suggestions to reform the existing antidumping law regime to work as a check on implementation of predatory pricing.

1.7 CHAPTERISATION

Chapter 1- Introduction.

This chapter includes definitions, factors that contribute to predatory pricing, feasibility of predatory pricing and how it is dealt under the Anti-dumping and Competition laws.

Chapter 2- The Economic and Legal aspects in determining predatory pricing.

The chapter deals with economic and legal development of predatory pricing theoretically and scrutinizes how it is intensified.

Chapter 3- Dumping and predation under WTO.

This chapter inspects the elements of dumping and WTO measures and the conditions required for ascertaining dumping and ponder the aspects of predatory dumping.

Chapter 4- Predatory Pricing.

Competition laws and predatory pricing is dealt in detail in this chapter. Theoretical aspects of competition, its role, tests to ascertain predation are also discussed.

Chapter 5- Analysing various jurisdictions.

Predatory pricing in Japan, USA, UK, Europe and Australia is dealt with. It also analyses how far their laws could serve as a means to protect competition. The chapter also analyses how the impact of predatory pricing has affected the trading practice amidst the pandemic.

Chapter 6- Conclusion and Suggestions.

The chapter focuses on the proposed suggestions and conclusions with regard to the existing situation of predatory pricing and its regulatory mechanisms imposed under the Anti-dumping laws and the competition laws.

2. THE ECONOMIC AND LEGAL ASPECTS IN DETERMINING PREDATORY PRICING

2.1 INTRODUCTION

Nature, the creator of all living beings on earth, made all the species of Kingdom Animalia to live in groups, and unlike all other members of the animal kingdom, man is bestowed with a unique ability to reason. Human beings began cohabitation, and thus people of common interest opted to live together, creating settlements and civilisations. There emerged the concept of society and togetherness. Being a social animal, man formed groups and started to lead a settled life. Under such circumstances, he realised the need for rules and regulations to govern the activities of him and his fellow beings. The shreds of evidence from the pages of history show that man was greedy to acquire power and did not leave any stone unturned to achieve the baton of power. People started to assume power, and for the urge to acquire power and supremacy over other citizens, the existing groups were split, giving rise to new ones. The person who ruled was named to be the King, and he was vested with the power to make rules for better governance. There developed the system of monarchy. Gradually the ordinary citizens became conscious about their rights, and through many years of struggle and hardship, the majority of the countries across the globe was transformed into democratic form. In a democratic form of government, the people are ruled and governed by their elected representatives. Independent countries were formed, which were ruled by their representatives guided by the constitution.

Even before the formation of such states, people started moving to earn foreign investment for trading and ultimately, it came to be monitored by a monarch when kingdoms were formed. Tracing the evolution of trade since medieval times, the movement of traders, it is clear that the merchants were not governed by their domestic laws but by the lex mercatoria or law of merchants. When Europeans started to diversify their trade relations across various continents like Asia, Africa and Latin America, it was difficult for them to adhere to their local jurisdiction as they were already bound by the laws of their country[7]. These foreign traders started to claim superior treatment from the local people as their local laws could no longer expropriate or nationalise their assets under their locally enacted legislation. As the local law was inferior, the foreigners could not be subjected to it as a much superior law

[7] Scholars like Grotius and Vattel strongly supported this contention under the assumption that the traders would carry the laws of their home country wherever they went and were not bound by the local laws of their trading places.

already bound them. With the inception of a modern state concept, people started to follow more settled trade principles across the borders. It was stated that many treaties were entered into between the European powers and the Asian, African states and the consuls continued to exercise power over their nationals while the European traders were bound by their nation's laws[8]. The phenomenon of globalisation was phenomenal as it helped in cultural exchange through trade and has integrated the world economy to a large extent. It thereby facilitated the better exchange of products across the borders without impediments. To safeguard the domestic industries and protect people's rights within their territory, numerous measures have been adopted by each of them[9].

International competitiveness is often employed to calculate macroeconomic performance. It compares and contrasts various economic factors of a country and its trading partners. The factors under consideration may be qualitative factors or those that immediately do not succumb to quantification[10]. Thus, factors like product specialisation, quality of products involved, technological innovation, the value of after-sale service are brought into consideration. Strengthening of competitiveness is made possible by the high rate of productiveness. The measures of competitiveness should adhere to the following aspects[11]:

a) Cover all sectors which are open for competitiveness
b) Encompasses all markets which are exposed to competition
c) Deduced from data competent enough to be compared in the international market.

Data limitations pose a roadblock to the analysis method and thus result in compromises in each stage such that all indicators measuring competitiveness is just a rough approximation of the ideal. The country's competitiveness may be affected both by the structure and location of the market. Different approaches may be adopted depending on the purpose to which the proposed indicator is to be put in. The study may be confined to the country's export market or domestic market, or it may focus on the country's competitive position in both the export market and the domestic market. The extent of competitiveness would vary with the markets take into consideration. Thus it is crucial to consider that the trade indicator may be accurate

[8] SD Sutton, ' EA Maffezini v. Kingdom of Spain and the ICSID Secretary General's Screening power', 200521(1) ARBITR. INT. 113, 119.
[9] For instance, certain policy measures like National Policy for India, 2016 which gave a roadmap of Intellectual Property Rights in India, Scheme for Facilitating Startups Intellectual Property Protection (SIPP) which ushered and empanelled 208 patent agents as facilitators by the Controller General of Patents can be rightly stated as a measures towards achieving a society that favours better protection of intellectual creations.
[10] NICOLA GIOCOLI, PREDATORY PRICING IN ANTITRUST LAW AND ECONOMICS: A HISTORICAL PERSPECTIVE 150-158 (Roultedge Publication 2014).
[11] Id at 160.

for a market under specific market condition and particular aspect of trade condition as the question would rely on the particular aspect alone. Several technical barriers arise in the interpretation of competitiveness indicators, and not every such aspect has a straightforward solution. The structural measure focuses on the elements of the market structure like the concentration ratio, which determines the distribution of markets across different jurisdictions. The entry and exit conditions also play a principal role in determining the market structure. Sunk is one such determining factor that affects the entry and exit of the firms and, in turn, influences the market entry. It is necessary to maintain the quality and price of the products in the market[12]; the greater the required profitability, which must be sustainable before any further entry occurs. When a large volume of production is witnessed in the economy, the marginal cost will reduce considerably, and the term economies of scale signify this dip in marginal cost. If the firms can realise the economies of scale to the same degree and the incumbents, they will make a smooth entry into the economy[13]. The structural measures of competition can only be successfully interpreted by combining them with the dynamic measures. This is because a new entrant firm and the incumbent firm always compete for an incumbent position, and sometimes the new entrant firm might expel the incumbent and occupy that position. Thus markets that exhibit high levels of solid dynamism will be stable in high levels of market concentration[14].

2.2 THE PRECONDITION OF THEORETICAL ECONOMIC EVALUATION

The concept of predatory pricing has stirred curiosity and perplexed the anti-trust regime as a whole for an extended period. The theory of predatory pricing is plain sailing wherein which the dominant firm predates over the smaller firms existing in the economy by keeping their prices reduced considerably for an extended period. This ultimately deters the smaller firms to make a re-entry to the market[15]. If the firm acting as the predator and other firms of the economy are equally efficient, then the loss suffered by them and its impact on them would be identical. For the predation to be coherent there must be some conjecture that the loss incurred by the firms would pave the way for future gains like any other investment. This would surmise the indisputable fact that the firms would ultimately regain a firm footing over the market forces and thereby reap more profit, which is potent enough to aver the foregone

[12] M Bajgar, *Industry Concentration in North America and Europe*, 18 OECD Productivity Working Papers, (2019).
[13] EDGARDO BUSCAGLIA, WILLIAM RATLIFF ET. AL., THE LAW AND ECONOMICS OF DEVELOPMENT 89-110 (Roultedge Publication 2014).
[14] Id at 99.
[15] Christopher R. Leslie, *Predatory Pricing and Recoupment*, 113 COLUM. L. REV. 1695 (2013).

profits. Generating better cash reserves, cross-subsidisation or better financing through other market or market products would ensure a more clear-cut route to be plied by the predator firm so that the victims can be outlived more efficiently from the market[16]. This notion was later augmented by the idea that the prospective gains are not limited to the market forces of predation. It also adds to the investment in reputation, which could add to the premium payment in other markets, thereby putting a stop to the entry of rivals[17]. Such spillover effects would endow the predator with more operating profit than the inceptive segment of predation. The subject of predatory pricing has been a growing concern amongst economists since the inception of trade.

The identification of predatory pricing was difficult since economists were pondering the difference in price structure in the economy. From McGee[18], many writers analysed the classic monopolies to analyse predatory pricing, particularly his original work in 1958 studied the Standard Oil Trust in the United States of America[19]. At the end of his research work, he affirmed that the Standard Oil Trust employed mergers rather than predatory pricing to monopolise the economy at the turn of the century. However, he concluded that "attempts at predation have been rare and that successful attempts will be found to be still rarer." Later, Elzinga[20] made the Gunpowder trust, which existed in the latter half of the 19th century, his subject matter by and based his research on a review record of the 1911 Department of Justice case against the trust. He finalised that predatory pricing might have occurred with less frequency, but many supporting factors like the entry and re-entry of victim firms worked against it. This ultimately resulted in a reduced frequency of occurrence of predatory pricing. He confesses that many roadblocks existed for the historical search of predatory pricing as cost data[21] was scarce even though price data[22] was adequately accessible.

[16] Patrick Bolton, Joseph F. Brodley and MH. Riordan, *Predatory Pricing: Strategic Theory and Legal Policy*, 88 GEO. L.J. 2239 (2000).
[17] RICHARD A. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE, 185-186 (Roultedge Publication 1976).
[18] John S. McGee, *Predatory Pricing Revisited*, 23 J. LEGAL ECON. 289, 291-292 (1959).
[19] John S. McGee, *Predatory Price Cutting: The Standard Oil (N.J.) Case*, 1 J. LEGAL ECON. 137 (1958).
[20] Kenneth G. Eizinga, *Predatory Pricing: The Case of the Gunpowder Trust*, 13 J. LEGAL ECON. 223 (1970).
[21] Cost data implies the factual information concerning the cost of labour, material, and other cost elements that the contractor has incurred or expected to have incurred while performing the contract. LawInsider, https://www.lawinsider.com/dictionary/cost-data#:~:text=Cost%20data%20means%20factual%20information,contractor%20in%20performing%20the%20contract (last accessed on 4th of April 2021 at 9:00 am)
[22] It means the factual information concerning prices substantially similar to the ones that has been procured. It involves offered or proposed selling prices, historic selling prices etc. LawInsider, https://www.lawinsider.com/dictionary/pricing-data#:~:text=More%20Definitions%20of%20Pricing%20data&text=Pricing%20data%20means%20factual%20i

Kreps and Wilson came with a model where both the monopolist and the entrant firms are uncertain about their costs[23]. The theory proposes a tussle between a strong monopolist firm and a weak monopolist firm. They concluded that the market may be open for any entrant firm by giving up its priorities which ultimately causes the weaker firms of the market to shatter its reputation.

2.2.1 Cost test

Predation occurs when the dominant firm seeks to control the market by reducing the prices and incurring an expected loss or lower profit. The antitrust analysis often involves deductions from both qualitative and quantitative aspects, and the price-cost test analysis plays a pivotal role[24]. Fixing the price above the short-run marginal cost implies profit maximisation, and if the short-run marginal cost is higher than the average cost, then the predatory intent of the firm is straightforward. When the prices remain constant, the rivals will restrict the output and thereby, the predator would gain the market share successfully. Any price which accounts for more than the short-run marginal cost can never lead to the riddance of an efficient competitor and drives an efficient undertaking out of the market that they are not capable of withstanding the tough competition conspired against them due to lack of financial resources.

The most influential cost-based rules were proposed by Areeda and Turner in 1975 and later modified together in 1978. Areeda and Hovencamp gave the theory a different form in 1986. The rule focuses on short-run pricing conduct, thereby making finalisations on the costs rather than the price-setter. The rule presupposes that the firm has monopoly power in the target market and prices at or above the reasonably anticipated average variable costs should be per se legal, and those which are below the presumed level are illegal. The court has rightly opined that when there is a price difference between average variable cost and average total cost, it is abusive if there is an intention to exclude a competitor[25]. There is no price below the average total cost, which is generally regarded as predatory, and the general principle followed is that if a dominant player does not incorporate average total cost, the competitor has to incur heavy loss. This is because it excludes firms that do not have the

nformation%20concerning%20prices%20for%20items%20substantially,prices%2C%20and%20current%20selli ng%20prices

[23] David M. Kreps and Robert Wilson, *Reputation and Imperfect Information*, 27 J. ECON. THEORY 253 (1981).

[24] Balde Alen, *Private Antitrust Law enforcement in cases with international elements*, 2 J. ECON. THEORY 33 (2016).

[25] AKZO Chémie BV v. Commission of the European Communities, Case C-62/86 [1991] ECR I-3359.

financial resources to endure predation. Reducing the prices below the profit margin by the dominant firm would imply benefit to the consumers, and a lower price could signify the efficiency in developing economies, thereby expelling the lower competent one from the market[26]. Compelling the firm to maintain the price above the cost facilitates the entry of inefficient enterprise into the market.

Some of the cost measures employed in the detection of predatory pricing include[27]:

The Marginal Cost (MC) measure implies the cost of production of the last unit of output.

a) The Average Variable Cost (AVC) concept signifies how the Marginal Cost would behave on an average at a considerable range of output. It is determined by adding all the cost entries that would vary with output and dividing the result by the total number of outputs produced.
b) The Average Available Cost (AAC) is determined by calculating the amount that the firm can evade by not producing specific units of output and dividing it by the total number of outputs that are not produced. The variable costs and product-specific fixed costs, without considering the sunk costs, which is not incurred while producing a range of products, constitute the cost that a firm in its production journey can evade.
c) Average Total Cost (ATC) is determined by dividing the firm's total cost, which includes the variable costs, fixed costs, and the expected costs[28] incurred.

2.2.2 Areeda- Turner test

The most famous of all the tests to check predatory pricing in an economy was made by Areeda and Truner in 1975 through their article[29]. They opined that any price marked below the short-run marginal cost is predatory, and those prices marked above it practically removes the chances of predation in the economy. The explanation provided by them was theoretical and straightforward. In an economy of perfect competition, the firms will be pricing at marginal cost, and as long as it remains at that level, it cannot be termed to be predatory because that level is maintained even in the most predatory kind of market. It is essential to observe that unless the price does not increase as the incumbent; the competitor cannot be

[26] Steven C. Salop, *The Raising Rivals' Cost Foreclosure Paradigm, Conditional Pricing Practices, and the Flawed Incremental Price-Cost Test*, 81 ANTITRUST L.J. 371 (2017).
[27] Y.V Tudo, *An Appraisal of Marginal Cost and Predatory Pricing Under Section 2 of the Sherman Act*, 30 ALA. L. REV. 562 (1979).
[28] Common costs support a number of activities or product lines. They are a part of the fixed costs and are not formed by any specific product alone.
[29] Areeda, P. E., & Turner, D. F. (1975). *Predatory pricing and related practices under section 2 of the Sherman Act*. HARV. L. REV, 697-699.

eliminated who would be at least as efficient as the incumbent firm. As the authors were well aware that Marginal cost, being more of a theoretical concept, cannot be used as an economic tool to determine predation in the economy, they resorted to Average Variable Cost as an alternative.

Some of the criticism levelled against the proposition of Areeda and Turner were[30]:

a) The tool of Marginal Cost is not practical to determine the predation because some price below it can be predatory, and prices above it can be predatory too.
b) Average Variable Costs are not a perfect alternative to the Marginal Costs because often they fall too much lower than the Marginal Costs at higher output levels and tend to exhibit extreme negative values while calculating the level of predation in the economy.
c) The Average variable Costs tend to favour the firms in setting high fixed costs and low variable costs significantly for the firms engaged in software production and transportation sector. Their low prices would easily remain below the average variable cost, thereby facilitating the incumbents to prevent the new entrants from recovering their capital costs for a very long time and thereby preventing their entry into the market.

Despite all these criticisms, most economists and jurists resort to its users than any other price-cost test theories. They opine that the lack of accuracy is made to settle accounts with its easiness to use. Also, if a firm fixes price below average variable costs, it indicates that it is not even covering all of its variable costs and is letting alone its fixed costs. Such a persistent situation would result in heavy losses for the firm than being eliminated from the market, and thus a firm that continues to exist even in that situation would be a predator unless it has proper justifications for its survival[31].

2.2.3 Average Total Cost Test

The main criticism raised against the Average Variable Cost test was that it fails to comprehend specific amounts in the category of below-cost pricing and underestimates the

[30] James Hurwitz & William Kovacic, *Judicial Analysis of Predation: The Emerging Trends*, 35 VAND REV. L 63-157 (1982).

[31] The legitimate Business Justification is said to exist when behaviour that fails tests of predatory pricing due to the existence of special circumstance that would render the comportment reasonable. Generally the legitimate business justification can be valid upon considering various instances where even pro-competitive reasons turn to be valid. To be precise, the burden of proving the legitimate Business Justification falls on the predator himself by making arguments that make it valid to prove that the prices were not intended to be made predatory and the pricing below cost was for legitimate reasons.

marginal cost price by overlooking the prices above average variable cost and below average total cost. At this instance, the firm will be covering variable costs but fails to cover the fixed costs, as a result of which it finds itself in a difficult situation in the case of interest payments and depreciation. An equally efficient competitor will not be affected in such a situation when the price is held below average variable cost, but if the price is held below average total cost for a considerable period, then it can turn out to be detrimental for both the rival and the predator. Some European Union jurisdictions have adopted the average total cost test as a basis for analysis predation in their domain. As per this test, those prices which are marked below the average variable cost are deemed to be predatory, and those which are recorded to be higher than the average variable cost but lesser than the average total cost, then those prices are considered to be predatory unless and until it the predator firm has sufficient justification in that regard[32].

The Average Total Cost test also suffers its loss. When a firm that specialises in multi-products are considered, this test fails to yield the result because, in such an instance, attribution of common cost to a single product line is more like an arbitrary process. This can be rectified by attributing common costs to different product lines of the firm based on the overall corporate revenue that they yield. It is easy to ascertain common cost by one business line and its products in the ordinal sense, but it is difficult to determine the usage in a cardinal sense by comparing it with another business line. It is relatively easy to determine the usage of a shared resource by a relatively low product line and the usage of the shared resource compared to a heavy product line, but it is not easy to understand how much they differ. To be precise, it is easy to comprehend which one of the firms is a heavy user but by what amount is a tough nut to crack.

Another set-back to the theory of average total cost is that fixing a price below the average total cost for some time in the case of a new entrant firm may be termed a rational response even if it does not ultimately result in the elimination of competition. When a new entrant firm makes its entry to the new firm with less cost, the existing firms might face a loss that can be made good by utilising the marginal cost pricing, which would enable them to cover the variable the fixed costs. In contradiction to this scenario, if the new entrant firm holds price steady at the pre-entry level, it might face a severe decline in the demand such that it would not be even able to cover its variable costs. Some of the prices marked below the

[32] Joskow, Paul & Klevorick, Alvin. *A Framework for Analyzing Predatory Pricing Policy*. 3 YALE L.J. 89 (2005).

average total costs are predatory while some are not so and due to the difficulty in sorting them out, it is better to leave them as it is.

2.2.4 Average avoidable cost test

The average avoidable cost test has been gaining considerable importance in the global economy concerning the testing of predation[33]. This test can be rightly termed as a variant of the Areeda Turner test, and it employs the method whereby the price fixed by the firm is compared to that of the average of variable costs added to the product-specific fixed costs without involving the sunk costs of the range of output under consideration. This test aims to determine the firm's savings if it did not produce any range of output. The advantage of this calculation method is that it analyses the cost incurred more accurately when it produces the output and is sold at a price alleged to be the predatory price.

The predatory firm might incur more cost when compared to the cost variance that might arise with every unit of output sold as per the measurement of the average variable cost test. While increasing the capacity to absorb more demand in the market, there are high chances that the predator firm might incur substantial fixed costs. By employing the average avoidable cost test, it blunts the criticism raised against the Areeda-Turner test that it could be employed in firms with high-fixed costs, and they could pass it easily.

Another advantage of employing the average avoidable cost test[34] is to study its flexibility in studying different aspects of a firm's pricing. It is usually performed to study different aspects of the total revenue from the sale, which is compared with the total saving the firm would make if the product is completely removed from the face of the market. Another matter to be considered is that when avoidable costs are to be calculated, it is dependent mainly on the time period over which the calculation is being made, i.e., the longer the time period, the more will be the total and the average costs due to the accumulation of the sunk costs as avoidable costs over time. Thus, the Average Avoidable Cost test finds itself hard to pass through the more prolonged the predatory pricing persists in the economy[35].

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[33] Janusz Ordover & Robert Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 YALE L.J 8, 17-18 (1981). In line with the airline specific legislation the Canadian Competition Tribunal has affirmed the average avoidable cost test in the case Commissioner of Competition v. Air Canada (2003), 26 C.P.R. (4th) 476, [2003] C.C.T.D. No. 9 (Competition Tribunal).

[34] Derek Ridyard, *Exclusionary Pricing and Price Discrimination Abuses under Article 82 - An Economic Analysis*, 3 ECLR 286, 295 (2002).

[35] William Baumol, *Predation and the Logic of the Average Variable Cost Test*, 4 J. LEGAL ECON. 60, 62-63 (1996).

2.2.5 Above-Cost Price

Analysing different test of predation, another issue of contention that came before the economists were that if a firm marks the prices of its commodities not below a particular limit but fails to maximise its short-run marginal cost, then whether that would amount to predation in the economy. The incumbent firm would sometimes set a price below the short-run profit maximising point by choosing a possible outcome level that leaves little more than the residual demand for an entry to be profitable. Moreover, ultimately the incumbents would keep the competitors out of the market. This strategy seriously affects the welfare of the consumers because the incumbents have driven off the new entrants who could have gained more volume of trade and more experience if they had a more firm foothold over the market. As an alternative method to address the injury inflicted through negative pricing, the economic expert Aaron Eldin has suggested that the incumbent firms should not cut their prices or make any improvisation in their product at least for that time which either the entrant firm would require to make it viable to the atmosphere of the new market or until the time when the then monopolist would be devoid of his paramountcy[36].

A serious issue to be encountered while employing the profit maximisation technique is that it is difficult to determine whether the process fixed is at the short-run profit maximisation level or not. The US Court of Appeals has observed that while employing this test of profit maximisation, one must be fully aware of the demand characteristics of the market, which adds to the convolution and precariousness[37].

2.2.6 Recoupment test

Predatory pricing is anti-competitive in all dimensions. The perpetrator firm has to forego their profits in the present economic structure only with the hope that they can reclaim the loss in future by exercising their market power. Thus, the market forces determine whether there is fertile soil for predatory pricing to be employed. The only matter of concern is that the firm must have a significant share in the market or acquire such a share. The entry conditions of the market should be in such a way that it allows the firm to exercise predation by lowering prices followed by a period of recoupment so that the firm can reacquire the firm's investments. The basic underlying principle of the recoupment test is that consumer welfare is the main objective of the competition laws across the globe. When other accessory

[36] Aaron Edlin, *Stopping Above-Cost Predatory Pricing*, 4 YALE L.J 939, 941-942 (2002).
[37] MCI Communications v. AT&T, 708 F.2d 1081, 1114 (7th Cir. 1983).

targets like safeguarding small competitors of the economy or cutting back on the market concentration, the test shall deplete its importance in a country's economic structure. In the process of predation, a firm, by elimination of other firms from the market, lowers their profits only with the hope of recouping the suffered loss on predation by earning supra average profits[38]. There is the slightest possibility for recoupment if the assets of the eliminated competitor firm are brought by the new entrant economic firm and eventually competes by lowering the price. The demand prospects are bright when the demand is high, and the prospects are low if there is surplus capacity and demand decreases. However, if the perpetrator firm mistakes the conditions of the market and suffers huge loss by preceding their profits initially and finally ending up not recouping their investment, then the process of predation becomes self-disastrous. In other words, a price is termed to be predatory if a firm finds it difficult to make a re-entry or that it would be forced to follow the prices as fixed by the incumbent firms of the economy. If the players or firms can effectively prove that their pricing technique is improbable to deter or do away with the entry of the new firms or that the recoupment of the losses is far-fetched, then the test enables the appraising agency to disband all allegations of predation even before conducting the price-cost test. Thus, the test proves to be the inception of the process of inquiry.

While employing the recoupment test, it has to be ascertained whether the predation is targeted against an existing competitor or a new entrant firm of the market. If the goal is to predate upon an incumbent competitor firm of the same economy, then the predatory firm, after causing the exit of the competitor firm or ensuring its firm hand over the prices of the economy, would raise the prices which are above than the price before employing predation. Then the predatory firm would reap more profit than the loss suffered and ultimately would thrive over the economic condition. This is usually not employed by any firm unless it is sure to incur a humungous profit than what it was earning in the presence or active participation of the competitor firm. If the target is on an entrant firm, then the predator firm would reduce the price to such an extent that the entrant firm finds itself non-viable to adjust to the new economic condition and makes its exit as early as possible. Once the incumbent predatory firm ensures the exit, it would increase its price to the level before the entry of the new firm.

There has been debate amongst many economists regarding the frequency or period over which the predation may exist, but still, no possible remedy has evolved due to a lack of

[38] C. Scott Hemphill, *The Role of Recoupment in Predatory Pricing Analyses*, 53 6 STAN. L. REV., 1581-1612 (2001).

evidence and statistics regarding the matter. Certain US courts have conclusively determined that predation for a less period is desirable, and the decrease in the frequency of predation would imply the relevance of the Areeda-Turner rule, which is in turn hostile to the plaintiffs[39]. The majority of the discussions prove that there is little basis for the extrapolation of activities of firms, and the change in the environment of trade in different countries adds to the risk in such extrapolation of the activities of firms. The issues of predation are brought before the competition authorities, and a considerable proportion of them deal with healthy price competition. Thus there is an urgent need for a rule that distinguishes occasional violations from numerous complaints.

2.2.7 Long term cost-based rules

As per the contention of Posner, the long-run marginal cost is a better indicator than the short-run cost to check the existence of predation in an economy. He states that a predator upon pricing at short-run marginal cost would efficiently drive away another equally efficient competitor who could not endure the loss for a short period from the market. The prerequisite for the market to be equipped was that the plaintiff must show that the market was predisposed to effective price marketing[40]. Also, the predator firm must have an intention to exclude the other competitors from the market. Posner also adds that based on the demand and supply, the defendant firm could price at short-run marginal cost and thereby make an exit from the market, which would be socially desirable.

2.2.8 No rule approach

Some economists argue that the instances of predation are so rare that the competition officials should be least bothered about such a phenomenon, and in such a situation, any rule has hidden elements of risk while being employed. The rules are then sure to yield false-positive errors, and those errors would increase exponentially with the unpermissive temperament of the rule[41]. The proponents of this concept also put forward the idea that predation being unsuccessful would act as a self-deterrent on the firms from employing it, and thus the intervention of the state is not required. The self-deterrence arises when the firm finds it difficult to gain the market even after reducing prices as a step of predation and finally inflicting injury. This forces the new entrant firm to disintegrate their predatory plans ultimately. The withdrawal by the firms may be seen after inflicting injury to themselves, but in some other cases, the firms would anticipate and abstain from such activities ab initio.

[39] Martin, S. *Areeda–Turner and the Treatment of Exclusionary Pricing under U.S. Antitrust and EU Competition Policy*. REV IND ORGAN 46, 229–252 (2015).
[40] Kaplow, Louis, *Antitrust, Law & Economics, and the Courts*, 50 4 LAW CONTEMP PROBL, 181-216 (1987).
[41] McGee, John S, *Predatory Pricing Revisited*, 23 J. LEGAL ECON., 289–330 (1980).

Another altercation against the no rule approach is that the courts find it difficult to distinguish between predatory pricing and competitive pricing. In such a case, if they disturb the prevailing competitive prices of the economy, then it affects the stability of the economy, leading to its collapse[42].

2.2.9 Deep Pocket Requirement

The firms that can establish their economies of sale are competent enough to enter into the market field and thrive by eliminating other firms such that their loss can be made good through their existing financial resources. Generally, a firm having sufficient monetary backing can endure the threat of predation and eventually engross the rival's share after their exclusion from the market. While a corporation is dealing with many market economies simultaneously, they have sufficient funds to be adjusted so that their action of predation would never incur a loss to them. Thus, a deep pocket firm that has a firm footing in the market economy and a stable reputation will exclude or deterred from entering the market, thereby enhancing the impact of predation.

Researchers were unsuccessful in inducing the subjects to behave as predators. The test conducted by Issac and Smith tried to formulate an environment that is conducive enough to create predatory firms, which is a two firm market, one with substantial cost advantage and others with deep pocket and sunk cost[43]. The experiment imposed entry and re-entry barriers, and the firms were unaware of each other's cost structure or demand. Ultimately the most common outcome was dominant firm pricing and high monopoly pricing, which was seen as a subset of all experiments employed to evaluate the antitrust rules against predatory pricing[44]. The Issac-Smith experiment was successful enough to explain the structure at the theoretical level. However, the practical viability of the experimental result is still dubious as it primarily deals with the single market, single product situations where the reputation is being seriously affected and the payoff from predation is having a negligible impact on the economy.

2.2.10 Net Revenue test

Predatory pricing may be defined in some aspects like the price cut where the profitability is entirely dependent on eliminating the other competitor firms. This definition paves the foundation for the net revenue test. As per this test, the firm has to prove that its profitability

[42] Sidak, Joseph Gregory. *Debunking Predatory Innovation,* 83 COLUM. L. REV, 1121–1149 (1983).
[43] R. Mark Issac and Vernon L. Smith, *In Search of Predatory Pricing*, 93 J. POLIT ECON 320 (1985).
[44] *Id.* at 334-335.

does not eliminate any of the existing firms from the market. If the firm successfully proves it, the firm is said to have passed the test[45]. It focuses on differentiating between non-predatory profit maximization responses and pricing to new competition. In the instance of a multi-product firm, the main question of contention that arises is whether the net revenue is calculated to be the firm's combined operation or the net revenue of prices challenged as predatory. When the demand for the firm's services is independent of the prices of the other firms, then the choices are entirely irrelevant as the net revenues will also change by the same amount proportionately, ultimately making no difference in the outcome. For assessing the level of predation, net revenue is the most appropriate measure when the tested service is either complementary or acting as a substitute for the services offered by the firm. Such a conclusion may be drawn by careful analysis of the firm's demand curve and cost curve in the appropriate time frame.

Upon the presentation of umpteen number proposals, it is likely to interpret that the economists would never concede to a theory to determine predatory pricing in the market, which is potent enough to hamper the growth of domestic industries. However, the situation is not that bleak as there is a high chance to separate rice from chaff out of these proposed theories. After deducing all the concepts, it is commonly agreed that a real measure of market power is pertinent for a predator before the predation rule is applied, markedly visible in Areeda-Turner's proposal. Posner has depicted proof for the plaintiff's 'market power' part, and Williamson considers the dominant position of the impugned predator. The rule-of-reason test also makes it mandatory to view the dominance of the predator. Thus, significant market power turns to be an inseparable aspect while employing all the proposed theories. Areeda- Turner's propositions could answer a variety of questions posed against the identification of predation in the economy. Even so, it is ambiguous when under some situations the industries would benefit from the short-run marginal costs in some stages of production but at the same time, categorizing such prices as predatory would trigger inefficiency in the economy. In the fullness of time, the general economic conditions are bound to play significant role in determining the application of pricing rules depending on the capacity of the predator and the domestic industry. The tricky question posed before economists across the globe is to assess which factor other than the cost while calculating predation in the economy. Intent may top the list of non-cost factors that must be considered to ascertain predation, but its limitations are also equally widespread.

[45] Alexander C. Larson, *The FCC's net revenue test as a predation and cross-subsidy safeguard*, 1 UTIL. POLICY, 319-325 (1991).

Nevertheless, certain economists willingly shut their door from receiving evidence regarding the purpose and intent of the dominant firm. While all these factors are considered, it is very significant that any rule crafted against predatory pricing would yield more harm than good even if drawn carefully and narrowly. Such a rule can deter honest pricing in the economy, which will outweigh the benefits of condemning the predator. The predation that is likely to cause reputational benefit across the product markets or geographic markets to discipline the rivals or lower the acquisition cost should not be dismissed out of hand. Thus, in a nutshell, the legality of pricing conduct is limited to highly defined market structures where predation is challenging to occur.

2.3 CONCEPTUAL EVALUATION

2.3.1 Price Stability

Price plays a vital role in determining whether a market is under the clutches of predation or not. If, while surveying the general trend of prices in an economy, it is evident that initially, the prices were low, which ultimately resulted in the exclusion of existing firms and eventually, it was hiked to another level, then predation may be suspected. However, the test is applied after the damage has been caused to the economy. The firm's success in precluding the anti-competitiveness ultimately depends on the punitive measures in the economy, which compels the firm to adjust its prices based on profitability[46].

An attempt to prevent long-term predation, without relying on the traditional cost-based tests, was made by Baumol, who ultimately aimed at the final price rise after a firm exerted its predatory power over the market[47]. He further explains that any price cut may be made after the entry is being made to the economy for a considerably long period after the exit. Thus, the principle put forward by Baumol prohibits a firm from capturing monopoly profits and limit the incentives incurred by the predator firm such that it does not incur losses or forego profits in the first instance[48]. The principle does not mandate the non-reduction of prices after entering into the market; instead, it compels to choose a price to thrive in that amount for a more extended period of time. The rule, therefore, avoids the burden of calculating the cost figure as the firm can independently decide what amount would be remunerative for its

[46] Hay, George A. , *The Economics Of Predatory Pricing*, 51 ANTITRUST L.J, 361–374 (1982).
[47] Kamerschen, David R., *Establishing Liability and Calculating Damages Under Robinson-Patman Act and Predation Claims*, 7 J. FORENSIC ECON., 81-102 (1993).
[48] William Baumol, *Quasi -Permanence of Price Reductions: A Policy for Prevention of Predatory Pricing*, 89 YALE L.J., 11-13 (1979).

survival. Another advantage is that any new firm which is equally efficient as the existing one would survive as any price cut by the existing firm would permit full cost recovery. Baumol permits the price hike by the firm upon exit from the market economy as it would occur, taking into account the price and demand factors. Areeda and Turner criticized the practicality of Baumol's work, mainly the fact that the authorities must ensure the existence of the price for a long time, even after the firm's exit. They suggested that the predator could effectively increase the price in several stages by claims of changes in cost and demand. They even noted that changes in quality or models would make price changes, and the rule might even make the smaller firms leery of the reduction in price with the fear of losing the ability to increase them again at a later point in time[49].

2.3.2 Market Power

The primary rationale that facilitates the firm to give way to predatory pricing is the combination of dominant market power and a high barrier for market entry. It is essential to have a strong market power to exclude the competitors, and the firm must offer things that the other market participants fail to provide. The process of predatory pricing involves reducing prices to a great extent such that consumers are attracted to the lower price offered in the market. The prices which are close to the cost will not deter the efficient firms from surviving in the market. When the dominant firm sells at a lower cost, the competitor firms may succumb to losses and eventually exit from the market and result in profound pocket doctrine. The recoupment becomes possible only for the firm with maximum market power. Market power is generally derived from large market share, network and substantial financial resources, and if there is no barrier, then new firms will compete and ultimately, competitive prices will arise[50].

2.3.3 Rule of reason

The rule of the reason may be termed as an amalgamation of a number of factors, namely:

a) Predatory pricing may be effectively proved by a price below the average variable cost
b) Unless the dominant enterprise can prove profitability in the short run, any price below the average variable cost may be assessed to contribute to predatory pricing.

[49] Schwartz, Louis B., *On the Uses of Economics: A Review of the Antitrust Treatises,* 128 U. PA. L. REV. 244-268 (1979).
[50] AB Paulson, *The Economic Front Matter*, 62 ECONOMETRICA, 1 11-13 (1994).

c) When a price depreciates below average total cost, it will not contribute to predatory pricing unless a price rise significantly follows it.
d) Another non-cost signal of predatory intent recovered from evidentiary documents may also be taken into account.

The supporters of this theory raise strong arguments against the existing measures to check the measures of predation and states that all such measures are deficient. This theory, however, considers all variables on a case-by-case basis, keeping an eye on the price pattern and other factors that existed which acted as a check on predatory behaviour, which thereby becomes onerous for the firms as there is no definite scale to determine whether it is impermissible or not.

2.4 PREDATORY LAWS

Under continental laws, numerous factors aid in the creation of unfair competition in the market. The precursor of predation is when the perpetrator firm reduces the price, and consequently, the rival members would follow the prices of the perpetrator, thereby eliminating the incompetent rival, which ultimately favours the consumers. The economy will face disastrous consequences if competent rivals are also expelled from the competition front. Passing off, disparagement of competitors and counterfeit non-protected product features and configurations amount to anti-competitive activities. The predatory pricing laws of a particular jurisdiction prevent a firm from exercising its dominant position in an abusive manner, resulting in poor consumers' choice.

Market share concentrations determine the dominant position of a firm in the economy. In a general conscience, the dominant positions negatively affect the social and economic perspective as it might result in welfare losses. The dominant position may be a single-player hegemony termed monopoly or monopsony[51] or it might be held by two or more players who agree to act and exert their influence in a monopolist or monopsonist manner. In the international scenario, such explicit provisions are absent concerning the regulations of anti-competitive laws. Neither the Kyoto Protocol nor such multilateral international treaties contain provisions concerning the exploitation of markets[52]. The U.S. Antitrust law and competitive laws find their basis explicitly in productive efficiency, innovation and economic

[51] As per the words of Posner, " When I speak of monopoly or monopolist, I mean a firm with monopoly power and not necessarily a firm with 100 percent market share.; Richard Posner, *Antitrust Law,* 3 U CHI L REV. 196-198,(2001).

[52] WTO, Ministerial Declaration, Fourth Session of the Ministerial Conference, Doha, WT/MIN(01), 9-14 November 2001. This declaration dealt with the recognition of a multilateral framework to understand the importance of competitive policies in international trade.

value[53] while efficient competition is necessitated in an economy for the stable growth of the economy[54]. The U.S. system as a part of the Anglo-American system of laws considerably differs from the European or continental laws as it bases very little on the legislative or executive powers but relies more on a system crafted by the jurisdiction. Despite all these factors, the antitrust laws are regulated by the Sherman Antitrust Act and the Clayton Act, where the latter deals mainly with merger-related regulations. Even though there are traditional differences with the market structure, treating anti-competitive laws by both jurisdictions is considerably similar.

Market power is generally set up through essential factors like the demand side substitution, market side substitution and market share[55]. The issues related to mergers depend on whether the new entrant firm has substantially lessened competition[56] or restrained trade[57] in the respective market of the player. The minimum market share threshold in the USA for a firm to hold a dominant position may be enlisted as:

a) The firm will decline if the market share is less than 30 per cent.
b) The firm is likely to decline if it has an intention to monopolize if its market share is between 30 to 50 per cent.
c) The firm is said to have a dominant position if it has a market share of more than 50 per cent.

From the perspective of legislation of the European Union, if the market share is more than 40 per cent, then the firm is regarded to be dominant, but under certain circumstances, even the market share is less than 40 per cent[58]. A firm is not regarded to be dominant if the market share is less than 25 per cent.

However, the market share is not a constant factor in determining the dominant position of the market, especially when the demand, supply, and production are concerned. The laws that act as a regulatory mechanism to govern the aspects of predatory pricing do not explicitly provide the mechanisms of enforcement that allow the court to exercise their discretion in dealing with the issues of competitive pricing.

The courts have counted on the intention to monopolize and eliminate competitors to determine predatory pricing in an economy from the passage of the Sherman Act. As per

[53] Areeda&Kaplow, *Antitrust Analysis*, 4 B.C.L. REV., 46-48 (1988).
[54] United States v. Microsoft Corporation, 253 F 3d 34, 58, 89-90.
[55] Hylton, *Antitrust Law: Economic Theory and Common Law Evolution*, 2 CAMBRIDGE L.J., 236 (2003).
[56] Goyder EC, *Clayton Act and Competition Law*, CORNELL L. REV., 368-369 (2003).
[57] Gelhorn, *Antitrust Law and Economics in a Nutshell,* U CHI L REV., 337 (1991).
[58] British Airways v. Commission, Case C-95/04 P. European Court Reports 2007 I-0233.

Areeda and Turner's opinion, the firm's intent is not an essential factor in determining the aspect of predatory pricing under section 2 of the Sherman Act. Courts have remarked that the firms must have the intent and power to monopolize but does not determine any specific intent as per the section. Areeda and Turner accepted average marginal cost as a measure to examine predatory pricing in the economy.

Tetra Pak International S.A. v. Commission of the European Communities[59], Tetra Pak International, mainly manufactured cartons and aseptic machines. They captured the market by fixing price lower than the average marginal cost and thereby establishing control over the market. The incentives lured the consumers to a considerably large extend and thus eliminated competitive firms. In the famous Brooke Group[60] Case, Ligget introduced generic cigarettes and sold them at a rate lower than that of the traditional cigarettes. Brown and Williamson tried to lower their cigarette's price below the average marginal cost for eighteen months but could not recoup themselves because it could not monopolize in an oligopolistic market structure due to the surplus of cigarette industry in the area. The Supreme Court held that price predation is said to have occurred when a firm sets a price lower than the appropriate measure of its costs to eliminate or reduce competition and thereby gain control over the market power and in this case, Brown and Williamson cannot be accused of employing predatory pricing as it would then result in the reduction of consumer welfare, competition and efficiency.

Thus according to the court, the factors which do not constitute predation includes[61]:

a) Smaller market share of defendant
b) Lack of entry barriers
c) Short recoupment period
d) Irrelevance of consequences after predation
e) A decrease in demand in the market might seriously affect the pace of recoupment by the firm

2.4.1 An insight through the regulations of other countries

The foundation of current legal perspective and the modern economic theory has faced serious tensions amongst each other, which is apparent when the courts abide by the non-strategic application of predatory pricing, mistaking it to be the economic consensus but

[59] Tetra Pak International S.A. v. Commission of the European Communities, Case C-333/94 P. European Court Reports 1996 I-05951.
[60] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578 (1993).
[61] William Baumol, supra note 48 at 233.

ironically it is one of the aspects which is not affirmed by the modern economists[62]. The reflection of this apprehension is not seen in the legal rule, which in theory would provide a platform for the argument on modern strategic analysis. However, a severe scepticism against predatory pricing has driven most cases to be summarily decided after the Brooke Group case.

The European Union employs a test that involves both the use of the firm's intention as a criterion coupled with the price-cost test by virtue of Article 82 of the European Commission Treaty[63]. The European Court of Justice affirmed the approach in the AKZO decision[64] where the court held that the prices which are fixed to be below average variable costs and those which are above average variable cost but below average total cost coupled to eliminate the firm from the market amounts to be illegal price. In contrast, prices which are marked above the average total cost are valid legally. All prices below the average variable cost are illegal without even affording an opportunity for the predator to justify the legitimate business justifications. This opinion of the court was later affirmed in the Tetra Pack II case[65]. The European Union does not employ the recoupment test as the court in the Tetra Pack II case has ruled out the condition to prove that the realist chance of recoupment of losses by the predatory firm and stated that it is mandatory to penalize predatory pricing whenever there is a chance of elimination of any existing firm from the market.

In the case of the U.K., despite having its Competition Act of 1998, the same measures adopted by the European Union are being employed in the legal analysis of predatory pricing in the economy. In the Aberdeen Journal[66], a weekly newspaper named Independent filed a complaint against Aberdeen Journals suggesting that the Journal priced their advertising space much below the cost prices. Upon further investigation, the Director-General of Free Trading found that the impugned Journal had priced many times below the average variable cost and sometimes above average variable cost but below the average total cost. The Abreeda Journal could not provide a proper and satisfactory explanation. The court held that

[62] BG Sutton, *Supermarkets v. Warehouse stores: analysis*, 36 W. RES. L. REV. I, 3-8 (1985).
[63] It states that any undertaking which is potent enough to exercise an dominant position will be termed to be incompatible to the extent of which it would affect the trade between other member nations. Such abuse involves imposing fair or unfair selling price or other trading condition, limiting production to the prejudice of the consumers, application of dissimilar condition over same transaction, conclusion of contracts based on acceptance by parties and not the subject of the contract.
[64] AKZO Chemie BV case, supra note 25.
[65] Tetra Pak International, supra note 59.
[66] Aberdeen Journals Limited v. The Office of Fair Trading, Case No. CA98/14/2002, 1005/1/1/01.

the Journal was guilty of employing predatory pricing 9in the economy and thus imposed a fine.

The case that showed that the recoupment test was gaining momentum globally was being illustrated through the case decided by the New Zealand Court. In the case of Carter Holt Harvey Building Products Group Limited v. Competition Commission[67], the parties to the suit were competitors to the insulation market of New Zealand. INZCO was the subsidiary company of the defendants, and with the entry of cheaper but high-quality wool of New Wool Products, the former started to lose their grip over the market. Before them, the possible solution was to reduce their price, and when they did so, the marked price went below the average variable cost. The New Wool Products filed a complaint before the competition commission alleging predation by the INZCO firm by violating Section 36[68] of the Commerce Act, 1986. The court held that there is no enough evidence to prove that the defendant reduced the price to reap supra-competitive profits but to meet the competition of a low-cost entrant firm of the economy. Thus the act of the defendant firm cannot be termed to be predatory, but it can be viewed only as a technique to withstand the market pressure and uplift its business by lowering the prices by preserving its shares which makes their act completely justifiable. This decision makes it clear that the recoupment tests are necessary for determining the predation in their economy.

The highest court of Australia has issued a recent decision in the case Boral Besser Masonry Limited v. Australian Competition and Consumer Commission[69] making the recoupment test mandatory to test predation in the economy. The court also opined that some jurisdictions find it difficult to catch hold of the predators, which are not in the forefront while exercising predation but come as a dominant player at a later stage. Thus such laws are meritorious in finding the predatory tactic performed by the firm only when it comes to the mainstream of competition.

The United States is perhaps the only jurisdiction that did not decide as to which cost is to be employed in the price-test must be employed to determine predation in the economy. In the

[67] Carter Holt Harvey Building Products Group Limited v. Competition Commission, Privy Council Appeal No. 6 of 2004, 14 July 2004, [2004] UKPC 37.
[68] Section 36(1) states that the dominant position enjoyed by a person shall not be used to restrict the re-entry of any firm or from deterring the entry of the firm into the competitive conduct or to eliminate any existing firm from the market.
[69] Boral Besser Masonry Limited v. Australian Competition and Consumer Commission, (2003) 215 CLR 374.

Brooke Group Ltd v. Brown and Williamson Tobacco Corp[70] the court denied to use specific cot test but suggested that the plaintiff has to prove that the cost is below the "appropriate measure of the rival's cost". The court also opined that the prices are fixed to be below the defendant's cost, not with the belief that the prices equal or above the defendant's cost would be non-predatory but leaves price-cutting as a legitimate means of competition. The reduced success rate of predatory price litigations is indicative of the rigorous tests employed in the jurisdiction. To be precise, after the 1993 Brooke Group case, U.S. has not witnessed any litigation in predatory pricing. Not only the recoupment tests have added to the hurdles of the plaintiffs, but the Areeda-Turners test also caused misery.

2.4.2 Indian Perspective

The Competition Act, 2002 encompasses different situations under which a firm can be booked if it lowers the price below the stipulated amount. Section 4 of the Act condemns price discrimination, and the concept of predatory pricing is included within it. However, if a price is fixed by a firm above the cost of production and thereby leads to a reduction of competition, it cannot be booked under the provisions of this act. The test of whether predation is being employed in a market is hampered by the lack of clarity in the enforcement. Generally, such issues related to the test of predation is being handled by the Competition Commission of India and would frame, revise and constantly monitor the framing of such rules under section 64(2)(a)[71].

2.5 CONCLUSION

However, predatory pricing is complex anti-competitive program conduct that requires the perpetrator to incur to forego the present profits or suffer loss with the hope that it would be recouped at some time in the distant future. For a firm to exercise price-predation, the market power plays a significant role in determining whether the price predation is a feasible tactic to be employed in the present economic condition coupled with the entitlement to acquire a considerable market share or ability to acquire such market share. Also, the market power must allow being exercised for a considerable period of time following the episode of predation so that the firm can recoup and adjust the loss incurred and thereby provide an arena for the investment of the predator. It is widely agreed that all jurisdictions must employ any of the price-cost tests to determine whether any firm is employing a tactic that aims to eliminate any incumbent or rival firm from the economy. There have always been heated

[70] Brooke Group Ltd case, supra note 60.

[71] Section 64(2) of Competition Act signifies the power of the Competition Commissioner to make regulation in particular to the enlistments made under S. 64(2)(a). Such regulations are to be placed before the Parliament for a total of thirty days to obtain the assent of both the houses.

discussions on the frequency of predation, but unfortunately, due to the lack of reliable statistics, the proper frequency at which predation occurs is unknown even now. The most sought technique to determine predation is Average Avoidable Cost and is the most recommended method amongst economists. On account of Australia's Boral decision[72] and New Zealand's Carter Holt Harvey[73] case decision, the shift of the world economy in adopting recoupment test in analysing predation in the economy makes it essential in deciding the predatory competition. The legitimate business justification makes it essential for the plaintiff and the defendant to clarify whether the pricing is done for a legitimate cause or not. Thus the firm has to make it clear that the attempt or drive to increase the price was a part of its business expansion or due to compelling situations. The appraisal agencies should focus more on the relationship between costs and the price of the defendants.

Recently, the U.S. Courts have admitted certain cases alleging predation in fewer frequencies, which paves the way for the rise of Areeda-Turner's rule, which is relatively hostile to the plaintiffs. The study of notable cases provides little basis for extrapolating to other firm practices, and the variation of legal and economic factors from different international boundaries adds to the risk of extrapolation. Competition Authorities are presented with cases comparatively less frequently, and many cases deal with instances of healthy competition. Thus, it is pertinent to consider that the rules against predation must be crafted so that it imposes some or no restriction on the ability of firms to compete on prices in a healthy manner. This conflicting view demands a more vigilant and well-thought-out approach to develop a minimalistically restrictive approach. All the rules devised to protect the firms from predation must provide a clear outline of function to the business community, thereby preventing abusive legislations and encouraging price competition. Predation rules are not the only mechanism by the competition authorities to attack predatory pricing, and thus the market forces must function adequately to bring a curb to predation. The efforts of competition authorities to promote and protect competitive market conditions would successfully prevent predation. Hence, the attempts to improve the conditions of a firm's entry and exit and the expansion of the market, including the lifting of trade barriers, would result in keeping away the possibility of predation to a large extent. A two-tier approach by the competition authorities in inspecting the elements of the market under consideration and assess its vulnerability to predation would be a possible and efficient method. However, price predation is not the sole modus operandi executed by the firm to seek market power. Some of

[72] Boral Besser Masonry Limited case, supra note 66.
[73] Carter Holt Harvey Building Products Group Limited case, supra note 68.

the non-pricing tactics employed by the firms, like the rising of the rival firm's price, may be executed in accordance with the price-cutting campaign.

The eruption of international trade along with the consolidation of commercial laws under the UNIDROIT Principles attracts the attention for revaluing the commercial law that exists across the globe[74]. The value of international trade, to a large extend, rests in acknowledging and appreciating creativity and innovation. The 21st century is experiencing a decreasing significance of territoriality and the creation of a globally civilised society the modern aspect of commercial law is no longer the matter of application of domestic laws but itself a source of law. The absence of consumer protection laws or international trade regulations, this field is developing free contractual structures. Both economic factors and legal development must be taken into account to consider the environment of trans-nationalisation under the realm of commercial arbitration. It was formerly stated by Schmitthof[75] that the modern approach of lex mercatoria is founded firmly on the ground of nation state aspect, which has transformed to a great extend in the 21st century to include various other factors like the universality, reliance of commercial custom and flexibility coupled with the ability to grow applies to its inherent rationality. The intervention of the decision maker must be strictly in adherence to the public policy standard or mandatory rule considering the possible partial illegalities and the restitutionary measures must be to that extend as the public policy measures would permit. The arbitrator would extend his reasoning in determining the illegality to the extent of ascertaining restitutionary consequences.

When it was observed that the dumped products created injury to the competition in the domestic industry, the matter was taken up by the World Trade Organisation by taking into considerations the initiation of laws made in this direction under the GATT agreement. The concepts of multilateralism of trade practices mooted under the aegis of the World Trade Organisation is being threatened increasingly due to the distorted trade practices that seriously hampers the prospects of free trade in the economy. By thorough analysis of the economic and legal aspects of the anti-dumping policy, it is essential to analyse the need for rationalization of the policy under the tenets of economic law. This analysis could easily be fulfilled in the direction required to fulfil predatory dumping. To a large extent, the anti-

[74] ROY GOOD ET. AL., TRANSNATIONAL COMMERCIAL LAW: TEXTS, CASES AND MATERIALS 49 (Oxford University Press 2015).
[75] Clive M Schmitthof ,*International Business Law: a New Law Merchant*, 3 CURR LEG PROBL, 38 41-42 (1961).

dumping laws have emerged as a remedial measure under the realm of the World Trade Organisation as an instrument of trade facilitation.

3. DUMPING AND PREDATION UNDER WTO

The chapter aims to explain the concept of anti-dumping through the perspective of the World Trade Organisation and to satisfactorily vindicate the issues associated with it through the intervention of the economic policies. The analysis of predation is only possible by completing the examination with the aid of conditions required to fulfil the instances of dumping. The chapter seeks to examine the attempts and initiatives under the regime of the World Trade Organisation to tackle the practise of predation efficiently.

3.1 INTRODUCTION

As a result of high potential to affect the international labour division and specialisation of product, free and fair trade generate more gains in the form of economies of scale, greater extent of diversification of goods and increase in aggregate production[76]. International trade helps us to augment the existing resources of our country and thereby create better productivity and growth for the economy. The free trade practice, thus increases the production of every country by reducing the higher possibility of risk associated with the investments made in the domestic country. As per the classical theorists, the major source of gain in the International economy is the specialisation on the basis of Comparitive Cost Advantage as postulated by the Ricardian theory or on the basis of the factor endowments as made in the Hecksher-Ohlin theory[77]. The rate of economic growth achieved by the internationalisation of trade and business which result in increased output from unit input and thereby reducing the cost of production significantly. The benefit of trade can also be attributed to the technology and knowledge flow that occurs across the international boundaries which thereby uplifts the economic standard. But sometimes, the economy witnesses certain trade distortion practices and trade barriers which would severely undermine the effect of free trade and in this context the concept of dumping can be brought in[78]. The phenomenon of dumping hits the economy severely and hampers the growth of indigenous industries. At this juncture, anti-dumping legislations gain more importance. The main determining factor of dumping in an economy is a country's dumping margin which is calculated by the difference between export price and the domestic selling prices. Coupling the dumping margin with the export price, a fair trade price can be rendered to the product. In

[76] NICOLA GIOCOLI, *supra* note 10 at 59-60.

77 MILTIADES CHACHOLIADES, THE PURE THEORY OF INTERNATIONAL THEORY, 189-263 (Aldine Publishing Company, 1973).

78 ALEN O SYKES, ANTI DUMPING AND ANTI TRUST: WHAT PROBLEMS DOES EACH ADDRESS, 11 22-23 (Brookings Trade Publications, 1998).

an instance when there is practically null or low volume in sales and it is difficult to calculate the comparable domestic price, then export prices or constructive value is employed which is calculated by adding the cost of production in the country of origin with the general, administrative, selling costs. When the export price becomes difficult to be determined or becomes unreliable, then the rate at which it is resold to the independent purchasers or the amount as determined by the concerned authorities are used to compare the prices[79]. As the concept of antidumping is employed as an exception to the Most Favoured Nation Clause, countries must employ serious care and caution while implementing it. It, however, does not require provisions of offsetting concessions as a measure of compensation or consent to the counter measures taken by the trading partner unlike other safeguard measures which are employed to protect the interests of the domestic industries. For instance, the antidumping duties may prevail for a considerably longer period of time, even after their conditions of levy has been eliminated and the antidumping investigations may be initiated in a circumstance without any evidence. Thus one among the key concerns of the Uruguay round was to discipline the rules of trade among countries and prevent the abuse of antidumping laws and use it as a measure of protectionism and import restriction.

3.2 THE WORLD TRADE ORGANISATION

It is often quoted that thought is the father of deed. The inception of World Trade Organisation is completely abiding by this concept. It is literally the confluence and conflict of ideas between law, economics and politics which ultimately constrained the ability of the countries to work collaboratively to create a rule-based system that would enable countries with wide disparity in economic and political backgrounds to work together in a reduced trade barrier environment. The development of World trade Organisation can be classified on the basis of three aspects. First and foremost idea of expansion of horizon was that states were sovereign and completely governs their own destiny but the best exercise of sovereignty is to enter into binding agreements with other states by which they place voluntary and mutual limits on their exercise of that sovereignty. The second idea of development was that the concept of free mutual trade would enable the countries to extract more mutual gains from their activities.

The modern state started to have a firm footing to set up an organisation at the global level which is capable focussing over commitments of negotiation among the sovereign member

[79] *Id.* at 12.

nations. With the advent of modern day trade and technology, the international institutions also witnessed their birth with the formation of The International Telecommunication union and International Telegraph Union in 1865 and got assigned with the present day name in 1934[80]. The Paris protection of Intellectual Property, 1883 marks the inception of WTO law which was later modified as the Trade Related Intellectual Properties implemented under the aegis of WTO. With the inception of League of Nations with the culmination of First World War, the countries felt the need to have a transparent third party forum to act as an intermediary for negotiations and thus the Industrial Organisations increased their importance with a significant number of quorum[81]. Initially, the tenets of International Law were not extended outside the boundaries of Europe and even their powerful former colonies were denied it application. They had to face gunboat diplomacy, legal policies which formalised inequality and unending chapters of colonialism[82]. When the architects of post-world war ordered led the path of creating International organisations which included the legislative organs of the United Nations, International Monetary Fund (IMF), International Trade Organisation (ITO), International Labour Organisation (ILO) etc which made the idealists to think that a combined effort of the world leaders in consonance with these International organisations would open to a new arena of world politics. However, the degree of sovereignty and independence sought to be achieved by each and every nation coupled with the strong political dissent that emerged from the cold war situation made it difficult to establish a peaceful world order. This made the International Trade Organisation working under the aegis of the global trade ministry to formulate certain modest goals[83] and resorted to the General Agreement on Tariffs and Trade (GATT) as the central piece of trade system. Since its inception, GATT was proposed to be an interim agreement upon which, all members nations who wished to take part in global trade would affirm and once a stable administration with a comprehensive trade plan is being setup in the global level, it would be replaced. Eventhough the GATT was aimed to be a temporary setup; it extended and controlled the regime of International Trade for half century and their growth over the ensuing centuries

[80] LEGAL AFFAIRS DIVISION AND RULES DIVISION OF WTO SECRETARIAT AND THE APPELLATE BODY SECRETARIAT, WORLD TRADE ORGANISATION: A HANDBOOK ON THE WTO DISPUTE SETTLEMENT SYSTEM, 1-2 (Cambridge University Press, 2017).

[81] *Id* at 5.

[82] JOHN H JACKSON, SOVEREIGNITY, THE WTO, THE CHANGING FUNDAMENTALS OF INTERNATIONAL LAW, 81-128, (Cambridge University Press,2018).

[83] Diebold William Jr, *Reflections On The International Trade Organisation*, 14 NORTH. ILL. LAW REV., 335-348 2005; He knew "of no one involved in working out the problems of international trade at the time who thought that free trade was a realistic goal or even a reasonable aspiration for a liberal economic system that had to be operated by sovereign states."

extended from deepening of the tariff commitments and widening the disputes across the international borders to those that occur by virtue of behind the border laws[84]. The GATT successfully upheld both the theory and practice of international trade by hosting eight multilateral negotiations since its inception in 1947 until it was subsumed in 1995 as the World Trade Organisation (WTO)[85]. Despite being an international head to monitor the trade related affairs, GATT was more of a contractual relationship with the member nations and their membership was more of a provisional rather than a definitive basis. The world leaders found the imminent danger of GATT proposals if the Uruguay Round expanded more issues of services, intellectual property rights and investments. Thus, GATT successfully established a transition from an "exclusive club" to an "essential attribute of global citizenship[86]" and the World Trade Organisation emerged to be better International Organisation found upon the firm footing of International Laws and enforceable by the dispute settlement mechanism.

At the time of creation of an international organisation, the main concern is the fact that none of the states would be willing to abdicate their sovereignty for the global interest. As the world at large is enjoying a position without being controlled by any superior power, majority of the countries have felt that giving up their power ultimately results in their territory to be in the control of any other political superior. Eventhough it was difficult during the days of inception, the world at large came to a final conclusion that, entering into bilateral investment treaties would result in more organised way of dealing with the like-sovereigns of the world so that voluntary and mutual levels of control are placed on each other for better governance of the world politics. The foundation of modern day legal system was laid since the beginning of 17th and 18th century under the speculations of natural law, but the real milestone in the development of International law was not laid unless the states developed a firm regime of positive law with the comprehensive formulations of treaties and understandings[87].

[84] CRAIG VANGRASSTEK, THE HISTRORY AND FUTURE OF THE WORLD TRADE ORGANISATION, WTO Publications, XV, 2013.

[85] Parallel negotiations were conducted for reciprocal reductions in tariffs which ultimately led to the signing of the General Agreement on Tariff and Trade (GATT) in 1947. A significant number of the then member nations, including the US ratified the adoption of GATT through the Protocol of Provisional Application in January 1, 1948. The negotiations of the International Trade Organisation were on-going and later it was adopted. The sad demise of International Trade Organisation was surpassed by GATT eventually but it lacked a coherent institutional structure.

[86] Diebold William Jr,, *supra* note 83 at 5.

[87] FREEMAN MDA & HDL LLOYD, LLOYD'S INTRODUCTION TO JURISPRUDENCE 9-23 (London: Sweet &Maxwell, 2001).

The second line of thought was that the countries might take control of gains from free trade more indiscriminately and thereby defeating the poor countries commercial interest. Generally in the domain of markets, the policy makers finalise regulations of trade and commerce and will not alter it unless and until they are satisfied that the individual and collective interests of the countries is more inclined to making profit from the trade and commerce based on the principles of comparitive cost advantage and economies of scale[88]. Eventhough the realm of Economics was developed two millennia after the Greek has developed the political science and history, their intelligentsia proved to be bright enough to demarcate the core principles of trade and commerce in their discipline. The contemporary concept of mercantilism was successfully adopted into the economy by the 18th and 19th century which replaced international trade to be the real conduct of international competition in place of war and wealth was used interchangeable with power[89]. Mercantilism aimed at maximizing export and minimising import so as to earn surplus of specie or precious elements like gold and silver so that it can be converted to instruments of power when needed[90].

The third point was regarding the exercise of power. Power is an indispensible factor and a world order was sought to be created which had less influence of power and the powerful states were restrained by the shackles of power or recognition of mutual self-interest. When power was exercised by the two hegemons, the Great Britain and United States of America, it is still a matter of question whether the tenets on which the economic and legal policies of International trade was vested, made a journey beyond speculations into practice. To enforce their power, the power factions tried to oust each other's establishments particularly when the General Agreement on Tariffs and Trade (GATT) under the British regime was replaced by the World Trade Organisation (WTO)[91]. But it is rather more welcoming to note that with the advent of the two major power factions in the global era, helped to assist and ensure the judicial equality and economic opportunities to all member nations across the globe because, the existence of a trade divide was rampant and there was clear evidence of unilateral exercise of power.

[88] JACOB VINER, STUDIES IN THE THEORY OF INTERNATIONAL TRADE, 15-25 (Routledge Library Editions: Landmarks in the history of Economic Thought, 2017).
[89] Diebold William Jr, *supra* note 83 at 350 .
[90] PAUL R KRUGMAN, MAURICE OSBTFELD, MARC J MELITZ, INTERNATIONAL TRADE: THEORY AND POLICY, 192-236 (Pearson Education Limited, 2018).
[91] JOHN H HACKSON, *Supra* note 82 at 130 .

It is not proper to view the World Trade Organisation as an extension of General Agreement on Tariffs and Trade but it should be approached as a different stack of agreements with a wide and firm base of development and better dispute settlement mechanisms.

According to Halsbury's Law of England property is that which belongs to a person exclusively of others and can be the subject to bargain and sale[92] where it includes goodwill, trademarks, licenses to use a patent, book debts, options to purchase, life policies and other rights under a contract. Salmond says that the unnatural product of a man's brains may be as valuable as his hands or his goods. The law therefore gives him a proprietary right in it[93]. The ability to think logically and understand a thing, intellect, makes man unique and to stand out from other animals. His incorporeal capacity to think rationally has taken him to greater heights of development and civilisation. We are living in a society where knowledge has been recognised as a potent force. The 21st Century, as rightly said by noted futurologist Alvin Tofler, is the century of mind power. Emergence of strong intellectual property regime and its global impact has opened endless opportunities for creating wealth. In borderless economy, multilateralism and globalisation are co-producers of each other. Creation, enjoyment and accumulation of property has been a central activity of human life. Thus to sum up, the proprietary right once vested as a product of one's intellect may be termed as an Intellectual Property Right[94]. The intellectual property law regulates the creation, use and exploitation of mental or creative labour and prevents third parties from enriching unjustly by reaping what they have not sown. This is a branch of law which protects some of the finer manifestations of human achievement[95]. Majority of businesses comprise of employment of intangible assets which contributes to more than 50% of their total assets[96]. Every human endeavour which promotes economic, social, scientific and cultural development of society must be encouraged and the creator must be suitably rewarded by affording legal protection to his intellectual creation. An impetus to invention was initiated in the 19th century during the post industrialisation period thereby making people aware about the need to protect the rights and liabilities of the creators for their intellectual labour employed. First multilateral effort employed in this regard was effectuated through Paris Convention for protection of Intellectual property convened on March 20th, 1883 followed by the Berne Convention for Protection of Literary and Artistic Works in 1886. Both these efforts in the international

[92] 33 HALSBURY'S LAW OF ENGLAND, 310.
[93] PJ FITZGERALD, SALMOND ON JURISPRUDENCE, 422 (Universal Law Publishing Co, 2017).
94 MISHRA JP: AN INTRODUCTION TO INTELLECTUAL PROPERTY RIGHTS 42 (Central Law Publication, 2009).
95 BHANDARI MK, LAW RELATING TO INTELLECTUAL PROPERTY RIGHTS 2 (Central law Publication, 2019).
[96] Stephanie Plamondon Bair, *Impoverished IP*, 81 OHIO St. L.J. 523 (2020).

regime is together termed as the Magna Carta of IPRs. The realm of IPR further expanded further with the establishment of World Intellectual Property Organisation and Trade Related Aspects of Intellectual Property Rights. As per the definition given by Organisation for Economic Co-Operation and Development (OECD) innovation may be defined as implementation of a new or significantly improved product (good or service), or process, a new marketing method, or a new organizational method.

3.2.1 WTO and IPR in the Trade regime

The formulation of Trade related Intellectual Property Rights has been considered to be a milestone in the arena of regulating and safeguarding intellectual creations as it brought the intellectual property rules into the field of multilateral trading regime. It monitors the flow of knowledge and creativity, puts an end to the disputes through dispute settlement mechanisms and ensures the domestic protection to all WTO members which can be availed in their home countries. The introduction of TRIPS is phenomenal when compared to the liberalisation methods adopted under the patronage of General Agreement on Trade and Tariff and the international coordination undertaken in the realm of Intellectual Property Rights[97] by treaties and agreements apropos of World Trade Organisation. It directly attacked some of the covert issues associated with IPR till then and paved way for those aspects of 'beyond the border' which was obscure till then as 'exclusive domain of trade liberalisation'. Being creations of mind, intellectual property takes shape in varied forms ranging from artistic expressions, names used in trade and commerce, designs etc. Certain bundle of rights are designated to the creators such that those rights are exclusively enjoyed by him against the other persons who are likely to take advantage of those grains which they have not sown and they are even entitled to negotiate payment for the advantage incurred by others in using them. Such incentives are being provided by the government to encourage such productions and to spread the idea so as to build a better society. The magnitude of protection varies across different jurisdictions significantly which sourced tension in the realm of International Trade.

TRIPS can be undoubtedly termed to be a result of deliberations and initiations by a broad syndicate of business interests particularly from the United States of America. The poor performance of US firms in 1980s and their fear of decline in their competitiveness led to the

[97] The proprietary right once vested as a product of one's intellect may be termed as an Intellectual Property Right. It monitors the creation, utilisation and exploitation of intellectual labour and prevents third parties from enriching unjustly by reaping what they have not sown. This is a branch of law which protects some of the finer human capabilities.

initiation of such negotiations in the global level[98]. All the international treaties that deal with Intellectual Property Rights prior to TRIPS were directly monitored by World Intellectual Property Organisation which is a United Nations Organisation headquartered at Geneva, Switzerland. They holistically dealt with different types of IPRs. For instance[99], The Paris Convention for the Protection of Intellectual Property, 1967 states that each of the member nations has to extend protection of copyrights for the creations of their citizens and provided a right to priority to the applicant so that he can claim the availed protection from other member nations within one year from the date of filing application. The Patent Cooperation Treaty (PCT), 1967 was envisaged to ensure protection of same invention in member nations by adopting centralised filing and standardised application methods. The Berne Convention is a conclusive treaty that deals comprehensively with copyright. It states that the signatory nations should provide foreign nationals the same degree of protection as afforded to their own citizens. The idea of linking IPR with trade was touted for so long by the representatives of business industries and eventually they were successful enough to claim victory over the reluctant representatives of copyright industries[100]. The concept of IPRs was incorporated in the Uruguay Round with the support of Japan and Europe.

Detailed perusal of the text of agreement suggests that TRIPS covers a wide variety of subjects ranging from copyright and patent in the industrial level to trade secrets and undisclosed information that triggers scientific inquisitiveness. Three significantly important principles laid down in TRIPS[101] are Most favoured nation clause[102], National Treatment clause[103] and minimum standards[104]. It deviates from the conventional areas of protection by awarding protection for computer programs under the head Copyright through Berne Convention. It also facilitates rental rights by renting out the sound recordings and computer programs which thereby yields monetary benefit to the creator. TRIPS requisitioned for the

98 MATTHEWS, D., GLOBALIZING INTELLECTUAL PROPERTY RIGHTS – THE TRIPS AGREEMENT, 66 (London and New York: Routledge, 2002).

99 WIPO INTELLECTUAL PROPERTY HANDBOOK: POLICY, LAW AND USE, Publication No. 489(E), (2001).

100 This aspect was first discussed in the Congress which made to amend Section 301 of US Trade and Tariff Act, 1984 thereby facilitating the imposition of trade sanctions for those countries which failed to protect the Intellectual Property Rights.

101 World Trade Organization (WTO) (1994), Agreement on Trade-Related Aspects of Intellectual Property Rights, Annex 1C of the Marrakesh Agreement Establishing the World Trade Organization, Geneva, Switzerland.

102 This clause envisages that all member nations must be treated equally and proves to be a boost to the intellectual property protection as a result of bilateral agreements entered into between the countries.

103 It directs to have equal rights to be made available to both the nationals and the foreigners which has been the matter of consideration for all the IPR conventions entered into till date.

104 The clause mandates for minimum protection in significant areas of IPR protection. For instance, the patent protection extends to at least 20 years in all fields of technology.

protection of a patent protection or a sui generis protection in case of plant variety rights and to claim the rights of a patent holder, it is not mandatory to have domestic production of the product. Layout designs and integrated circuits are given a minimum protection of 10 years whereas in the geographical indications, higher degree of protection is awarded for wines and spirits. Trade secret protection is one among the important protections laid by TRIPS and also mandates that the test data submitted to the government for approval must be protected from unfair trade use. The agreement also mandates the enforcement of rights and states that the procedure adopted must be fair, just and equitable, the procedure should not discriminate against foreigners and it should not be indiscriminately complicated. Willful counterfeiting of trademark and copyright is treated as a criminal offence and it envisages the governments to take aid of the customs authorities to regulate the import and export of counterfeit products across the national borders. The bold move of taking TRIPS under the aegis of WTO was to ensure the compliance and regulation of the agreement in tune with the international trade laws. The integrated dispute-settlement of WTO ensures that the shortcomings in the enforcement of IPR by the governments of member nations are made good. A different phase-in period was envisioned under TRIPS wherein which the developed countries comply with the provisions of the agreement within one year, developing countries by five years and 11 years for least developed countries. But the least developed countries are allowed for an extension as per Article 66 of TRIPS.

The Intellectual Property Rights have direct impact on the trade that happens cross border. Goods which are vulnerable to copying like the computer software and programs to entertainment industry are susceptible to be used indiscriminately by someone who is not authorised to use them. Especially in the case of trademarks that completely rely on certain minute aspects which involve huge investment like the design, colour, marketing etc which are not borne by those who counterfeit but they enjoys free riding over the product. This brings huge loss to the legitimate owners and thereby reduces investments in quality products which in turn affect the trade system adversely. The weakening of trade occurs mainly due to two reason, due to the monopolist effect, the incentives granted to IPR holders gets limited and also strong IPRs facilitates the production of legitimate domestic products which thereby reduces the import of foreign products to the country's market[105]. The main aim of TRIPS was to facilitate more IPR protection thereby creating higher global protection level. It is

[105] This is however not conclusive but as per the research enumerated in The Journal of International Economics, 1995, it is evident that increasing patent protection has benefitted the OECD countries with more number of bilateral negotiations.

however pertinent to note that TRIPS imposes more or less an onerous burden on developing countries and the level of IPR protection may depend upon the stage of development. For instance, weaker IPR protection yields better results in triggering economic development. The optimal IPR protection system rendered by different countries varies as there are no uniform standards to such protection and thus might affect the trade due to variation in perception. The free riding phenomenon of IPR is that the owners of the intellectual property are overly protected by the government and thus makes it difficult to device new patents in the same realm. Such behaviour by the intellectual property owners are seen even in case of developing countries and it may prove deleterious for the development of technology of their own needs[106]. IPR protection in developing countries must be devised in such a way that the policies would facilitate dynamic competition and technical change which involves the development of more socio-economic freedom, measures to prevent corruption or to liberalise the trade and investment regime. In the long run the implementation of TRIPS proves to be beneficial as it helps in the flourishing of socio political institutions which in turn allows the markets to function in an efficient and better manner.

The two power factions of the globe, The European Union and The United States of America, have exaggerated the judicial and administrative aspects of Competition law and Intellectual property rights. From the inception of Trade Related Intellectual Property Rights (TRIPS), the aspect of monopolisation was directly equated with the patent regime[107] and the Competition law made it important to look for the prevention of abuse of granting patent through the patent licensing policies by virtue of the doctrine of patent misuse[108] followed by the 'Nine no-no's of USA and its Correlative in the EU jurisdiction[109].

Remarkably in the sector of IPR dominant industrial standards, the completion authorities' concern arise in two matters[110]; the first is regarding unprecedented expansions of protection extend by the IPR regime in the new range of products of the knowledge economy[111]. The emergence of the IPR sector also witnessed the extrapolation of the patent and copyright

[106] VETHAN LAW FIRM PC, https://info.vethanlaw.com/blog/intellectual-property-what-is-ip-and-the-problem-of-free-riding (last visited on 7th June, 2021 at 6pm).
[107] E Bement & Sons v. National Harrow Co, 186 US 70, 91, (1902); United State v. Masonite Corp, 316 US 265, 280 (1965).
[108] Motion Picture Patent Company v. Universal Film Company Manufacturing Company, 243 US 502 (1917).
[109] Hartmut Johannes, *Comments on Presentation of Iain C. Baillie*, 54 ANTITRUST L.J. 699 (1985).
[110] I. RAHNASTO, INTELLECTUAL PROPERTY RIGHTS: EXTERNAL EFFECTS AND ANTITRUST LAWS, 49-62 (Oxford University Press, 2002).
[111] Commission on Intellectual Property Rights (CIPR), Integrating Intellectual Property Rights and Development Policy, (2002).

regimes to include the modern tenets of biotechnology as under the EU Biotechnology Directive and the EU Copyright and related rights directive along with the Digital Millennium Copyright Act embraces the realm of Information technology and it has also been extended to computer softwares and business methods along with the sui generis protection to databases and semiconductors. Such a humungous expansion of the IPR is seen in USA and EU only because of the increase in awareness about the possible wealth creation methods as a base for the international competition in the global market[112]coupled with the urge to protect the intellectual creations of individuals by employing necessary protections thereby forbidding the illegal copying of such products[113]. This was given a firm backing after the scholars of US opined to have a "strong property rights concept" by the expansion of intellectual property rights[114]. With the pronouncement of decisions by the US court thereby facilitating the ease of obtaining patent[115] by providing greater possibility of enforcement[116] and enlarging the scope of protection of copyright[117], opened up a new arena for the development of IPR[118]. The widening of litigation in the realm of IPR has caused the rapid development of intellectual property in comprehensive judicial pattern[119]. The EU also led expansion in their trade related activities with the development of intellectual property rights but not as rapid as USA[120]. As the geographic expansion of the IPR regime is being witnessed across the globe, it saw its expansion under the aegis of WTO through the medium of TRIPS when the countries with weak legislation son IP especially those from the developing countries, required a firm ground to protect their investments in Research and Development and related issues from illegal enrichment by unauthorised persons which ultimately instilled the wish list of various IPR lobbies into the public international law[121]. On the basis of the Berne convention Paris convention, the TRIPS agreement has imposed certain high minimum standards[122] on its member nations on the aspects of Intellectual Property Rights. Another important milestone in the industrialised countries is the expansion of research and

[112] OECD, Competition and Intellectual Property Rights, Paris, 1989.
[113] W CORNISH AND D LLEWELLYN, INTELLECTUAL PROPERTY: PATENTS, COPYRIGHT, TRADEMARKS AND ALLIED RIGHTS, 33 (London Sweet & Maxwell, 4th Ed, 2000).
[114] D Hemstez, *Towards a theory of Property Rights*, AM. ECON. REV., 347 (1967).
[115] R Merges, *As many as six impossible patents for breakfast: property right for business concepts and patent system reform*, 14 BERKELEY TECH. L.J, 578 (1999).
[116] Warner Jenkinson Co v. Hilton Davis Chemical Co, 520 US 17 (1997).
[117] Lotus Development Corp v. Borland International Incorporation, 49 F. 3d 807 (1st Cir 1995).
[118] R Merges, supra note 115 at 16.
[119] Diamaond v. Chakraubarty, (1980) 447 US 303.
[120] State Street Bank and Trust Co v. Signature Financial Corporation 149 F 3d 1368 (CA Fed Cir 1998).
[121] P Gehart, *Why law making for global intellectual property is unbalanced*, EUR. INTELL. PROP. REV., 309 (2009).
[122] Commission on Intellectual Property Rights (CIPR), supra note 111

development investment which contributed to the increase of cumulative risks in the high technology regime. The USA and EU markets had growing tendencies to characterise themselves based on the individualised market braced by the industrial standards[123]. The product gaining such an importance in the market is often subjected to careful monitoring by the competition authorities as the market power may be exercised in such a manner so as to preclude the access from the downstream markets.

3.3 INCEPTION OF ANTI-DUMPING CODE UNDER WTO

Initially, the antidumping laws were enacted across jurisdictions as a protection against predatory dumping[124]. The prospects of free trade is under great threat as the emerging issue of multilateralism is being negotiated under the aegis of The World Trade Organisation which is brought under the shadow by the distorting trade practices one among which is the dumping policies of firms that engage in trading. The concept of anti-dumping was introduced to prevent certain firms from exercising monopolisation in the market through predation where such firms would charge heavily from the domestic firms while they market their goods for cheap rate in the foreign market. Subsequently, as the competitor is eliminated from the market equation, the exporters would hike their prices. There was a huge concern that accompanied with the adoption of anti-dumping rules by the GATT and eventually being recognised by the framework of WTO as it was primarily regarded as a backdoor tool of protectionism that takes away the advantages of multilateral trade liberalisation.

Both in the static and dynamic context it is stated that the free trade mechanism has the potential to trigger the accrual of gains by causing its impact on product specialisation and international division of labour. As per Article 2.1 of WTO Anti-Dumping agreement, when a product is exported to a foreign country at a price much lower than the normal price with an aim to market the product and take control of the foreign economy may be termed as dumping[125]. In spite of being a lengthy section, the situation of dumping is ascertained by the basic principles laid down in Article 2 of Anti-Dumping Agreement of WTO and the implementation is left to the discretion of member nations of WTO. The provision of a level playing field in the economy for the domestic firms by offsetting all the possible predation existing in the economy is the main aim of the Anti-dumping Agreement. Like predatory

[123] P Gehart, supra note 121 at 313.
[124] Tania Voon, *The WTO Anti-Dumping Agreement: Analysis of Commentary by Edwin Vermulst*, 56 INT COMP LAW Q, 463–465 (2007).
[125] David Palmeter, *A Commentary on the WTO Anti-Dumping Code*, 4 J. WORLD TRADE, 43-49 (1996).

pricing, the game plan of predatory dumping is to eliminate the market run loss earned as a result of predation by marking the costs of products much lower than the long-run profit maximising prices which is ultimately financed by the exporter with the amount he earned as a result of enjoying the monopoly power over the domestic economy[126].

The initiation of anti-dumping legislations can be dated back to early 19th century when the European sugar industrialists and manufacturers alleged the dumping of sugar in their locale which made them difficult to sustain in the market competition with existing resources and they sought help from the concerned government authorities. With this, the countries realised the need to have an antidumping legislation to regulate their market activities and thus a formal agreement was entered into by 1902. Canada initiated the chain of legislations by adopting the first antidumping legislation in 1904 succeeded by the United States of America and European Countries by 1906. By virtue of this legislation, the US citizens were allowed to approach the civil courts for restricting the imports, acquiring civil damages and instituting penal action. The complainant however has to prove that the foreign company approached the market with an intention to dump the products and thereby cause injury to the US economy. The foundation of antidumping laws and principles under the aegis of GATT/WTO was laid with the adoption of Canadian Law and US law modified in 1921[127]. With the inception of GATT in 1947, the antidumping principles were employed as a protectionist measure in various trade disputes across the globe as it was found to seriously hamper the growth of domestic industries. In the Trade Negotiations of 1967, popularly known as the Kennedy Round of Multilateral Trade Negotiation, the members signed to adopt Article VI of GATT which is popularly termed as the Antidumping Code. However, it took some more years for the Kennedy Round of Multilateral Trade Negotiations, 1962-1967 to make the first Antidumping Code a reality which ultimately finalised by the Tokyo Round of GATT Negotiations, 1973-1979 thereby replacing the negotiations of the 1967 Round[128]. The minutes of these rounds provide the attempts and initiations made by the member countries to homogenize various aspects of operation and regulation of antidumping and countervailing duties across the globe. By virtue of the Uruguay Round, the regulations agreed in the Tokyo Round Antidumping Code were modified to constitute a new Antidumping agreement. The Uruguay round made a clarion call for modification as the procedure to investigate and

[126] Claire Kelly. *Panel Report, United States—Anti-Dumping Measures on Polyethylene Retail Carrier Bags from Thailand (WTO), Introductory Note by Claire Kelly*, 49 INT. LEG. MATER, 934–946 (2010).
[127] D Bibek and N Banik, *The Dumping Issue*, GLOB. BUS. REV, 33-40 (2000).
[128] HELM D, THE ECONOMIC BORDERS OF THE STATE, Oxford; New York 1-4, 5 (Oxford University Publications1989).

calculate the dumping margins and extend of injury caused to the domestic industries was so cumbersome that many countries found it difficult to abide by the technical complexity. These represent the first multilateral approaches to discipline the implementation and the operation of antidumping and countervailing measures. While retaining the central system elements of the GATT administration, the Uruguay Round made some changes in the implementation of Article VI marking an attempt to bring transparency to the entire regime, including its application and is binding to all member nations of World Trade Organisation unlike the plurilateral Tokyo Code[129]. The current antidumping legislation is in consonance with Article VI of GATT by which the process of selling below the normal price and authorises the imposition of antidumping measures as an element of protectionism to safeguard the domestic industries[130]. Uruguay Round mandates an application from the domestic industry as a precursor to initiate investigation. The written application advanced from the side of the domestic industry must contain evidence of resale in importing country at a price below the normal value or dumping, relation between the injury caused and the dumping, material or threat of causation of injury. The producers in such a complaint must account for 25 percent of the output of producers to show that the parties are not indifferent to the issue and must be more than 50 percent of the total domestic production[131]. Unsubstantiated applications are rejected *perse* and thus the domestic industry must furnish details as to the prevalent domestic price and injuries price of the product in dispute. As a precursor to the initiation of antidumping litigation, the export country must be intimated. If the dumping margin is *de minimis* or less than 2 per cent of the export price or if the exporters collectively amount to more than 7 percent of the total exports or the dumped import volume amounts to less than 3 percent of the imports of like category products in the importing country[132]. The interested parties shall be given a 30 days' notice to reply and the anti-dumping duty shall not be levied by the authorities beyond 60 days from the initiation of the investigation proceeding which will eventually expire within 5yrears unless revalidated through a fresh review[133].

129 SCHERER FM AND ROSS D, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE, 1-6 (Oxford University Publications 2000).

130 BARRY J RODGER & ANGUS MACCULLOH, COMPETITION LAW AND POLICY IN THE EUROPEAN UNION ANDUNITED KINGDOM, 7-10 (Cavendish Publishing, 2017).

131 *Id.* at 18.

132 HANS ULLRICH ET AL. ,THE EVOLUTION OF EUROPEAN COMPETITION LAW, 24-26 (Edward Elgar Publishing Ltd, 2006).

133 *Id.* at 271.

While many of the tariff barriers are being reduced, the non-tariff barriers exists as such or has increased its prevalence because of the inability to identify one particular regulation as a trade barrier and the exceptions imposed in the WTO regime on various non-tariff barriers even if it pose a threat to the emerging market economy[134]. The Anti-dumping provisions of the WTO or Antidumping agreements are used whenever it is evident that the export goods have been dumped indiscriminately into the market economy in violation of Article VI. The provisions are employed whenever the domestic country government finds that the goods are dumped less than the normal value which is being fixed by the domestic government and details about the economic policies and procedure to assess the current exercise of anti-dumping duties. In practise the anti-dumping measures are often resorted to punish and deter the instances of dumping and by allowing targeted tariffs on import from particular trading partner the WTO provides an exemption to the most favoured nation clause[135].

3.4 THEORETICAL FOUNDATIONS OF ANTI-DUMPING DUTIES

Under certain circumstances, the domestic countries will be forced to enact laws so as to protect the domestic countries from the dumping of the exporter. The main justifications for the enactment of anti-dumping laws are closely similar to the policies which initiated the anti-trust policy[136]. The predation anticipated from the foreign producers made the domestic countries in justified in being already under the garb of anti-monopolising legislations within the territory. Jacob Viner was the first to provide a standard support to the anti-dumping theories and suggested that it was presumptive evidence of abnormal and temporary cheapness[137] which would ultimately lead to higher profit for the consumers in the long run with the increase in monopolistic behaviour. The main drawback with the WTO mechanism of identifying predation is the lack of ability to distinguish between predatory dumping and other kinds of dumping eventhough the rules of predation justifies the anti-dumping duties[138]. This shortcoming was addressed by the domestic anti-trust laws which wisely crafted their policy so as to give primacy to the concept of intent such that the intent of predation is one of the main ideals in determining the predatory pricing of the economy[139]. The domestic anti-

[134] Daniel Y Kono, *Optimal obfuscation: Democracy and trade transparency*, 100 AM POL.SCI. REV 369 (2006).
[135] GATT Article VI and the Anti-dumping agreement provides a base to determine the anti-dumping laws against the predators. http://www.wto.org/english/thewto_e/whatis_e/tif_e/agrm8_e.htm (last accessed on June 4th, 2021).
[136] After the Supreme Court denied the extra-territorial application of the Sherman Act, the anti-dumping law, 1916 was enacted as contemplated in the case Am. Banana Co v. United Fruit Co, 213 US 347, 357 (1909).
[137] Graham, Frank D., *The Analysis of Antidumping Theories*, 14 AM. ECON. REV., 321-324 (1924).
[138] Robert D Willig, *Economic Aspects of Anti-Dumping Policy*, 3 PAP. TRADE J, 2 (1998).
[139] *Id.* at 75.

trust laws are often wide when compared to the anti-dumping policies that were introduced by the incorporation of Article VI because, under the domestic laws, it covered a wide range of dumping policies provided there was a concrete justification for anti-dumping law for preventing predatory dumping. The peculiarity was that intent was not mandatory for the domestic laws. The predatory pricing dumping being the most important rationale in justifying the anti-dumping policies has been proved by the economists as unlikely and less probable to occur but still does not wipe out the entire possibility[140]. The concept of strategic dumping is yet another concern in the economic angle of anti-dumping policy where the exporters can sell the export products lower than their domestic market as they are protected from competition in the domestic market[141]. This can be detrimental as the importer firms may not be able to generate the same economies of scale as the exporters earn by selling their product in the international market. This predation can pose high rate of risk if the industries are recorded to have high research development cost or larger economies of scale. In such a condition, the anti-dumping duties play a pivotal role in providing an effective remedy by deterring strategic dumping and thereby the monopolistic behaviour exercised in the economy. Thus, the anti-dumping duties can do nothing but to help the producers to the detriment of the import market consumers if the imposed anti-dumping duties cannot effectively deter the competition in exporter's home market. Eventhough the instances of strategic dumping are rare, the implication so it in the realm of anti-dumping duties has been a bone of contention for the economists since ages. The justifications for advancement of anti-dumping duties have been expanded to fears of market-expansion dumping[142], cyclical dumping[143] and state-trading dumping[144]. These types of dumping are robustly consistent with the competition market of the economy[145]. The buyers are highly benefited in terms of the consumer's surplus or producer's loss of surplus which is resultant of the sale of imports at a low price[146]. The WTO mechanism however provides a disguised protectionism if it is

[140] EDWIN VERMULST, THE WTO ANTI-DUMPING AGREEMENT: A COMMENTARY, 56 (Oxford University Press, 2005).
[141] Gunnar Neils, *What is Anti-dumping policy really all about?,* 14 J. ECON SURV, 467-476 (2000).
[142] Market-expansion dumping may be defined as "exporting at a lower net price as is charged at home for the purpose of the expanded export sales that this form of price discrimination makes possible". Willig, *supra* note 138 at 72.
[143] *Id* at 73. Cyclical dumping may be defined as "export at unusually low prices of goods for which there is substantial excess production capacity owing to a downturn in demand".
[144] State trade dumping may be defined as "the export of state-owned enterprises in economies whose currencies are not freely convertible to those generally employed in international trade" for the purpose of gaining hard currency". Willig,*supra* note 138 at 73.
[145] *Id* at 76.
[146] *Id* at 77.

found that there is sufficient evidentiary backing to the predatory pricing scheme employed by the firm[147].

The most disturbing fact is that eventhough these policies and principles are exclusively meant for the predatory pricing measures which cause severe detrimental effect in the economy but is rare its occurrence, they have been used even against the non-predatory price discrimination which are beneficial for the economic growth. These are stated to be beneficial forms of dumping because they force the producers to have their own cost reductions and the consumers to have gains from lower prices. Thus, when anti-dumping laws are employed to prevent such beneficial forms of dumping, then the importing country is forced to move into market crash and ultimately to poverty due to poor economic management. The usage of the anti-dumping policies for nefarious activities is not a new issue to be pondered as umpteen meritless allegations have been levelled against exporting firms alleging indiscriminate dumping. The anti-dumping policies can stifle international competition to the consumer's detriment and negatively affect the suppliers involved by depressing the real income globally through the higher price charged[148]. When a country is utilising the anti-dumping machinery to the core, some instances might arise when the companies would restrict their exports or choose to raise their prices. Such chilling effects can seriously affect the economic growth in the long run detrimentally[149]. Thus anti-dumping policies may be defined as an ordinary protection along with good public relations that allows the domestic industries to seek the protection of the superficial righteousness to protect them from unfair competition from outside firms and business giants. The inclusion of Article VI is indeed a mistake on the part of the founders of GATT and the anti-dumping duties have occupied the position of tariff which was accorded with a status of trade barrier thereby benefitting the imposing country alone but affects all other countries globally when implemented in an international manner. A common agreement between the trading nations to bring an end to the increasing exploitation of tariffs can be beneficial but can be a cumbersome process when compared to the reduction of tariff rates as the WTO mechanism would require a platform that would be open for genuine true dumping duty allegations and at the same time disincentivises those frivolous claims of anti-dumping in the trading ecosystem.

3.4.1 Legal implications

[147] JH JACKSON, WJ DAVY & AO SYKES, INTERNATIONAL ECONOMIC RELATIONS, 765 (Thompson, 6th ed, 2020).
[148] KD RAJU, *India's involvement in Anti-dumping cases in the first decade of WTO*, 3 J. ECON SURV 37 (2007).
[149] *Id* at 44.

The institutional, financial and human resources which are available to pursue a case may be defined as the legal capacity[150]. This is an important characteristic feature attributable to the members of World Trade organisation due to an increase in the adjudication of international trade dispute, the mechanism of settlement associated with it, investing a large amount of time and effort to bring the case before the forum of WTO and contesting it all the way till conclusion[151]. The average length of time mooted to span between the identification of violation, preparing the arguments, filing a complaint, arguing before the panel and then the appellate body would take about 15 months[152]. Legal capacity has nothing to do with the political power but their economic condition does play a serious role in it. Many developing countries find it difficult to contest a case before the WTO but other countries like China, India find it more comfortable to litigate despite of the sizeable nature of the economy and the ability to withstand it despite of having a low GDP rate[153].

Studies conducted over the past decade about the legal capacity of WTO dispute settlement and found that countries with sophisticated technology and better legal capacity are rarely made the target of anti-dumping duties and are most likely to contest the issues relating to the disputed anti-dumping policies. Thus trade maximization is not a factor which is endogenous to the country itself but is more attributed to the complexity of WTO dispute settlement measures and the resources employed to navigate it. Research finding portray it clear that the least developed countries are often targeted by the anti-dumping duties which are least likely to challenge it which makes it evident that majority of the countries tries to exercise their anti-dumping duties by assessing the ability of the country to contest it; poor countries finds it difficult to continue the contentions and thereby succumbs to the anti-dumping claims advanced against them[154]. The developed countries have chosen to work as a third party to all the dispute settlement issues before the WTO which is suggestive of the fact that the value of participation exceeds its costs in majority of the situations[155]. However, after getting into litigations, it is possible for the trade relation terms to improve a high rate. Thus improving

[150] AT Guzman and BA Simmons, *Power plays and Capacity constraints: the selection of defendants in World Trade Organisation Disputes*, 34 J. LEGAL ECON, 557, 591 (2005).
[151] G Shaffer, *Developing Country use of WTO Dispute Settlement System: Why it matters, the barriers posed*, 5 J. ECON SURV 168, 170-177 (2008).
[152] WJ Davey, *Evaluating Dispute settlement: what results have been achieved through consultations and implementation of panel report?* J. LEGAL ECON 20 (2005).
[153] G Shaffer, *supra* note 151 at 580.
[154] INTERNATIONAL CENTRE FOR TRADE AND SUSTAINABLE DEVELOPMENT, GENEVA, SWITZERLAND, http://dx.doi.org/10.2139/ssrn.1091435 (last accessed on 5th June 2021).
[155] G Shaffer, *supra* note 151 at 567.

the legal capacity is the linchpin to escalate the merits by reducing the damage of anti-dumping duties.

3.5 UNDERVALUATION OF IMPORTS

The mystery of international predation can be addressed by pondering over the undervaluation of import commodities in an economy. The Anti-dumping agreement formed under the aegis of WTO has provisions for undervaluation of imports which is adopted from Article VII of GATT by the heading customs valuation of imports[156]. The Anti-dumping agreement provides for the under valuation of imports and divided the class of imports to two categories namely imports that cause dumping and imports that do not cause dumping[157].

3.5.1 Predation that cause dumping

There are certain situations where the predator would predate only in the international market and would spare the domestic firms of his country. For instance, if a firm produces a product with a production cost of Rs 100, and sells it in his domestic market for Rs 150 and in the international market for Rs 80, then the firm is said to predate only in the international market as his selling price is less than the cost of production[158]. In the impugned situation, the dumping margin is calculated by export price and the domestic price which is much higher than the cost of production. This is a clear case of dumping where the first price option as mentioned in Article 2.1 of the Anti-dumping agreement[159] is being employed and the imports are targeted with an aim to remedy dumping which also remedies the aspect of predatory pricing. The most challenging part in the impugned instance is to show that the predator was having intent to dump which however is not of primary concern as per the Anti-dumping Agreement, Article VI. As per the decision of the Appellate Board in the case United States- Anti-dumping Act of 1916, intent to destroy or injure a domestic firm or to establish a monopolising effect over the market is immaterial to the applicability of anti-dumping measures if other measures of dumping are present in the economy[160].

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[156] EDWIN VERMULST,*supra* note 140 at 578.
[157] Prabhash Ranjan, *International predation and Anti-dumping*, ECON POLIT WKLY, 4880-4883 (2004).
[158] Ly Van Anh and Ngo Thi Trang, *NME Status in Anti-dumping Proceedings: A Revision under WTO Law and Practice*, 1 J. INT. TRADE LAW POLICY, 196 – 208 (2016) .
[159] Article 2.1 details the instance when a product is said to be dumped. As per the impugned article, is less than the normal price when introduced into the economy, i.e., when the export price of the commodity which is exported from another country, is less than the comparable price, which in the ordinary course of trade is destined to be consumed in the exporting country.
[160] AB Report on US-Anti-dumping Act of 1916, WT/DS136/AB/R and WT/DS162/AB/R.

3.5.2 Predation that do not cause dumping

In the theoretical terms, if the predation occurs both in the domestic market and in the international market, then predation is not said to be existing in the economic condition. Taking the example of the previous situation where the production cost of a product is Rs 100, if it is being sold in the domestic market for Rs 85 and in the international market for Rs 90, then predation does not occur as the export price is more than the domestic market price. However, as he is selling in both the markets at a rate lower than the cost of production, it is said to be predating in both the economies and since no instance of dumping occurs, the provisions of Anti-dumping is not employed at any of the instances so long as *statusquo* is maintained in the environment of the economy[161]. It is economically viable for a firm to predate in both the economies if they have big and deep pocket. Article 2.2 states that a significant amount of general cost and profit must be added in the production cost so as to determine the dumping margin which can inflate the production cost and the quality of the product to a large extend such that it even has potential to hurt the genuine competitive practices that existed in the economy.

The main implication is to trace and target those predatory imports which cannot be determined under the dumping measures. The undervalued imports are also dealt under the Agreement on Subsidies and Countervailing Measures (ASCM) which primarily focuses on the imports that have been subsidised by the exporting country. As these products are being suffixed with the subsidisation by their national governments, there is no requirement of the producers ultimately resulting in the fact that undervaluation of imports caused as a result of predatory pricing cannot be counted under the ASCM as there involves no subsidies provided by the concerned governments[162].

3.6 CURRENCY MANIPULATION AND ANTI-DUMPING

In the recent chapter of United States- Mexico- Canada Agreement (USMCA), which was previously known by the name North Atlantic Free-Trade Agreement (NAFTA), now brings forth the forgotten issue of currency manipulation to the international arena by deterring such manipulating parties from entering into the realm foreign trade[163]. It is a hortatory obligation

[161] Ly Van Anh and Ngo Thi Trang, *supra* note 158 at 210.
[162] KATARZYNA CZAPRACKA, INTELLECTUAL PROPERTY AND THE LIMITS OF ANTITRUST A COMPARATIVE STUDY OF US AND EU APPROACHES, 200 (Edward Elgar Publishing Limited, 2009).
[163] UNITED STATES-MEXICO-CANADA AGREEMENT (USMCA), https://ustr.gov/trade-agreements/free-trade-agreements/united-states-mexico-canada-agreement (last accessed on 5th June 2021).

primafacie but it directly hits at the root of international currency manipulation by addressing the issue of Free Trade Agreements[164]. The exchange rate variation causes significant diversion by one percent of the world trade in the regime of International Trade as per the empirical study conducted by United Nations Conference on Trade and Development (UNCTAD)[165]. The international organisations and other sovereign states give more importance to this issue on account of the economic aspect associated with it which results in the undermining of the Most Favoured Nation principle, the tariff laws of WTO and the National Treatment principles[166]. The Articles of International Monetary Fund (IMF) clearly lays down provisions regarding the prohibition of securing unfair competitive advantage in the market economy but it faces a severe dearth of a proper enforcement mechanism while the WTO has less reach over the subject as it does not fall within its border of its jurisdiction.

The calculation of dumping margin determines the possibilities of eliminating price advantages, which are attributable to currency devaluation, by virtue of the anti-dumping policies. In the international scenario, both WTO and IMF have separate division of responsibilities whereby, the primary cause of concern for the members of WTO is to cater to the issues of the trade distortion effect caused by the lower export price. The intention behind the anti-dumping policies is in consensus to such aspects as it allows the victim nation to take all possible actions to prevent the destruction of its domestic markets. Paragraph 2 and 4 of Article XV of the GATT Agreement and the agreement between WTO and IMF lays down a legal foundation for the WTO to accept the findings of IMF regarding the violation of Article IV 1(iii) of IMF Article of Agreement. It also specifically states that the currency manipulation amounts to dumping as it partially depreciates the currency of the country thereby making it clear that the antidumping mechanism takes into consideration of the influence of exchange rate. By analysing the previous Dispute Settlement Board decisions affirm the fact that the concept of price gap between the normal value and the export price value. It is immaterial to consider whether the cause of such a price gap was by virtue of the governmental intervention or company's low pricing tactic or the socioeconomic elements. In the case US- AD/CVD the issue of double remedies was brought in question where both the countervailing duties and antidumping duties were levied which resulted in calculating the

[164] THE PETERSON INSTITUTE FOR INTERNATIONAL ECONOMICS (PIIE), https://www.piie.com/blogs/trade-and-investment-policy-watch/positive-step-usmca-countering-currency-manipulation (last accessed on 5th June 2021).
[165] Nicita, Alessandro, *Exchange Rates, International Trade And Trade Policies.: International Economics*. Int. J. BUS. LAW RES. 112-113 (2015).
[166] Beckington, Jeffrey S. and Amon, Matthew R., *Competitive Currency Depreciation: The Need for a More Effective International Legal Regime*, 10 J. BUS. LAW RES., 22-25 (2011).

government subsidy into the dumping margin and the effect of countervailing duty offsets the effect of subsidy twice[167]. The Appellate Body gave the final verdict in the impugned case that, the double remedy was an issue due to the fact that the countervailing measures were not implemented properly and not because there was an inadequacy in calculating the anti-dumping margins[168]. In the EU-Biodiesel case, the European Union adopted the constructed value method[169] to calculate the dumping margin as the bio diesel market was heavily under the control of the Argentina State government. The record maintained by the Argentinian producers were not used but the investigation authority relied upon the adjusted international price claiming that the Argentinian government suppressed the soybean price by the export tax system which resulted in an increase of 40 per cent of dumping margin when compared to the costs calculated with the real cost of the producer[170]. The Appellate Board opposed the surrogate price adopted by the European Union by interpreting Article 2.2 of Anti-dumping Agreement and Article VI: 1(b) (ii) causing this finding to be a milestone in the anti-dumping investigation procedures which made it possible to discourage market distortion as an excuse to construct normal value with surrogate country prices. Thus it would be beneficial for the entire global community if the anti-dumping policies are focussing on the business policies rather than the state level policies[171]. The Anti-dumping measures takes into account *exante* commitments, which is in addition to the general obligations, while considering the impact of state interventions in ascertaining the dumping margins. Many of the scholars have acceded to the fact that the anti-dumping policies must be limited to the product pricing decisions of the companies and not to be related to the government of the sovereign states at the macroeconomic level due to the possible risk of exchange rate misalignment[172]. However, this argument lacks any legal or scholarly backing because none of the provisions of GATT or any such minutes of the expert committees comment about the exclusivity of predatory pricing from being performed by the private entities alone thereby denying the basis of anti-dumping to be anti-price discriminations and that the elements beyond the export company's

[167] WTO, "United States definitive antidumping and countervailing duties on certain products from China-Report of Panel", WT/DS379R, [US-AD/CVD] 198-200.
[168] *Id* 218.
[169] The ascertainment of normal value on the basis of administrative expense, selling, cost of production is the constructed normal value and determining whether the sales made below the cost also applies to constructed value calculation where the inclusion of reasonable amounts of profit marks the difference. https://www.wto.org/english/tratop_e/adp_info_e.htm (last accessed on 5th June, 2021).
[170] WTO, "*European Union: Anti-dumping measures on Biodiesel from Argentina – Report of the Appellate Body"*, WT/DS473/AB/R (EU-Diesel) 19 (2016).
[171] W. Zhou, *Appellate Body report on EU-Biodiesel: The Future of China's State Capitalism Under The WTO Anti-dumping Agreement*, WORLD TRADE REV. 609,632 (2019).
[172] CD Zimmermann, *Exchange rate misalignment and International law*, 5 AJIL 423 (2011).

activities can contribute to such discrimination[173]. With the WTO mechanism not excluding the state activities on the price distortion in calculating the dumping margin, it is evident that business activities of firms are not alone calculated to determine the effect of anti-dumping in the economy.

3.7 CONCLUSION

The anti-dumping laws negatively affect the world trade in general along with the country imposing anti-dumping measures and the exporting countries. The recent study evidences that legal capacity of a country in contesting the issue before the WTO panel is important factor to determine the issuance of anti-dumping duties upon them. After the study, the Dispute Settlement Board has suggested with a mechanism which decreased the necessity to have an appropriate legal capacity to challenge the allegations issued in furtherance of the imposition of the anti-dumping policies thereby indicating that the Dispute Settlement Board throws a sight of suspicion over the matters alleging of anti-dumping duties. This reform would prove to be an efficient method to all countries irrespective of the economic condition in which they are and would welcome more investments to their country. It seeks to bring about a settlement at the consultation stage which would in-turn reduce the burden upon the contesting states. The main idea for the anti-dumping duties to be resilient to inquiry emanates from the US situation where the courts felt that the proper functioning of the political process has been defeated and they interposed themselves between various political actors[174]. At some situations, the court rejected certain rational legislations as it violated the politically powerless groups and violated fundamental principles of constitution law, but at the same time the courts were transparent enough to allow the coalitions to pass legislation in so far as they related to the rational goals which they sought to have achieved which proved that law of a government action should survive its high standard of review. A terminology used to signify exaction of judicial scrutiny, high standard of review is employed by the courts whenever there is a direct cut at the root of the fundamental constitutional part and that the a highly suspected tool has been employed to achieve the aims of the state[175] like classification on the basis of race, religion and gender. The courts still advocate for such categorisation in the realm of judicial scrutiny but it should tailored in a narrow manner that they rarely withstand the judicial scrutiny in the real scenario. The statutes that employed

[173] *Supra* note 169.
[174] RAV v. City of St Paul, 505 US 377 (1992); Loving v. Virginia, 388 US 1 (1967).
[175] United States v. Carolene Prods, 304 US 144, 152, 156.

such clauses of categorization has rarely withstood the test of time with respect to the court's scrutiny as it defeated the democratic process as per the Court's opinion a political process functioning on merits would never allow such a statute to take root in the soil of its society. The US judiciary thus, ensures that the courts are sceptical if there is an element of illegitimacy involved in the enactment of legislation so as to defeat the existing political regime of the country[176]. This foray of legislative principles and administrative action appears to have no connection directly with the anti-dumping legislation practices in the international regime of trade and practice. But on a closer analysis it becomes evident that the circumstances that led to the heightened scrutiny of anti-dumping laws is similar to the heightened judicial scrutiny exercised to protect the politically weak group and fundamental rights in the domestic law aspect. A parallel being drawn with the domestic aspect is pertinent due to the similarity of the justifications of strict laws in the domestic realm and the attempt to prevent protectionist tariffs by employing the anti-dumping measures in the trade aspect. The domestic law has been subjected to more strict judicial scrutiny which made the political processes founded on impermissible motivation to be broken down so as to enunciate justifications and in the same manner, the deliberations of the Dispute Settlement Board requires in challenging the anti-dumping duties[177]. To be more precise, while interpreting the laws by the domestic industries, it completely neglects the fact that the anti-dumping measures are destroying the welfare of the consumers and the protectionist behaviour is supported by the entrenched bureaucracies and import-competing firms of the economy[178].

The adjudication ignores the benefits which many groups incur as a result of the anti-dumping policies which make the protectionist tariffs a virtual reality and the anti-dumping investigations perfunctory. In the opinion of J. Michael Finger, when economic decisions are made through political institutions, the interest of the least politically powerful group is jeopardised[179]. Thus the wealth diversion and political power plays a significant role in the anti-dumping proceedings. To overcome the institutional breakdown, strict scrutiny measures must be employed as the government that conducts the enquiry acts against the normal competitive practice or under respects the anti-dumping scenarios[180]. Due to the inherent

[176] Adam Winkler, *Fatal In Theory And Strict In Fact: An Empirical Analysis Of Strict Scrutiny In The Federal Courts*, 59 VAND REV. L., 793, 797 (2006).
[177] B LINDSEY AND DANIEL IKENSON, THE RHETORIC AND REALITY OF US ANTI-DUMPING LAW IN ANTI-DUMPING: GLOBAL ABUSE OF A TRADE POLICY INSTRUMENT 106-108, (Oxford University Press, 2007)
[178] *Id.* at 117.
[179] MICHAEL FINGER, ANTI-DUMPING: HOW IT WORKS AND WHO GETS HURT, 110-123 (Cavendish Publishing,1993).
[180] JH ELY, DEMOCRACY AND DISTRUST A THEORY OF JUDICIAL REVIEW, 73 (Harvard University Press, 2008).

tension between the tariffs and anti-dumping measures, the court is justified to take a strict scrutiny of matters that involves the trade related matters of WTO. While construing the tenets of Article VI, it should be construed under the light of the founding document's Preamble, which urges the member nations to expand the production and exchange of goods by reducing and eliminating the tariff and other trade barriers[181]. If the dumping is found to be narrowly tailored to actual impermissible dumping accompanied with a strong force of justification which would heighten the scrutiny of anti-dumping in compliance with the aim of WTO and thereby ensures that the anti-dumping policies are never to subvert the purpose of the institution.

The history of dispute settlement by the Appellate body suggests that it has already adopted the measure of heightened security in scrutinising the anti-dumping policies with the practice of strictly scrutinising all the trade policies initiated through the national administrative authorities by the domestic governments[182]. Daniel Tarullo also argues that if such a policy is framed in a *de facto* manner, then the countries must be made aware about the same so that the countries with less legal capacity can be assured of the fact that eventhough the requirements mentioned under Article XVII seems to be exceeding the financial capacity limits, in reality it will not cost such a huge expenditure for the entire process[183]. This would help the countries with less legal capacity to assess and decrease the possible cost of expenditure of litigation before the Dispute Settlement Body and thereby increase the chance of winning the dispute raised.

In order to sustain the important finding that the anti-dumping duties are necessary for the survival of the economy, the Dispute Settlement Bodies are most likely to explicitly impose a higher threshold which facilitate the integration of domestic anti-trust policies and the international trade regulations which draws a clear distinction between the non-actionable competitive behaviour and actionable predatory price discrimination by neglecting the issues that might erupt in the political environment which require each of the government to enact a separate anti-dumping regulatory policies which is crafted with due care and caution to prevent the deleterious effect of dumping while sustaining the other types of beneficial

[181] General Agreement on Tariffs and Trade (GATT), Art. XXI, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194.
[182] Daniel K Tarullo, *The Hidden Costs of International Dispute Settlement: WTO Review of Anti-dumping Decisions* 59 GEO. L.J 35-37 (2018).
[183] Daniel K. Tarullo, *Paved with Good Intentions: The Dynamic Effects of WTO Review of Anti-Dumping Action*, 2 WORLD TRADE REV. 373 (2003).

dumping[184]. This method of scrutinising the anti-dumping policies would makes it easy to challenge the anti-dumping duties imposed on the export industries thereby reduces the cost of contesting a dispute before the WTO panel by the member nations. When the issue before the Dispute Settlement Body is having merit, then the Appellate Body can go deep into the merits and authenticity of the petition by delving deep into matter including the badges of fraud that can be contrary to the very basic nature of the founding documents of WTO. Eventhough the panels do not initiate any de novo investigative methods; it does not imply that the panel has to accept whatever is presented before it. Since consumer goods constitute a large proportion of the export goods, such a heightened security is mandatory and majority of the anti-dumping procedures are opaque to the interested parties. The main aim of Anti-dumping policy is to safeguard the economy and maintain the level of competition. Scrapping the legal regime that controls the whole system of dumping can be detrimental to the wellbeing of the society. Introduction of predation can be an effective measure to tackle the evil of dumping issues to a large extends both in the regional and multi-lateral trade. The reform goes directly to the problem of legal capacity without requiring major reforms in the way the W.T.O. operates. By increasing the likelihood that such challenges will be successful at a cheaper price, a heightened scrutiny standard should effectively reduce the use of anti-dumping duties. While Article VI is not going anywhere, the utilization of that provision can, and should, be limited by making the procedural changes outlined and reducing the legal capacity constraint in challenging anti-dumping duties.

To prevent the abuse of dominant power, predatory pricing is prohibited under Competition Law. If a firm price its products below the market price, then there is no other rationale which can be attributed to the act but to affirm it as a tactic to exclude competition from the market. Predation occurs when a firm deliberately reduces the price to capture the economy and thereby monopolise the power. Such a practice can be exercised only by a dominant firm capable of exerting influence on the firms at the lower rungs of the economy. The Competition laws of various jurisdictions contain effective legislations to tackle the issue of predation.

[184] Doughlas H Ginsberg, *Comparing Anti-trust enforcement in the United States and Europe*, 1 COMPETITION J AND ECON. 427 (2005).

4. PREDATORY PRICING

This chapter attempts to analyse the perspective of Competition Law and Predatory Pricing. The concept of Predatory Pricing, being a paradoxical offence, is completely prohibited under the tents of Competition Law to prevent the abuse of dominant power by any of the existing firm in the economy and deters the new entrant firm from devising any policy so as to pave way for its dominance. Pricing a product below the cost of production is necessarily predatory in nature as there is no other economic rationale behind such a move than to eliminate the level of competition in the market zone. The Competition Law across various jurisdictions asses predatory pricing to be synonymous with abuse of dominant power as the fixing of price below the cost of production is to occupy the market and is possible only to those companies which are dominant. Predatory pricing is feasible only in a multi-market setup where the loss of one firm is recoupled in the profit from another firm of the same market zone[185].

4.1 INTRODUCTION

The exploitative conduct exhibited by a firm over the market zone is one of the most controversial areas under the Competition Law and it has adopted many measures to deter such practices for the betterment of the society. This is clearly reflected in the way in which each of the jurisdictions considers the excessive pricings marked by the firms within their territory. In North America, the excessive pricing is completely neglected and is not covered under the ambit of Competition Law whereas within the jurisdiction of European Union, even though it is mentioned under Article 102 of the Competition Act, it is rarely used to impose sanctions on the violating firms. With respect to the BRICS countries, the Competition Laws strictly monitors the fixation of priced by the firms through centralised mechanism and thereby allows seeking proper redressal with a considerably speedy recourse[186]. The authorities employ a tedious process to categorise the pricing to be abuse of dominance and it has become much difficult to determine the standard of proof used by the authorities to reach the conclusion. The three problems often construed while deciding the prices include the problem of definition. It is difficult to ascertain what constitute predatory pricing and how much higher is a price than the competitive counterfactual so as to determine such pricing to be predatory in nature. The second problem lies with the determination of excessiveness.

[185] Junmin Liu & Xiuling Wang, *Predatory Pricing Prescribed by Law*, 2 US. CHIN. LAW REV 50 (2005).
[186] Dustin Sharpes, *Reintroducing Intent into Predatory Pricing Law*, 61 EMORY L.J. 903 (2012).

Eventhough many comparator analyses are introduced through the economic literature, it is difficult to choose one such aspect conclusively. The third issue is regarding the problem in distinguishing between the abusive prices which constitute the evil of the economy and those prices which are excessive due to innocent reasons. Also an active enforcement will lead to its effects to be felt in other parallel realms also like the lack of clarity in the usage of fining policies under the antitrust areas to be equally employed in other areas of exploitative conduct.

4.2 HISTORIC INCEPTION

4.2.1 Contribution of American Jurisprudence

The Gilded age American Jurisprudence provides the classical inception of competition laws prevalent in the country at present. With the adoption of the principle of Substantive Due Process (SDP) which is largely premised on the protection of life, liberty and property of an individual by safeguarding the private transactions from unwarranted legislative interventions as propounded by the Fourteenth Amendment of the American Constitution. The principle meant crediting individuals with a constitutional right of freedom of contract which is protected under the constitutional amendment and guaranteed with the protection from government interference. The victims can seek recourse by invoking the principle and evaluate the substantive effect of the interference in their contractual freedom. Both the classical economics and the principle of substantive due process are bound inextricably and the main purpose of fourteenth amendment is to protect the civil rights and political rights which included the aspect of economic rights[187]. As property and contract were the two essential limbs of economic liberty, they were selected as the civil rights and the general accepted notion was that the capacity to own property and right to make contracts contributed to maximum economic independence of the individual[188]. Thus, the principle of Substantive Due Process became a door way through which the framers of the constitution introduce economic liberty into the American Constitution. Eventhough the classical theory of economics became obsolete with the passage of time, the principle found its application through the tenets of American Constitution.

The principle of Substantive Due Process constitutionalised the economic theory with a policy centric value and through the classic theory disfavoured the intervention of

[187] Hovenkamp, H. , *The Political Economy of Substantive Due Process*,. 4 STAN. L. REV 379–447 (1988).
[188] *Id.* at 445.

government in the economic matters of individuals. It also deterred the legislature to interfere with those functions which the individuals were able to perform better through private engagements. In case of any dispute, it was the court to decide whether it was legitimate or not for the government to interfere in the matter by keeping the doctrine of laissez faire as the guiding light. Including freedom of contract among the constitutional liberties protected by SDP shows the extent of political economy's influence upon late nineteenth-century American law, even in the absence of any explicit use, by courts or legislators, of formal analytical arguments. This is hardly surprising because broad principles of economic theory also affected, as we know, the common law of Contracts in Restraint of Trade and combinations which are the only kind of antitrust law available in countries like Britain and the US before 1890. Both the constitutional doctrine of SDP and the law of trade restraints recognized private property and freedom of contract as fundamental principles. But property and contractual freedom, together with the freedom to trade, were in turn consubstantial with classical laissez-faire. In short, the classical model provided American courts of the Gilded Age with the building blocks for handling economic cases. One of these cases, Lochner, is the acknowledged symbol of the where in the 1905 decision concerning the state of New York's regulation of bakeries' working hours, the Supreme Court drew the line between the individual right to contractual freedom protected by SDP and the state right to prohibit contracts deemed harmful to the "safety, health, morals and general welfare of the public[189]."

The fear that individual liberty could be curtailed by majoritarian government acting on the public interest's behalf pervaded Justice Rufus Peckham's opinion[190]. Underlying this fear was the more general principle that individual rights were separate from, and often opposed to, government and public interest rights indeed, that the former existed independently of the latter. Protecting the rights of every individual against the oppression of majoritarian government was the guiding light of Peckham's opinion. Writing for the Court's majority, Peckham solved the line-drawing problem with the assumption of formal equality in contracts, i.e., with the principle that all parties in a contract are a priori equal in intelligence and capacity. If all parties in a labour contract were legally equal, state regulation could not protect the weaker party because none existed. Similar bargaining parties did not need the state to act as a supervisor, or *pater familias* over their freely entered contracts.

4.2.1.1. Advent of Sherman Act

[189] Lochner v. New York, 198 U.S. 45 (1905).
[190] Ely, James W. Jr., *Rufus W. Peckham and Economic Liberty*, 6 VAND REV. L.591–638 (2009).

Peckham's assumption of formal equality between bargaining parties would turn out crucial for Lochner and SDP and later antitrust enforcement. The parties could be workers and employers or big and small firms competing for the same market. Stressing formal equality, the assumption downplayed the real balance of bargaining power in the specific contract under scrutiny. Despite widespread recognition of their actual inequality, all parties were equal at the fictional bargaining tables envisioned by Peckham. In the realm of antitrust, the assumption had momentous consequences. Under the Lochner doctrine, enforcing the Sherman Act would not be a matter of ensuring actual equality between competitors – that is, of protecting the principle of free competition against significant market power imbalances – but instead of respecting the freedom of every business to pursue its own interest by entering, on formally equal footing, any lawful contract. In short, it would be a matter of freedom of agreement rather than freedom to trade[191]. But, of course, this would be a peculiar reading of an Act whose main goal allegedly was the protection of competition. The truth is that the dichotomy between the two notions of freedom in antitrust law had a more profound history. The contrast did not begin with Lochner and dated back to at least the US Congress debate about the Sherman Act.

Section 2 of Sherman Act mandates the charge of felony against those firms which practice or conspires to practice monopolisation of trade and commerce in the economy with the nationals or foreigners. As a pre-requisite, the firms must have substantial market power and at least one qualifying exclusionary practice[192]. The aim of any competitive legislation is to maximise profit which legitimately happens at only at the expense of one's own profit but the reason for considering predation to be an unlawful and exclusionary practice in the economy is because of it would not be profitable in the absence of its exclusionary principle. Analysing Bork's definition of predation, it states that the deliberate aggression of a firm against by employing certain sets of business tactics which under normal circumstances would not cause

a) The rivals to be eliminated from the market leaving the predator firm with a humongous market share sufficient enough to monopolise the trade and commerce.

[191] That bargaining power between workers and employers be actually unequal was the main concern behind Justice Harlan's dissent in Lochner. One year earlier, recognition of unequal economic power had been the pillar of Harlan's opinion for Court in the Northern Securities Co. v. United States, 193 US 197.
[192] CORNELL UNIVERSITY, www.law.cornell.edu/uscode/text/15/13a (Last accessed on 31st May 2021).

b) The rival firms, who are exercising threatening or inconvenient behaviour against the predator, would be forced to give up their business due to low profit returns[193].

The US code under Title 15, Ch 1, § 13[194], any sale or contract of sale to sell goods at a price much lower than the existing price of the economy with an intention to eliminate the competitor or destroy the potential competition is unlawful in all sense and the firm performing it would be liable for punishment. Such a note of prohibition is alien to the Sherman Act and the Clayton Act. However, the Clayton Act was modified later in 1936 with the addition of § 3 of the Robinson-Patman Act. In the celebrated case of Brooke Group Ltd v. Brown& Williamson Tobacco Corp[195], the US Supreme Court entertained the matter whether the concept of predatory pricing violated the Sherman Act under the principle of exclusionary practice and the Clayton Act as amended by the Robinson-Patman Act. The Court held affirmatively that the competitive injury as contemplated in the Clayton Act as per the amendment brought in the Robinson-Patman Act and the exclusionary practices under Sherman Act is one and the same. The essence of both the claims was that a business rival would price his products to such a meagre amount with an aim to expel or retard competition from the market and gain control over the market prices.

The concept of unfair pricing and unreasonably low price as mentioned by the US Supreme Court has been defined by the Organisation for Economic Cooperation for Development in terms of the production costs. Dominant firms exercise a deliberate strategy to exclude the competitors from the market by selling at a price lower than the firm's incremental cost of production. Once the potential competition is eliminated from the economy and all possible new entrants are deterred from the market, the firm can increase prices to a large extent and reap maximum profit so as to compensate the earlier succumbed loss[196].

In a nut shell the long passages of modern day economists can be simplified by juxtaposing with the concept proposed by Bolton. He propounded that a price reduction created in favour of the predator only because of the added market power acquired by eliminating, disciplining and inhibiting the competitive conduct of the potential rivals of the economy and such prices are profit maximising only because of their exclusionary and anticompetitive practice. The

[193] ROBERT BORK, THE ANTI TRUST PARADOX: A PARADOX AT WAR WITH ITSELF, 72 (New York Free Press,1978).
[194] *Id.* at 15
[195] *Supra* note 60.
[196] ORGANISATION OF ECONOMIC DEVELOPMENT (OECD), GLOSSARY OF INDUSTRIAL ORGANISATION ECONOMICS AND COMPETITION LAW, www.oecd.org/regreform/sectors/2376087.pdf (last accessed on June 1st 2021).

effect of such pricing is higher cost with reduced output[197]. The modern day definitions makes it mandatory to have a market power as a precursor to predatory pricing where, the market power is used to gain more profit to compensate the loss suffered and resorts to disciplining the competitive attitude of the economy rather than eliminating the rivals[198].

One of the commonest interpretations of the 1890 Sherman Act is that its framers intended neither more nor less than to federalize the common law of Contracts in Restraint of Trade and combinations. The wording of the Act is usually cited as evidence. Thus it is evident that offences identified in the Act, that is, contracts, combinations and conspiracies in restraint of trade and monopolizing attempts, should be given a common-law explanation. However, the common law roots of the Sherman Act, undeniable as they are, do not tell the whole story of its enactment. The literature on the Congressional events leading to the Sherman Act is enormous. Explanations of the passage of the first federal antitrust law range from the purely tactical through the anachronistically theoretical and the openly political to the overtly cynical. However, what matters here is not the true motive behind the Act, if any exists, but rather the available options concerning its actual content and effectiveness. Congressional debates about the Sherman Act support the assertion that two different views, or rhetorics, have shaped antitrust policy: the evolutionary view and the intentional view, or freedom of contract versus freedom from market power. The records show that the two theories were openly on the table during the debates. The eventual outcome was an Act that featured elements of both. By adopting the common law language, it endorsed the evolutionary rhetoric that, inspired by classical economics, dominated the late nineteenth-•century law of Contracts in Restraint of Trade and combinations. But the Act also contained elements of the intentional rhetoric, that is, of the idea that courts' intervention could help restore the proper working of competition against excessive market power. In particular, by making violations actionable by either third parties or the government and by establishing civil and criminal sanctions against violations, the Act marked a sea change from traditional common law.

The dichotomy between freedom of contract and freedom from market power is the guiding theme in Rudolph Peritz's narrative of the enactment and early years of the Sherman Act[199]. Exemplary in this regard is the story of the events leading to the statute's approval. Senator

[197] Bolton P, JF Brodley and MH Riordan, *supra* note 16 at 33

[198] Jane Smith, *US Trade Remedy Laws and Non-market Economies: a Legal overview*, INT COMP LAW Q 88 (2015).

199 PERITZ, R. J. R., COMPETITION POLICY IN AMERICA: HISTORY, RHETORIC, LAW. 77 (Oxford University Press, 1996).

John Sherman did not author the enacted version of the Sherman Act. Still, by the chairman of the Senate Judiciary Committee, George Edmunds[200]. It is not just that the statute should more appropriately be called the Edmunds Act. The real point is that the difference between Sherman's various Bills and Edmunds's final version exactly coincides with the difference between the intentional and the evolutionary view. Regardless of Sherman's own goals, this wording associated his Bills with the intentional rhetoric. Both the notions of full and free competition and that of the consumer paying the cost of anti-competitive behaviour could find no place in the evolutionary, common law approach to Contracts in Restraint of Trade. They were, on the contrary, consistent with the intentional goal of antitrust to defend competition from the market and, possibly, also economic power. The enacted version of the statute would contain no such wording, including no mention at all of the term competition. Senator Edmunds would draft it explicitly in the common law language of contracts, combinations and conspiracies in restraint of trade and of monopolizing attempts. This phrasing validates Justice Holmes's famous dictum in the 1904 Northern Securities case that the Sherman Act was not about the competition. Indeed, were it not for its revolutionary procedural provisions, the Act could be wholly interpreted according to the evolutionary rhetoric of freedom of contract and property rights.

The Congressional debate triggered by Sherman's proposal illustrates the division between the two rhetorical camps. A few observations will suffice[201]. Sherman and the other supporters of Bill's original language emphasized two negative consequences of combinations: harm to industrial liberty and harm to consumers. The former threat struck at the Jeffersonian view of a country of small dealers and worthy men, that is, of an economy made of small businesses, none of which were capable of exercising a significant power on the market. The latter struck at the possibility of consumers escaping from high prices by turning to alternative producers. Taken together, these two harms could lead to an even more severe threat to social and political liberty. According to Sherman, an economically independent citizenry was the cornerstone of representative government. Therefore, competitive equality in the marketplace was crucial to preserve not only economic but also political liberty and, eventually, liberal democracy. Failure to answer the citizens' cry for Congressional remedy against the combination ogre would risk opening the door to "the

200 LETWIN, W. LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT 56 (University of Chicago Press 2018).
201 *Id*. at 34.

socialist, the communist, and the nihilist[202]. In the opposing camp, those who believed that competition could be as dangerous as a combination and those private agreements could mitigate destructive competition. In the new economic order of large-scale industrial processes, business concentration and monopoly were the inevitable competition products, its natural evolutionary outcome. This result could not, and should not, be hindered by the government or the law. Many Congressmen believed that, by preserving the complete freedom of contract, the law could favour the other, equally natural, equally evolutionary outcome of the new industrial era, namely, the birth of private agreements and combinations as a safeguard against the most destructive effects of competition. Like many American economists of the time, these Congressmen thought that industrial liberty was not synonymous with unrestrained competition or, as Peritz put it, that unrestrained competition is not free competition[203]. According to this view, competition could only be termed free when market participants could exercise their most complete contractual freedom, including the freedom to restrain one's market behaviour voluntarily. The law should aim at preserving that freedom by proscribing only those contracts and practices that curtailed it, i.e., that coerced an individual into adopting a behaviour he would not voluntarily choose.

4.2.2 Monopolising third party actions

Introducing the notion of monopolizing added to the Act's intrinsic ambiguity[204]. Restraints of trade as intended by the common law necessarily involved an agreement between two or more parties. Edmunds and his colleagues in the Judiciary Committee wanted to add a provision extending §1 prohibition to any individual who restrained trade acting by himself. The problem with §2, which made it illegal to monopolize or attempt to monopolize interstate commerce, was that the term monopolize had no immediate correspondence in common law, except perhaps in the out-dated notion of engrossing a local food supply. Edmunds was aware of the vagueness of the new provision. As if prescient of the future distress of §2 courts, he tried to clarify the meaning of monopolizing. He reassured perplexed senators that §2 would never be applied against any individual who had conquered the whole business by his own superior skill and intelligence, a perennial issue in subsequent case law.

[202] EDLIN, A. S. PREDATORY PRICING: IN RESEARCH HANDBOOK ON THE ECONOMICS OF ANTI-TRUST LAW, 56 (University of Chicago Press, 2015).
[203] PERITZ, R. J. R. *supra* note 199.
[204] LETWIN, W., LAW AND ECONOMIC POLICY IN AMERICA: THE EVOLUTION OF THE SHERMAN ANTITRUST ACT, 78 (University of Chicago Press, 1965).

According to Edmunds and the Judiciary Committee, monopoly was a technical term at common law, meaning "the sole engrossing to a man's self by means which prevent other men from engaging in fair competition with him." This understanding of the term fell well within the common law boundaries of coercion as a limitation of someone else's freedom. It followed that no market position, no matter how large, could ever be called a monopoly if gained by superior skill and intelligence[205]. In 1890, no senator realized that the word monopoly is not synonymous with monopolizing. The former term refers to a state of the market, the latter to behaviour. In other words, even if acquired by superior skill and knowledge, and so being no monopolizing at all in Edmunds's terms, monopolies would be forbidden because of their sheer existence, a fact that would itself be taken as an unlawful impediment to competition. The most significant departure from common law could, in any case, be found in the sections of the Act devoted to remedies and actionability[206]. As we know, the consequence of finding a restraint of trade unreasonable at common law was, at worst, a declaration of unenforceability against the parties. The right to legal action only belonged to contracting parties injured by a breach or complaining about the contractual terms. It followed that, for instance, in the case of two or more firms merging into one, there was nothing left to complain about, nor anyone left entitled to complain, once the merger had been completed. The Act introduced new remedies and empowered new actors, two features unheard of at common law. People in business violating the Act could go to jail and their property confiscated. Third parties injured by a contract were entitled to sue even when the agreement had been perfectly implemented. More than that, they could seek injunctions and treble damages. By allowing outsiders to claim damages, Congress had created a remedial mechanism for public harms caused by Contracts in Restraint of Trade.

The statute authorized both public and private exercise of something akin to a police power to enforce common-law standards of commercial conduct[207]. This was the most important transformation brought in the new statute. Notably, both the possibility of multiple damages and entitling outsiders to action belonged to Sherman's original Bill[208]. That they had retained their place even in the enacted text shows that the intentional rhetoric of full and free competition had not been entirely removed from antitrust law. Courts would not take long to

[205] Bills and Debates in Congress Relating to Trusts: 1888–1902. Washington: Government Printing Office. 1903.
[206] PERITZ, R. J. R. *supra* note 199..
[207] *Id.* at 121.
[208] *Supra* note 205.

exploit the potential of this novel feature well beyond a strictly common law reading of the Act.

4.3 PREDATION AND ANTI-TRUST LAWS

Predatory practices were a perennial foe of antitrust enforcers during the formative era. Even when the courts most actively supported freedom of contract, undertaking such practices was deemed evidence of unlawful behaviour because they entailed coercing someone else's liberty. Adherents of classical political economy believed that such coercion was relatively rare or, better, that it was rarely significant enough to justify legal interference with the coercing party's freedom. Competition would almost always find a way to circumvent that limited coercion. Common law shared this view so much that Contracts in Restraint of Trade were rarely actionable by third parties unless they entailed explicit boycott or other major coercive acts. The Sherman Act did represent a radical innovation in this respect, as it made contracts in restraint of trade actionable by third parties and the government. However, the legal interpretation, and possible prohibition, of specific contracts and practices still centred on the notion of freedom of contract. Even the per se rule against price-fixing, the most enduring heritage of the Supreme Court's Literalist phase, could be justified in contractual terms. Any contract depriving cartel members of their most basic economic freedom that of setting prices was necessarily unreasonable by interfering with the essential feature of the competitive process, the dynamics of prices, the unreasonableness of the restraint extended to non-participant firms, whose price-setting freedom was also coerced by the cartel's policy. Even external firms were thus entitled to take action against the cartel, provided the latter was big enough to deprive them of that freedom significantly. Antitrust enforcement against Predatory Pricing followed a similar pattern. The legal standard naturally emerging from the formative era emphasized the elements of intent and market power; the former as proof of a predator's willingness to coerce a rivals' freedom, the latter as evidence of the significance of the coercion i.e., of the ineffectiveness of the classical magic wand, potential competition.

Intent and power thus became the behavioural requirements for condemning predatory behaviour. Economists in the formative era offered a more detailed explanation of predation. The basic Predatory Pricing story emphasized the short-•run welfare gains due to the price cut, and long-run welfare losses, due to monopoly pricing of the strategy. Implicit in that story and the indictment, Predatory Pricing was, therefore, a balancing of gains and losses. Elements of the basic story did appear in the formative era's case law, most significantly in

American Tobacco. Still, no explicit balancing of gains and losses was ever tried or mentioned. Though the actual extent of the coercion did matter, the logic of contractual freedom was dichotomise at its core which an individual could either be or not be coerced. In Predatory Pricing, this particular intent and power might suffice to condemn a specific pricing behaviour as predatory and absolute regardless of its actual net effect on welfare behaviour. The 1914 statutes brought no absolute novelty to Predatory Price. Now predatory behaviour was explicitly prohibited by the Clayton Act, but this did not modify the dichotomist attitude nor suffice to accommodate the economists' basic story. The Clayton Act's new test to substantially lessen competition or tend to create a monopoly was still adjudicated in terms of the alleged predator's intent and power. The actual game changer came four years after the conventional end of the formative era, with Justice Louis Brandeis's new rule of reason.

First, the rule's foundations did not rest anymore in the constitutional, i.e., intangible, principles of the right to enter into contracts and property protection notions. To apply the rule, courts had to balance the pros and cons of a given restraint. The pros were often purely private gains, while the cons consisted of the public adverse effects on competition and market outcomes. If the latter prevailed, the restraint had to be proscribed, regardless of any alleged right to property or contractual liberty. In short, Brandeis's version of the rule of reason became the backdoor into American courtrooms of the idea that a business practice could be sanctioned only when it had no serious adverse effects on competitive markets. Second, the rule now had to be implemented by an inductive procedure, looking at the facts in the trial record. Applying it required a fact-based balancing method between the gains and losses of any given practice or restraint. The contrast with the purely deductive procedure in White's original formulation, where the rule descended from Constitutional and common law first principles, was dramatic. As a result of the new rule of reason, even traditional references to the intent and power to unreasonably coerce someone else's freedom i.e., the two critical ingredients of Predatory Price enforcement had to be wholly redefined. Intent and power did not disappear as legal notions, but the yardstick for assessing them became the loss caused to competitive markets. A low price would pass or lead to the failure of the promote or suppress test depending upon the firm's intent and power to determine competitive harm by significantly obstructing competition. The new rule of reason would create a friendlier environment for neoclassical economics. The neoclassical approach broadened the notion of coercion from contract to market. Market coercion added to classical contractual coercion the

deprivation of those economic opportunities granted by the effectual working of competition[209]. An individual was neo-classically coerced when the actual competitive situation in the marketplace did not allow her to exploit some of her market possibilities. As any other neoclassical notion, market coercion naturally lent itself to measurement. Hence it fitted Brandeis's balancing method nicely in fact, it was the perfect conceptual arena to apply "the promote or suppress" test. The neoclassical way of thinking represented the ideal environment for the basic Predatory Pricing story. It was, therefore, in the framework of the new rule of reason, suitably augmented by the neoclassical cost/benefit methodology, that the essential story eventually became dominant, though often loose narrative in future predation cases.

4.4 PREDATORY PRICING UNDER ANTI-DUMPING LAW

Unfair competition in monopolized firms exists not only at home but also in the fields of international trade. It is the exporter who has the predatory intention, but it is challenging to testify. The protection to importers from damage caused by dumping is limited; therefore, the anti-dumping law must do something to predatory pricing. Dumping, in fact, a concept in economics, refers to what exporters have done leads to selling difficulties of other competitors in the domestic market in importing countries and destroyed competitors in importing countries to monopolize the market in importing countries. The legal definition of dumping is laid down in Article VI of GATT: Product export from one country to another at a price below the standard value. Article VI of GATT comes directly from the Antidumping Law in America, and almost all the countries have adopted this theory. The direct aim of the Antidumping Law is to protect domestic industry. Many economists have researched predatory price distortion, which dictates no economic basis for anti-dumping.

On the contrary, anti-dumping rules always distort the decision-making of parties, especially exporters in international trade. Anti-dumping, in essence, protectionism hinders exporter abroad from expanding the global market and damages the interests of domestic consumers at last. There are many kinds of dumping, and it is predatory pricing that should be against mostly. Therefore, the authority concerned is authorized to use constructed price to calculate average value against predatory price discrimination. Constructed price refers to the price of a similar product, namely, the cost of production in the exporting country plus a reasonable

[209] Hovenkamp, H. *Introduction to the Neal Report and the Crisis in Antitrust*. 5 COMPETITION POLICY INT 217–22 (2009).

amount of administrative, selling and general costs and profits. Of course, it does not necessarily lead to anti-dumping measures when all conditions imposed on anti-dumping have been met. Political and economic factors have to be taken into account to decide whether anti-dumping measures should be taken. For example, Region authority in America holds corporations' complaints against Japan on anti-dumping. Because American authority thinks Japanese authority plays a vital role in co-defending former Russian, political reasons.

4.4.1 Predatory Intent

Framing the issue of intent has been a source of difficulty in predatory pricing law: there are various ways of doing so, and courts have not always been clear in this regard. The framing manner has significant consequences. If framed as intent to harm or destroy competitors, penalizing such intent runs the risk of discouraging competition[210] if framed as an intent to undertake the price cuts at issue, the intent is meaningless[211] after all, companies do not accidentally lower their prices. To avoid potential difficulties, one must therefore identify what precisely is meant by a requirement of predatory intent before making a case for its addition and elaborating on how it might be employed. The meaning of intent flows naturally from the definition of predatory pricing "as a price reduction that is profitable [i.e., rational] only because of the added market power the predator gains from eliminating, disciplining, or otherwise inhibiting the competitive conduct of a rival or potential rival[212]. Viewed from this lens, predatory intent means the intent to profit through a price reduction only by producing exclusionary or disciplining effects. Thus, predatory intent would be present where the theory of profitability behind a company's price reduction would exclude other companies from the market or cause them to acquiesce to the company's later elevated prices. Predatory intent would be absent where. Therefore, predatory intent is essentially the absence of a business justification[213]. Courts have recognized business-justification defences in some situations, apparently realizing that pure cost-based rules sweep too broadly[214]. However, they have failed to provide any clear guidelines[215]. For instance, courts have recognized promotional pricing as a possible business justification[216], but it is unclear what defences might be

[210] Edward H Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373, 395 (1974).
[211] PHILLIP E AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW 22 (Cavendish Publishers 2008).
[212] *Supra* note 60.
[213] Bolton P, JF Brodley and MH Riordan, *supra* note 16 at 33
[214] Margaret C. Ling et al., *Predatory Pricing Law A Circuit-Bycircuit Survey*, 3 GEO. L.J 70 (2018).
[215] Id at 22.
[216] Airweld, Inc. v. Airco, Inc., 742 F.2d 1184, 1194 (9th Cir. 1984).

available beyond that[217]. Despite some general language in cases since Brooke Group about business justifications[218], Courts have not provided any additional guidance. As a result, some commentators have suggested definite recognition of several business justifications, such as defensive price-cutting, promotional pricing and learning by doing network externalities[219]. To the extent that business-justification defences are recognized as affirmative defences, the burden is generally on the defendant to establish them. Even if the number of recognized business justifications increases, it will necessarily be on an ad hoc basis[220]. Given the relative infrequency of predatory pricing cases, it is unlikely that the law relating to business justifications will develop expediently and predictably. Thus, if more emphasis is placed on business-justification defences, the law on what constitutes such a justification will not become settled anytime shortly. Recognizing intent as the converse of a business justification simultaneously places the burden on the plaintiff to prove the absence of a business justification and settles the question of what constitutes a business justification.

Evidentiary issues with the proof of intent appear to have been a driving force behind its elimination from predatory pricing analysis. A significant objection to utilizing intent in predatory pricing cases is that plaintiffs' attempts to prove intent complicate litigation by expanding the scope of discovery to produce supposedly smoking-gun-type statements in which the defendant evinces a desire to destroy his competitor and that these statements, once produced, distract and mislead the jury, ultimately reducing the accuracy of decisions[221]. While these concerns may be valid under a different conception of intent, they are inapt for the inquiry this Comment proposes. It is quite right to express concern over the potential for statements such as "Let us pound them into the sand[222]" or "We are going to run you out of the egg business" to mislead the jury. After all, the desire to prevail over one's rivals is entirely consistent[223] with hard competition-a principal goal of antitrust law and the presentation of such statements may give the impression of an improper motive where the only motive is to outcompete one's rivals.

[217] Concord Boat Corp. v. Brunswick Corp., 207 F.3d 1039, 1062 (8th Cir. 2000).
[218] Bolton P, JF Brodley And MH Riordan, *supra* note 16 at 15.
[219] Id at 22774
[220] PHILLIP E AREEDA & HERBERT HOVENKAMP, supra note 211.
[221] A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc., 881 F.2d 1396, 1402 (7th Cir. 1989).
[222] U.S. Philips Corp. v. Windmere Corp., 861 F.2d 695, 703 (Fed. Cir. 1988).
[223] PHILLIP E AREEDA & HERBERT HOVENKAMP, supra note 211 at 11.

Nevertheless, the concern with[224]such evidence is that the law has no non- probative evidence. Such statements are not probative of the issue of intent as it is described in this Comment-that is, they are not probative of a company's theory of profitability underlying its price cuts. Because they do not affect the likelihood of predatory intent, they may be inadmissible for lack of relevance[225].And, to the extent that such statements are relevant to the issue of intent, they may still correctly be excluded under Federal Rule of Evidence 403[226]. Courts, therefore, already have the tools to prevent these types of statements from burdening litigation and manipulating results. The intent should not present any special issue long as courts adhere to the proper notion of intent. Judges would have to use their discretion, bearing in mind that a simple desire to crush competitors by outcompeting them is not relevant to the inquiry-the goal must be to exclude or coerce. For example, it would likely be appropriate to consider private consultants' reports of the type in Inglis, provided that there is a causal link between suggested strategies and those[227]adopted. Evidence, such as that in MeGahee that a firm investigated competitors' financials before implementing its series of price cuts[228]may also be relevant. At the same time, statements, such as those in McGahee, merely showing that a firm wanted to crush competitors[229] would not be relevant. A company's statements and memoranda might, in some circumstances, be pertinent to the intent inquiry. However, they would have to go beyond merely stating the goal of crushing the competition to stating the company's projections and expectations for how it will profit from business decisions.

Additionally, proof of intent could centre on companies' business and financial records[230]. In the absence of foul play, this information should always be readily available[231]and should provide sufficient information from which to glean the defendant's business rationale for its prices. Reliance on these documents is unlikely to complicate litigation beyond its present state. It should focus the inquiry on relatively dry business data that is unlikely to mislead or inflame juries. Whatever the type of evidence relied upon, to satisfy the burden of production, the plaintiff would have to present some evidence tending to show that the defendant's theory

[224] RONALD L. CARLSON ET AL., EVIDENCE: TEACHING MATERIALS FOR AN AGE OF SCIENCE AND STATUTES 327 (Oxford University Press 2007).
[225] Barry Wright Corp. v. ITT Grinnell Corp., 724 F.2d 227, 232 (1st Cir. 1983).
[226] Reynolds Tobacco Co. v. Cigarettes Cheaper!, 462 F.3d 690, 696, 698 (7th Cir. 2006).
[227] William Inglis & Sons Baking Co. v. ITT Cont'l Baking Co., 668 F.2d 1014, 1038-39 (9th Cir. 1982).
[228] McGahee v. N. Propane Gas Co., 858 F.2d 1487, 1504 (11 th Cir. 1988).
[229] *Id.* at 1504.
[230] Kimberly L. Herb, *The Predatoty Pricing Puzzle: Piecing Together a Unitary Standard,* 64 WASH. & LEE L. REV. 1571, 1574 (2007).
[231] *Id.* at 1573.

of profitability behind its price cuts was based on the ability to exclude or coerce. It could satisfy this burden by providing direct evidence of such intent or demonstrating the scheme's inconsistency with legitimate business justifications, such as promotional pricing, learning by doing, or network effects. If satisfied, the defendant would have to rebut with some evidence that its prices were motivated by business objectives other than excluding or coercing. The issue would then be litigated in a standard fashion; there would be no need for allocating the burden differently based on the defendant's price-cost relationship. Whatever type of evidence is presented, so long as courts keep in mind the proper definition of intent, the inquiry would be unlikely to complicate litigation further and should focus on information that is unlikely to mislead or inflame juries.

Typically, considerations of intent in predatory pricing law have been thought to reduce the burden on plaintiffs[232]and to produce more false positives. However, such impressions are significant of intent-based standards. This should not be the case under this Comment's conception of intent. Focusing on intent as a business's rationale for its prices, whether it intended to profit by excluding or coercing rivals or had some other purpose consistent with competition, would not punish firms for striving to outcompete their rivals. Furthermore, requiring intent as an additional element, rather than as a substitute for more objective, cost-based tools, would not reduce the burden on plaintiffs but would increase it. The intent is an essential component of a complete definition of predatory pricing. Definitions that do not mention, or at least allude to, intent tend to identify the concept very generally and then seek to determine on an ad hoc basis which prices should be deemed predatory and non-predatory, respectively[233]. This reveals that price- and cost-based tests leave holes specifically; they are only negative indicators, whereas intent is a positive indicator[234]. Focusing on below-cost pricing and the feasibility of recoupment helps to identify situations in which there was no predatory pricing and establishes situations in which predatory pricing may have occurred. However, it does not affirmatively establish the presence of a predatory scheme. Proponents of cost-based rules seem to recognize this much but seem satisfied that such rules are sufficiently tailored so that predation may be presumed if they are satisfied. The incompleteness of the two Brooke Group prerequisites presents a significant problem of over inclusion. Business-justification defences limit this problem to some degree but provide an

[232] Staples v. United States, 511 U.S. 600, 615-16 (1994).
[233] Cascade Health Solutions v. PeaceHealth, 515 F.3d 883, 893, 898 (9th Cir. 2008).
[234] Steven R. Beck, *Intent as an Element of Predatory Pricing Under Section 2 of the Sherman Act*, 76 CORNELL L. REV. 1242, 1242 (1991).

imperfect solution. There are no clear standards for when they might apply[235], which places a tremendous burden on defendants: they must establish that a business justification should be recognized and that their conduct conforms to that justification. As this Comment has discussed, any rationale for a business's below-cost prices, other than to exclude or coerce rivals, renders them pro-competitive. Thus, there is not much sense to recognize a limited number of business justifications and place the defendant's burden to establish them. Putting the burden on the plaintiff to establish predatory intent better reinforces the distinction between anticompetitive conduct and challenging competition. Requiring intent as an additional element would provide a proper limit on the ultimate scope of the law and may decrease the burdens of litigation. Because intent would be the third element of a prima facie case, it would provide an additional mechanism for defeating meritless claims; claims could be defeated because the plaintiff failed to establish below-cost pricing[236], feasibility of recoupment[237], or predatory intent. At least in some situations, this might decrease the burdens of litigating the Brooke Group prerequisites. For example, defining the relevant market is often complicated and may determine whether the prices are below or above cost[238]. The relevant market issue may have added importance because of the lack of uniformity among the circuits concerning the appropriate cost measure[239]. An intent requirement may decrease the importance of vehemently contesting this issue: if intent cannot be established, this and other points are nonissues. Adding an element of intent may reduce the costs of litigation, which could reduce the potential for strategic misuse of predatory pricing lawsuits[240]. Requiring intent as an element of predatory pricing may provide essential limits on the scope of the law and minimize current problems with predatory pricing litigation. Any other rationale backs the company's price reduction.

4.4.2 Analysis through case laws

As pronounced by the Supreme Court, proving that a competitor priced below its costs is the first element that an agency must overcome to prove a predatory pricing claim[241]. The pricing-below-cost element has been required to avoid penalizing pricing strategies that do

[235] PHILLIP E AREEDA & HERBERT HOVENKAMP, supra note 211 at 115.
[236] Taylor Publ'g Co. v. Jostens, Inc., 216 F.3d 465, 478 (5th Cir. 2000).
[237] Rebel Oil Co. v. Atl. Richfield Co., 146 F.3d 1088, 1097-98 (9th Cir. 1998).
[238] Spirit Airlines, Inc. v. Nw. Airlines, Inc., 431 F.3d 917, 933 35 (6th Cir. 2005).
[239] Brown Shoe Co. v. United States, 370 U.S. 294, 325 (1962).
[240] Daniel A. Crane, *The Perverse Effects of Predatory Pricing Law*, 5 DALHOUSIE J. LEGAL. 55-58, (2006).
[241] *Supra* note 60.

not harm competition[242]. Most notably, the courts and commentators have generally agreed that pricing above marginal cost is "per se" legal, and only pricing below marginal cost can harm competition[243]. Whether such a bright-line rule is rational is the subject of controversy[244] among some notable commentators. Summarily dismissing agency allegations of predatory pricing because the pricing-below-cost element is not proven sidesteps the complete analysis needed to decide whether a particular pricing strategy is indeed harmful to competition.

The basic assumption that underlies a claim of predatory pricing, whether above or below some measure of cost, is that the losses suffered by the predator must be recouped in the future by supra-competitive prices to make the pricing strategy rational[245]. The analysis of pricing-below-cost is an extraneous legal exercise because a predator can harm competition by implementing a pricing strategy, whether above or below cost, that can exclude rivals and be successful if recoupment is possible[246]. A predator cannot implement a successful predation strategy, even below cost, without the ability to recoup its losses[247]. The current predatory pricing analysis evades the critical issue of whether pricing strategy will harm competition-the ability to recoup lost profits-by dismissing predation claims simply if the pricing-below-cost element is not satisfied[248]. The pricing-below element is a significant barrier for agencies to prove a predatory pricing claim, whether measured empirically or conceptually[249]. It is not widely debated that a "safe harbour" is necessary to protect price reductions competitor because such conduct is the hallmark of competition[250]. It is more controversial whether the pricing-below-cost element should be the relevant sentinel guarding pro-competitive pricing conduct against anticompetitive predation[251]. Although the pricing-below cost element has probably faired well in deterring false convictions of predatory pricing, one must wonder whether the element's minute probative value in predation analysis makes it an artificial barrier that sacrifices valid predation claims for deterrence of false

[242] Matsushita v. Zenith Ratio Corp., 475 U.S. 574 (1986).
[243] Einer Elhauge, *Why Above-Cost Price Cuts To Drive Out Entrants are Not Predatory--and the Implications for Defining Costs and Market Power*, 112 YALE L.J. 681, 684-90 (2003).
[244] Aaron S. Edlin, *supra* note 36 at 911.
[245] Supra note 242.
[246] Neumann v. Reinforced Earth Co., 786 F.2d 424, 427 (D.C. Cir. 1986).
[247] Jonathan B. Baker, *Predatory Pricing After Brooke Group: An Economic Perspective*, 62 ANTITRUST L.J. 585, 594 (1994).
[248] Kenneth G. Elzinga & David E. Mills, *Testing for Predation: Is Recoupment Feasible?* 34 ANTITRUST BULL. 869, 869-70 (1989).
[249] Bolton P, JF Brodley And MH Riordan, *supra* note 16 at 17
[250] United States v. AMR Corp., 335 F.3d 1109 (10th Cir. 2003).
[251] Alexander C. Larson & William E. Kovacic, *Predatory Pricing Safeguards in Telecommunications Regulation: Removing Impediments to Competition*, 35 ST. LOUIS U. L.J. 1 (1990).

ones[252]. Furthermore, the impracticality of calculating the appropriate cost measure from accounting data and the seemingly insuperable scrutiny the courts apply to decide whether the plaintiff's calculation of cost meets the legal standard has made any pricing conduct virtually per se legal, even though direct evidence of possible harm to the competition may exist[253]. The assertion that dismissing predatory pricing claims based on lack of pricing-below-cost sidesteps the reason why predation is damaging to competition and requires the assumption that price reductions, whether below or above cost, can be harmful to competition[254]. It seems that commentators weaken the belief that pricing above cost can never harm competition[255]. As for the rationale for the pricing-below cost requirement as one rooted in judicial efficiency, the Supreme Court is reticent to pass on above-cost price conduct because it may not discern competitive from anticompetitive conduct when overhead cost[256]. The Court, however, shirks its duty by summarily implying that above-cost pricing conduct is per se legal based on conclusive statements in dicta rather than through actual analysis in a live case or controversy[257]. The Supreme Court has recently reiterated that another reason that above-cost predatory pricing schemes are not punished is that such conduct is beyond the practical ability of a judicial tribunal to control. If the premise that the Court should not propagate rules or duties that it cannot control is to be accepted[258], the premise calls into question the practicality of the Court's pricing-below-cost element as well. It would be puzzling if the Court cautioned delving into substantive conduct it could not adequately control but promoted rules to analyse conduct which it could not adequately explain or supervise[259]. The numerous predatory pricing cases dismissed due to a lack of finding that an antitrust agency proved pricing-below-cost suggest that it is a difficult test to satisfy[260]. One pervasive difficulty is the fact that the courts have not been consistent in their treatment of what must be proven to satisfy the pricing-below-cost standard. The wide array and depth of the differences in the correct measure of pricing-below-cost are compelling because the test is vacuous and not judicially administrable. The pricing-below-cost element

[252] Id at 2.
[253] Kenneth G. Elzinga & David E. Mills, *Trumping the Areeda-Turner Test: The Recoupment Standard in Brooke Group*, 62 ANTITRUST L.J. 559, 560, 563 (1994).
[254] David Spector, *Definitions and Criteria of Predatory Pricing*, 3 ANTITRUST L.J 55-67 (2001).
[255] Verizon Communs., Inc. v. Law Offices of Curtis V. Trinko, LLP - 540 U.S. 398, 124 S. Ct. 872 (2004).
[256] *Supra* note 60.
[257] Id at 223.
[258] Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is.").
[259] PREDATORY PRICING LAW, A CIRCUIT-BY-CIRCUIT SURVEY 10 (Barbara. Bruckman Publications, 1995).
[260] Kenneth G. Elzinga & David E. Mills, *supra* note 253.

seems to be unsound based on economic theory[261] and not judicially administrable, which appears to call for a revised approach to predatory analysis where pricing-below-cost is not given dispositive weight. The recent evolution of monopolization theories further evinces the question whether conduct that does not fall under the parameters of a classic predatory pricing claim should be dismissed as having no anticompetitive consequences[262].

As areas of antitrust law like the duty to sell and bundle rebates evolve as the relevant economic theory evolves, the courts and antitrust agencies should review whether the Brooke Group standard should also grow; commentators have developed new approaches of how to price predation, not necessarily below cost, can be anticompetitive. As certain conduct in the monopolization context reaches a crossroads in its legal analysis and effects, a fresh look at predatory pricing would also be welcome.

An alleged argument is that the pricing-below-cost element should be excised from predatory pricing analysis. Pricing-below-cost has become such an ingrained part of the analysis for courts and commentators that such a proposal will almost assuredly fail[263]. This Comment proposes that pricing-below-cost becomes part of a Rule of Reason balancing test in antitrust agencies predatory pricing claims, in which the act of pricing below-cost is probative, and not dispositive, of proving or disproving a claim. Under a Rule of Reason approach, this Comment suggests a structured step-by-step analysis, rather than an unordered analysis of the clutter of factors in a predatory pricing soup in which the Court does a subjective balancing test. First, the approach would begin with barriers to entry analysis[264]. It is universally agreed that predation does not harm competition when potential competitors can enter the market with ease in response to a subsequent price increase by a predator after the predation period; thus, the absence of barriers to entry should give conclusive weight that the pricing conduct is not predatory[265]. Second, if barriers to entry exist, the analysis should proceed to an analysis of recoupment[266]. The anticompetitive effect of traditional predatory pricing exists due to the subsequent price increase after predation. Thus the ability of a predator to recoup lost profits should be of paramount concern[267]. Insufficient evidence of recoupment would end the

[261] Bolton P, JF Brodley And MH Riordan, *supra* note 16 at 35.
[262] Janusz A. Ordover & Robert D. Willig, *supra* note 33 at 11.
[263] United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377 (1956).
[264] Richard T. Rapp, *Predatory Pricing Analysis: A Practical Synthesis*, 59 ANTITRUST L.J. 595 (1990).
[265] Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 19-23 (1984).
[266] Paul L. Joskow & Alvin K. Klevorick, *A Framework for Analyzing Predatory Pricing Policy*, 89 YALE L.J. 213, 244 & 249-55 (1979).
[267] Daniel M. Wall, *Predatory Pricing: Are Cost Tests on Their Way Out?*, 4 ANTITRUST MAG. 40, 42 (1989)

analysis[268]. Strong evidence of recoupment, however, would be significantly probative of predatory pricing yet not conclusive. If there is prima facie evidence of recoupment, a rebuttable presumption of anticompetitive effect accrues that the alleged predator can refute by offering a legitimate business justification for its pricing decision or efficiencies coming from the pricing conduct[269]. Of course, in a situation where a competitor prices below a defendant's price, the law should not handicap a defendant from meeting or beating a competitor's price[270]. Once a rival is forced to exit the market, however, because the defendant's price reduction trumped its price reduction, the defendant must have a legitimate business justification for any subsequent price increase[271]. If no legitimate business justification can be averred, the lack of explanation should strengthen the conclusion that the defendant cut-price solely to eliminate its rivals and thus is predatory[272]. his Comment's suggested approach to predatory pricing analysis includes the pricing-below-cost element as a probative factor when claims are ambiguous or not clear-cut, favouring either finding or dismissing the lawsuit after the above analysis is completed. Similar to how the courts use the evidence of intent[273], evidence of pricing-below-cost would be probative toward finding a greater likelihood of anticompetitive harm because pricing-below-cost is irrational, absent an exclusionary effect[274]. This Comment suggests that finding a defendant did not price below cost would tilt the test in favour of absolving the defendant of predation[275].

4.5 INDIAN ASPECT OF PREDATORY PRICING UNDER COMPETITION LAW

Competition law enforcement is triggered where competitive constraints are weakened. Fear of losing customers keeps prices down. However, where a firm acquires a dominant position or significant ‘market power’, it becomes strong enough that it remains unconstrained by its competitors while setting its pricing strategy. Indian Competition Act, 2002 (the Act) defines the dominant position as the ability of the enterprise to work independently of the market forces plying in the market and or affecting its competitors or consumers or the relevant market in its favour. Such a dominant firm’s pricing policy could either be excessive, predatory or discriminatory (all the three falling under the gamut of unfair prices) for it to be

[268] *Id.* at 41.
[269] United States v. Microsoft, 253 F.3d 34, 58-59 (D.C. Cir. 2001).
[270] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451 (1992).
[271] David Lee, *The Lack of Guidance for Proving the Pricing-Below-Cost Element of Predatory Pricing and a Call for a Revised Approach to Predatory Pricing Analysis*, 56 ADMIN. L. REV. 1285 (2004).
[272] Dustin Sharpes, *Reintroducing Intent into Predatory Pricing Law*, 61 EMORY L.J. 903 (2012).
[273] Harry S. Gerla, *The Psychology of Predatory Pricing: Why Predatory Pricing Pays*, 39 SW. L. J. 755 (1985).
[274] Einer Elhauge, *Defining Better Monopolization Standards*, 56 STAN. L. REV. 253, 344 (2003).
[275] California Dental Association v. F.T.C., 224 F.3d 942, 948 (2000).

characterized as abusive conduct. Excessive prices are abnormally high prices for goods and services which have no reasonable relationship to their economic value[276]. Over the years, competition authorities have typically shied away from intervention in excessive pricing for various reasons, the most prevalent one being that price regulation, as such, is not their mandate. Besides, price regulation acts as a disincentive for investment and will have a chilling effect on innovation[277]. While excessive prices can lead to violations of competition rules in South Africa, the European Union , its Member States and a few of other countries, some other jurisdictions, including the United States , consider that competition authorities should not control high prices, as markets will self-correct any pricing excesses by dominant firms because excessive prices will attract new entrants[278]. India, although has made a start, has not gone far ahead in this direction mainly because not many cases have come before it and partly because some investigations are still in progress.

Excessive pricing remains a highly controversial topic in competition law. The arguments for intervention/non-intervention are varied, and the actual practice may differ from jurisdiction to jurisdiction. The case in favour of intervention by competition agencies is argued on the ground that it directly increases consumer surplus, at least in the short run. In a developing country with capital scarcity, there is a view that producer surplus should benefit which would enable capital formation and further investment, generating robust growth. However, as economies grow and develop, consumer interest becomes paramount, and consumer surplus is aimed to be maximized. In such a scenario, excessive pricing would tend to be treated as a drag on consumer surplus and be frowned upon. However, intervention by competition authorities is not free from constraints. This is because, firstly, excessive prices are difficult to assess and necessitate establishing a standard benchmark 'fair price'. Secondly, high margins in some industries are necessary for future productivity and dynamic efficiency. Some industries, such as high-tech and network industries, have high fixed costs, low marginal costs and oligopolistic market structures[279]. Thirdly, excessive pricing can be self-correcting at times. This happens as excessive prices attract new entrants, which makes the dominant firms lower their prices and restrain them from charging high prices. Fourthly,

[276] BELLAMY, C AND CHILD, G, EUROPEAN COMMUNITY LAW OF COMPETITION, 56 (Sweet & Maxwell, 2001).
[277] MOTTA, M, COMPETITION POLICY THEORY AND PRACTICE, 34 (Cambridge University Press, 2008).
[278] Pricing Decisions in Industries where High Prices Do not Attract Entry presented in Third Annual Competition Commission, Competition Tribunal and Mandela Institute Conference on Competition Law, Economics and Policy in South Africa (2009).
[279] OECD Roundtables: Excessive Prices (2011), DAF/COMP(2011)18

what level of profit margin is acceptable as excessive is difficult to assess[280]. Fifthly, in the absence of an objective and efficient rule to determine price, cost or standard profitability benchmark, it becomes impracticable to work out the legal standards[281]. Sixthly, excessive price actions may undermine the investment incentives of new entrants and also of the dominant firms[282] but all said and done, the question of how to remedy the situation remains.

4.5.1 Historical Development

In India, price control has, until a few years back, been one of the weapons in the armoury of the Government for achieving socio-economic objective under the 5-year plans. Taking the basic form of price ceiling and price floors, price control subsumed itself as a regulatory tool, regulating the prices of commodities in order to maintain their availability and to prevent inflation of prices during shortage. Besides curbing black marketing, price control measures seek to ensure distributive justice, maintain the quality of goods and services and aid in prevention of monopolistic, restrictive, unfair and anticompetitive trade practices. Over the years, it has served as an instrument aiding the state to achieve its socio-economic goal laid down under Article 39(b) of the Constitution of India. The objective of price regulation, in short, is anti-profiteering. Post- independence, India followed a mixed economy model[283] with the state retaining control over 'the commanding heights of the economy' such as heavy industries and utilities. Although private sector was allowed to step in, it was basically made subject to governmental control in the form of licensing and quotas. The Government was not only the producer and regulator in strategic areas but also exerted direct control over the output and price of goods which fell in the private sector domain. While the era of 1985 saw deregulation of many industries and relaxation of quotas, the decade of the 1990s witnessed opening up of India's relation with the world though globalization, privatization and liberalization. The comprehensive liberalization covered industrial, investment, fiscal and trade policy. The Monopolies and Restrictive Trade Practices Act enacted in the year 1969 (MRTP Act), was drastically amended in 1991 with the Rs 1 billion threshold for MRTP registered companies being removed and chapter relating to mergers and amalgamations

[280] Geradin, D, *The Necessary Limits to the Control of 'Excessive Prices by Competition Authorities – A View from Europe*, 11 FORDHAM INT'L LJ 23, 33-35 (2007).
[281] THE UNIVERSITY OF OXFORD CENTRE FOR COMPETITION LAW AND POLICY, (https://www.law.ox.ac.uk/sites/files/oxlaw/cclpl41.pdf, last accessed on 18th June 2021).
[282] FLETCHER, A AND JARDINE, A, TOWARDS AN APPROPRIATE POLICY FOR EXCESSIVE PRICING,(Hart Publishing 2008).
[283] OECD, CUTS INTERNATIONAL, (https://www.oecd.org/gov/regulatory-policy/ 44925979.pdf, last accessed on 18th June 2021).

deleted therefrom. Large government monopolies began to give way to private entrepreneurship making sectors such as civil aviation, banking and insurance, oil and gas, telecommunications, etc. open to private investment. The move from state monopolies to multiple players including private enterprises necessitated the need to ensure a level playing field, and this is where various independent regulators were made to step in.

4.5.2 Sectoral regulations

From electricity to telecommunication, banking to pharmaceuticals, India witnesses a wide array of regulators overseeing the activities in the relevant sector. Sectoral regulators are in-market regulators with an ex ante interventionist approach. They set the rules of the game besides deciding on the entry and exit conditions, performance parameters, technical details, safety standards, etc. They seek to prevent inefficient use of resources through regulation, control prices, quantity and or quality of regulated product and usually provide a specialized dispute redressal mechanism. Sectors such as electricity, petroleum and natural gas, telecommunication, insurance, airports and airlines are regulated by independent sectoral regulators which in turn are governed by the respective legislations and regulators. The regulator not only sets price ceilings but also ensures that the same are not violated. While sectors such as petroleum[284] and the telecom have witnessed a gradual abandoning of price regulation in the recent times, price regulation in electricity remains intact. While a sector-specific regulator seeks to identify a problem ex ante, addressing structural issues before the problem arises; competition regulator generally addresses the problem ex post in the backdrop of market conditions. The Competition Commission of India constituted an ex post regulator with cross sector sweep, in the year 2003 under the Competition Act, 2002. However, the enforcement of the provisions of the Act started in May, 2009 and June, 2011 for anticompetitive agreements and combinations respectively. The Commission was preceded by the Monopolies and Restrictive Trade Practices Commission (MRTPC) established under the MRTP Act. Though the presence of a regulator does not oust the jurisdiction of the Commission, nevertheless any intervention by the competition regulator in the regulated sector may lead to conflicts between the two regulatory bodies. A step towards reconciliation of the unnecessary tension between the two regulators is Section 21 and 21A of

[284] In April 2002, India abolished the Administrative Pricing Mechanism (APM) controlling the domestic price of petroleum products in India under which product prices were directly administered by the Central Government based on cost of operating capital plus formula. The new regime brought to the forefront the freedom of oil marketing companies to set retail product prices based on an import parity pricing formula, under the supervision of the petroleum sector regulator. The domestic refining and retail sector was also opened to private sector firms.

the Competition Act, where the competition watchdog may refer the matter to another regulator for its opinion. Similarly, regulatory authorities may also refer a matter to the Commission when they find themselves vexed in a case which impinges upon competition in the market. The recently passed Real Estate (Regulation and Development) Act, 2016, expressly mandates the authority therein to make a reference to the Commission where it is vexed with an issue pertaining to agreement which prevents/restricts/distorts competition. The authority can also suo moto make reference where market power of a monopoly situation is being abused affecting the interest of the allottees.

Although the MRTP Act did not contain any specific provision on excessive/unfair pricing, false claims or representations regarding the price of goods and services therein amounted to unfair trade practices. On repeal of the MRTP Act in 2009, the then ongoing unfair trade practices cases were transferred to the National Commission constituted under the Consumer Protection Act, 1986. It is noteworthy that Section 2(r) of the CPA defines unfair trade practices in the same way as MRTP Act does[285].

4.5.3 Legal Framework

Price overcharge resulting from the collusive activity is a way of imposing excessive prices under the Act. Price overcharge refers to the difference between the collusive price and the price that would have been observed in the absence of cooperation by the interplay of market forces, the latter price being called the benchmark price. One aspect of Section 3 of the Act is that it deals with the price increase in price fixation resulting from collaboration among horizontal players. The Indian regulator has received several cases where the parties have alleged that unfair/ excessive prices have been extorted due to cooperation. In S. K. Sharma, Deputy CMM-IV, North Western Railways v. M/s RMG Polyvinyl India Ltd & Ors[286] the informant issued tender to procure polyvinyl sheets. It was alleged that a rapid hike in the price of PVC sheets by opposite parties in a connected way amounted to cartel formation. The informant stated that he procured the sheets from the opposing party four months earlier at half the price. The investigation found that the rates of PVC sheets were increased to very high levels without any justification by the parties even when the prices of the raw materials did not change much. However, the case did not result in a penalty imposed upon the parties

[285] DUGAR, S. M., GUIDE TO COMPETITION LAW, 66 (Lexis Nexis Butterworths 2016).
[286] North Western Railways v. M/s RMG Polyvinyl India Ltd & Ors, Case No RTPE 31/2008, initiated under the MRTP Act, 1969. Order passed by the Competition Commission of India.

as the alleged violation was supposed to have been committed in 2007 when the Act was not in force.

Similarly, in the Cement[287] case, the Commission imposed a penalty upon ten cement companies and their trade association, the Cement Manufacturers' Association, for cartelization in the cement industry. The Commission concluded violation, taking note of the high-profit margins and net profits of the opposite parties compared to the previous year's figures, for establishing the change in prices by the opposing parties amounting to anticompetitive conduct. In Re Aluminium Phosphide Tablets Manufacturers[288], the anticompetitive conduct in the tender for procurement of aluminium phosphide tablets required for the preservation of central pool food grains by the Food Corporation of India was in question, and the Commission penalized Excel Crop, Sandhya Organics and United Phosphorus at a rate of 9% of their total turnover[289] for agreeing to raise bid prices between 2007 and 2009. The Act makes a distinction between agreements of a horizontal nature and those of a vertical nature. While the former is subjected to a rebuttable presumption of anti-competitiveness, the latter is subject to the standard evidence of 'rule of reason pure and simple, a preponderance of probabilities. It is interesting to note that RPM, which features a vertical agreement under Section 3 (4) (e), has relevance for excessive pricing in the context of India. While MRP is the maximum retail price that can be charged from a consumer, resale price management is the price below which many manufactures do not permit the selling of the product to the consumers by the retailers. A conjoint reading of both the terms suggests that there are cases where RPM could be susceptible to higher than normal prices. If the MRP, which is not subjected to any regulatory ceiling, is excessive, there is no guarantee that the retail price subjected to resale price management will not be excessive. The Commission is at present investigating a case against Becton Dickinson and Max Super Speciality Hospital[290] where the allegation about the conduct of Max Hospital in charging a higher price, through printing excessively higher MRP as compared to the price charged by the manufacturer to the retailers on 'Disposable syringe with needle size 10 ml of B. D. Emerald Brand' (DS) in connivance with Becton Dickinson, which, prima facie, amounts to imposition of unfair price in the sale of DS in violation of the provision of Section 4(2) (a)

[287] Builders Association of India v. Cement Manufacturer's Association,Case No 29/2010, Competition Commission of India.
[288] Re Aluminium Phosphide Tablets Manufacturers, Suo Moto 02/2011, Competition Commission of India.
[289] Reduced by the Competition Appellate Tribunal (now National Company Law Appellate Tribunal) and the Supreme Court to relevant turnover instead of total turnover while upholding the contravention.
[290] Vivek Sharma v. Becton Dickinson and Max Super Speciality Hospital Case, Case 77/2015, Competition Commission of India.

(ii) of the Act. It is to be noted that the Consumer Protection Act, 1986, is intended to ensure that the traders do not charge prices above what has been restricted by law as the MRP. However, when the price has not been fixed by law or displayed on the package, the Consumer Protection Act, 1986, does not contemplate any action on the ground that excess prices may have been charged. There is umpteen number of cases that deal with resale price management that was looked at by the Commission during the last seven-plus years of its existence, the major ones being ESYS Information Technologies v. Intel[291], Prime Magazine v. Wiley[292] and Ghanshyam Das Vij v. Bajaj Corporation[293]. The third and the most common form of the notorious conduct of excessive pricing is the abuse of dominant position as dealt with under section 4 of the Act. While Section 3 deals with price overcharge in the form of price fixation resulting from collaboration among horizontal players, Section 4 addresses unfair prices or increase in costs due to unilateral abuse of dominance. The standard of proof required in either case will depend upon the nature of the case, nature of the allegation, etc. While Section 3(4) can be effective only when significant market power is attributable to the enterprise, Section 4 relates to enterprises that hold a dominant position[294]. Indian law does not envisage any safe harbour market share for market power as far as Section 3(4) (e) is concerned. A charge of excessive pricing under resale price management, which is subject to the rule of reason, can be defended by the opposite party on showing pro-competitive effects exceeding adverse effects on competitors. However, the position is somewhat distinct under Section 4. Once it is shown that the enterprise is dominant in the relevant market and the abuse falls under the designated subsections of Section 4, it is not open to the party to show that the conduct had some pro-competitive or beneficial effects on the market on the consumers.

4.5.4 Sector wise analysis

The market dynamics, including the ability of competitors to provide a counterweight to the market power of the alleged dominant player, is closely studied. The role of the product and the enterprise in the economic development of the country is also assessed. Besides, the definition of dominance does not allow the Commission to yield to the temptation of bringing into the fold of dominance the enterprises that have fleeting market share predominance. The

[291] ESYS Information Technologies v. Intel , Case No 48/2011, Competition Commission of India.
[292] Prime Magazine v. Wiley, Case No 07/2016, Competition Commission of India.
[293] Ghanshyam Das Vij v. Bajaj Corporation, Case 68/2013, Competition Commission of India.
[294] Dominant position is established with reference to explanation (a) to Section 4 and Section 19 (4) of the Competition Act, 2002.

enterprise's ability to act independently of market forces, including competitors and consumers should come out distinctly and clearly on a stable basis to be treated as a dominant enterprise. Abusive conducts are well defined and categorized into five types. These, if engaged in by dominant players, are treated as anticompetitive in themselves, and no escape route is envisaged.

4.5.4.1 Airline and Civil Aviation sector

In Manjit Singh Sachdeva v. Director General of Civil Aviation[295], it was alleged that the Directorate of Civil Aviation being regulator of aviation sector had not evolved any pricing policy on air tickets for air fares to be charged from the passengers for service offered by various airlines and that, due to the same, airlines were charging exorbitant prices fixed arbitrarily and whimsically from air travellers. The Commission found no competition issues and held that it cannot direct the Government of India to fix prices of services provided by private entrepreneurs as the same runs contrary to the spirit of competition law. In Citizen Grievances Redressal Foundation v. Mumbai International Airport and Delhi International Airport[296], the informant alleged that Mumbai and Delhi International Airports abused their dominant position by charging excessively high vehicle parking rates as compared to the International Airports of Kolkata and Chennai. The Commission observed that the two airports were owned and operated by consortiums. In a consortium bid project, competition is at the time of bidding which is known as 'competition for the market'. Once the project is awarded the monopoly status of awardee is not an issue. Hence, the dominant position of Mumbai and Delhi International Airports in the relevant market of 'the aeronautical and non-aeronautical services in the airport of Mumbai and of Delhi', respectively, was not an issue. The Commission observed that the earning from non-aeronautical services form a substantial part of income of the consortium and it is given liberty to charge for such services so as to recover the investments and to meet overall maintenance and management of the airport. Thus, each non-aeronautical service could not be separately looked into from the point of view of cost audit or pricing to come to the conclusion of unfair prices. A comparison could not be made of the parking rates prevailing in Mumbai and Delhi airport with other airports. Also, keeping higher parking rates is in consonance with the interplay of demand and supply as Mumbai and Delhi International Airports have two to three times higher passengers than

[295] Manjit Singh Sachdeva v. Director General of Civil Aviation, Case No 68/2012, Competition Commission of India.
[296] Citizen Grievances Redressal Foundation v. Mumbai International Airport and Delhi International Airport, Case No 51/2013, Competition Commission of India.

other airports. In a comparatively recent case, the Commission dismissed the case of abuse of dominant position in the Bangalore International Airport Limited (BIA) v. The Airports Authority of India (AAI)[297], the informant was engaged in providing Ground Handling Services (GHS) to various domestic airlines and services for chartering of aircraft. Bangalore International Airport was engaged in the operation, maintenance, etc. of Kempegowda International Airport at Bengaluru (KIAB). Airports Authority of India is responsible for development, finance, operation and maintenance of airports. It was alleged that, citing security reasons and congestion at KIAB, Bangalore International Airport refused to allow it to offer self-handling of GHS for its TruJet flight operations without offering any explanation. The Commission, considering the relevant market as the 'market for the provision of ground handling services at Kempegowda International Airport in Bengaluru', considered that Bangalore International Airport enjoys complete discretion in matters relating to handling of aircrafts, passengers, baggage and cargos at KIAB and was in a dominant position. It was noted that the Directorate General of Civil Aviation's circular on GHS prohibited self-handling of GHS at KIAB and other metropolitan airports and that the number of GHS providers had been ascertained by the Central government with regard to the GHS and availability of infrastructure. In Yeshwanth Shenoy v. Air India & Ors[298], it was alleged that Air India charged higher price for the tickets booked under Leave Travel Concession Scheme of Union of India in comparison to the tickets available in non-concession category. The Commission was of the opinion that Union of India, being in the position of a consumer of air travel services, had the right to exercise its free choice to avail the services of Air India which negated the allegation of unfair price against Air India.

4.5.4.2 Agriculture

The agriculture sector is marked by the presence of the case of Monsanto. The controversy arose during the MRTP days when the state of Andhra Pradesh filed a reference before the MRTPC requesting for a temporary injunction restraining Monsanto[299] from collecting Rs 1250/- per 450 grams for Bt cottonseeds as trait value from the farmers pursuant to the agreement entered. It was alleged that the cost of production of the variety of seed ranged from Rs 400/- to Rs 500/- per 450 grams of seed whereas Monsanto was selling the same

[297] Bangalore International Airport Limited (BIA) v. The Airports Authority of India (AAI), Case No 59/2015, Competition Commission of India.
[298] Yeshwanth Shenoy v. Air India & Ors, Case No 98/2015, Competition Commission of India.
[299] Mosanto v. Nuziveedu, Case No RTPE 05/2006 & Interim Application No 05/2006, Monopolies and Restrictive Trade Practices Commission.

between the price range of Rs 1600/- to Rs 1800/- per packet of seeds of 450 grams in the state of Andhra Pradesh, the latter price being unbearable and unaffordable by majority of the farmers[300]. The MRTPC took note of the fact that the trait value was not mentioned in the agreement and that it had to be fixed from time to time and that during the pendency of the petition the trait value was reduced to Rs 900/-. The MRTPC accepted the comparison of the prices prevailing in India with that in China owing to the same geographical and economic conditions but not that of the USA and Australia and held that charging of Rs 900/- for the seed packet of 450 grams imposed an unjustified cost on the consumers. The MRTPC acknowledging that it was not empowered to decide the price of any article or decide margins of profits, directed Monsanto not to charge trait value of Rs.900/- for a packet of 450 gm of Bt cottonseeds and to fix a reasonable trait value by the manufacturing company in neighbouring countries like China. In Mahyco Monsanto Biotech v. Competition Commission of India,[301] the case pending before the Commission where investigation orders have been passed, it has been alleged that the trait value is unfair as it is being unilaterally fixed by Monsanto at rates higher than those determined by the state governments and that MMB is dominant in the upstream relevant market of 'provision of Bt cotton technology'. The Union Government, Ministry of Agriculture and Farmers Welfare, recently issued a seed price control order[302] declaring the maximum sale price of Bt. cottonseed packets (450 grams of Bt. cottonseed plus 120 grams refugia) to Rs 635/-. In Saurabh Bhargava v. Secretary, Ministry of Agriculture & Corporation[303] the informant was an importer of insecticides, and the opposite parties were government departments in charge of administering of the Insecticide Act, 1968. It was alleged that as a result of monopoly, exorbitant prices were being charged by the insecticide importers and manufacturers. The Commission that the Ministry of Agriculture & Cooperation was not engaged in any economic activity so as to qualify them as enterprise under Section 2(h) of the Act. Further, there was no evidence that the insecticide importers and manufacturers were charging exorbitant prices.

4.5.4.3 E commerce

[300] Monsanto was charging trait value of Rs 1600/- to Rs 1800/- per packet of seeds of 450 grams in the State of Andhra Pradesh. During the pendency of the petition before the MRTPC, Monsanto reduced charging of the trait value to Rs 1250/- per 450 grams.
[301] Mahyco Monsanto Biotech v. Competition Commission of India,Reference Case No. 2 of 2015 & Case No. 107 of 2015, Competition Commission of India.
[302] S.O. 686 (E) dated 08/03/2016.
[303] Saurabh Bhargava v. Secretary, Ministry of Agriculture & Corporation, Case No 70/2011, Competition Commission of India.

In Deepak Verma against Clues Network[304], the informant alleged that the sellers on the online platform charge more prices than the bricks and mortar market. However, the Commission found no case and observed several competitors selling similar goods and services both online and offline. Hence, the buyers were not dependent on the sellers mentioned above. Therefore, Clues Network was not found dominant.

4.6 CONCLUSION

In a free market economy, determination of prices is left to the market forces. However, in actual, market forces may not always function freely. Competition authorities as 'off-market' referees are mandated to keep a watch to ensure that prices are the outcome of free play of market forces. When distortion in the market takes place, whether through anticompetitive agreements or abuses of dominant position, competition authorities are expected to act. However, when it comes to excessive prices as an abuse of dominant position, some of the major jurisdictions are reluctant to intervene, while others including India have shown a cautious approach. Excessive prices, generally speaking, are abnormally high prices for goods or services which have no reasonable relationship to their economic value. India has a long history of price regulation which has been gradually getting phased out in the wake of the 1991 liberalization and the subsequent reform process. Regulation of excessive pricing in the form of anti-profiteering has, recently, been introduced in 2017 in the wake of the implementation of goods and services tax. While the peaceful coexistence of the competition commission and sectoral regulators is envisaged through Section 21 and 21A of the Act, the recent judicial pronouncements make it clear that when there is no irreconcilable conflict, the Commission can proceed to intervene. The Delhi High Court in Ericsson case [305] gives a green signal to the Commission to proceed when there is no irreconcilable conflict. The law has been spelt out in even clearer and wider terms by the Hon'ble Supreme Court in its most recent judgement in CCI v. Fast Way[306] where it is observed that Section 60 of the Competition Act, keeping in mind the economic development of the country as a whole, gives overriding effect to it over other statues in case of a clash. The MRPT Act had taken a few steps to tame excessive pricing, though in limited cases. The extant Competition Act addresses unfair/excessive pricing in three ways: price overcharge by concerted action in

[304] Deepak Verma v. Clues Network, Case No 34/2016, Competition Commission of India.
[305] Telefonaktiebolaget LM Ericsson (Publ) v. Competition Commission of India and Anr, Judgement dated 30/03/2016 of the Delhi High Court in W.P.(C) 464/2014 & CM Nos.911/2014 & 915/2014.
[306] Competition Commission of India v. M/s Fast Way Transmission Pvt Ltd & Ors, Judgement dated 24/01/2018 of the Hon'ble Supreme Court in CA No 7215/2014.

horizontal agreements, manufacturers setting MRP too high along with mandatory RPM to allow the high set MRP to be indiscriminately exploited by the retailers and finally abuse of dominant position. Excessive prices under abuse of dominant position in Section 4(2) (a)(ii) are (i) unfair in nature; (ii) indulged into by enterprises enjoying dominant position in the relevant market and (iii) determined by economic analysis within the broad framework of legal provisions based on the facts and circumstances of the case. The major reason for rejection of cases of alleged unfair pricing at the prima facie stage was absence of dominant position of the opposite party. What assumes importance here is the proper and rigorous definition of relevant market. While a flaw can give misleading results, loosely defined markets can throw up false positives. In regulated sectors portraying evidence of regulated conduct, the Commission has been cautious in intervening. However, when competition or competition process was at stake, the Commission has not failed to strike, despite the fact that in some cases judicial challenges had to be withstood. Dealing with IPRs, not only in India but worldwide, is a slippery slope as a static view may turn out to be at the cost of future dynamic efficiencies. The 'self-correcting markets' paradigm holds the Commission back from taking an overly proactive role as regards alleged excessive pricing. Economic analysis for determining excessiveness of prices in the form of price cost comparisons, comparisons with enterprises in the same market or with those in similar markets, can help, subject to a number of ifs and buts. While designing remedies, what is most important is to address the root cause of excessive pricing, based on case-to-case analysis. Structural remedies are invoked when behavioural remedies are either not effective or are not practicable. The Indian law provides for division of enterprise as an extreme remedy which has not been resorted to as yet. Indian jurisprudence is still evolving.

5. ANALYSING VARIOUS JURISDICTIONS

The chapter aims to provide a country-by-country analysis of different legal regimes adopted to tackle the issue of predatory pricing in their soil. It attempts to detail the monopolisation effects and the attempts initiated by the governance systems of such countries to prevent abuse of dominant position of power. The attempts of a multi-market firm in securing the predatory pricing are also brought into the fore line.

5.1 LEX MERCATORIA AND TRADE

Berthelot Goldman has defined Lex Mercatoria as the principles of customary rules that would govern the realm of international trade law without giving any reference to the national laws to which the parties are bound[307]. Considering the sources of Lex Mercatoria, the restrictive approach opines that the principle is grounded in International conventions and model laws and trade usages and practices[308]. The liberalist view, propounded by Berthelot Goldman, opines that there are several other sources to the principle of lex mercatoria apart from those pointed out by the propounders of restricted approach which include code of conduct, arbitral awards and standard contract forms[309]. In a nut shell, lex mercatoria may be termed as a set of principled adjudication aimed at settling the uncertainties in contractual disputes pertaining to the order of International Commerce as an alternative to the national laws. To the extent that none of the laws hold the position of lex fori to the arbitral tribunals as its decisions are not made on behalf of national systems, lex mercatoria serves the title of lex fori. The principles of Lex Mercatoria have significantly influenced the shaping of the basic templates of International Commercial Arbitration. For instance, when the parties have agreed between each other that in case of any dispute, the national law would be applied, then the arbitrator would apply the national law pertaining to Contract including the concepts of sanctity of contract and freedom of contract. Henceforth, in such circumstances, the principles of Lex Mercatoria may be applied to the substance of the dispute particularly in the applicability of trade usages and the interpretation of the national laws[310]. When the parties have agreed to comply with the principles of Lex Mercatoria, the arbitrator must ponder with the possibility to determine the basic principles as to the extent to which the parties would prevent the decision maker from considering the national laws as indicating their reasonable

[307] Infra note 311.
[308] Clive M Schmitthof , *supra* note 75 at 45.
[309] 15 FM ABDUL, LEX MERCATORIA AND INTERNATIONAL CONTRACTS, 669 (Oxford University Press, 2000).
[310] *Id*. at 678

expectations. Where the arbitrator is selected to be the amiable compositeur, Lex Mercatoria can be resorted to by the arbitrator for his considerations of equity which helps them to deliver a reasoned award that accurately and persuasively caters to the reasonable expectations of the parties. In those instance where the parties have not agreed upon the laws that would be binding on them, the arbitrator should refer to the established rules of conflict even if it is a national law provided that as per the basic reading of good faith and equity the parties have agreed to exclude the application of any national laws in this regard.[311]

The criticisers often quote Lex Mercatoria to be quasi-legal recognition of rules of equity and reasonableness that did not specify or significantly refer to Lex Mercatoria[312]. This rightly points as to how Lex Mercatoria has failed to represent the present legal regime but was able to fill the lacunae in the old legal system thereby enabling to extract reasoning from ex post decisions making process to adapt for the developing and evolving legal relations in the international commercial law. It is also argued by them that the dangers of arbitrary and capricious are flourishing by neglecting the objective nature of the national laws and subjective approach of the arbitrator's decision which can be invoked and misuse the principles of Lex Mercatoria under improper circumstances[313].

While recommending the more favourable clause to be applied in the process of enforcement of commercial arbitral awards, the UNCITRAL Model laws provide a possible solution that parties can take more advantage of the domestic laws while the case is instituted before the domestic courts which is beyond the writing requirement under Article II of the Convention which ultimately facilitates the parties to meet their expectations more favourably[314]. The parties can benefit from the more favourable right clause mentioned in Article VII(I) of the convention even if they are not in a model state and as per the modern approach, the e-signature provides that an email agreement to arbitrate can be enforced under the Federal Arbitration Act as it satisfies the writing requirement under this Act[315]. The phenomenon of globalization has integrated the world economy to a large extend. It thereby facilitated better exchange of products across the borders without impediments. To safeguard the domestic industries and to protect the rights of people within their territory, numerous measures have

[311] Frey v. Cucaro, Year Book Commercial Arbitration I, Italy, 193.
[312] H Keith, *The Enigma of Lex Mercatoria*, 5 TULANE LAW REV, 69 (1983).
[313] *Id.* at 74.
[314] SUPREME COURT CASES OF GERMANY; YEAR BOOK COMMERCIAL ARBITRATION, 199 (YSP Publications, 1970).
[315] Campbell v. General Dynamics Government Systems Corporation, 403, F. 3d 546.

been adopted by each of them[316]. The eruption of international trade along with the consolidation of commercial laws under the UNIDROIT Principles attracts the attention for revaluing the commercial law that exists across the globe[317]. The value of international trade, to a large extend, rests in acknowledging and appreciating creativity and innovation. The 21st century is experiencing a decreasing significance of territoriality and the creation of a globally civilised society the modern aspect of commercial law is no longer the matter of application of domestic laws but itself a source of law. The absence of consumer protection laws or international trade regulations, this field is developing free contractual structures. Both economic factors and legal development must be taken into account to consider the environment of trans-nationalisation under the realm of commercial arbitration. It was formerly stated by Schmitthof that the modern approach of Lex Mercatoria is founded firmly on the ground of nation state aspect, which has transformed to a great extend in the 21st century to include various other factors like the universality, reliance of commercial custom and flexibility coupled with the ability to grow applies to its inherent rationality. The intervention of the decision maker must be strictly in adherence to the public policy standard or mandatory rule considering the possible partial illegalities and the restitutionary measures must be to that extend as the public policy measures would permit. The arbitrator would extend his reasoning in determining the illegality to the extent of ascertaining restitutionary consequences.

[316] For instance, certain policy measures like National Policy for India, 2016 which gave a roadmap of Intellectual Property Rights in India, Scheme for Facilitating Startups Intellectual Property Protection (SIPP) which ushered and empanelled 208 patent agents as facilitators by the Controller General of Patents can be rightly stated as a measures towards achieving a society that favours better protection of intellectual creations.
[317] ROY GOOD ET. AL., *supra* note 74 at 34.

5.2 CANADA

The process of predation may be said to be in existence when a firm exercises its control by reducing the prices of its products below the normal value of price at which the goods are being sold in the market for considerably a long period of time thereby deterring the future entrants from making their entry into the economy and exhibit a vigorous competition or eliminating the existing competent firm by diluting the economic competition. Consequently, the predator will raise the cost of its product to a higher rate in the less competitive market created by it so as to incur more profits than the loss to which it succumbed.

5.2.1 The Statutory Analysis

As per the provision of section 50(1)(c), a person who is found to be engaged in selling his produce at a considerably low price or having the tendency to lessen the competition or eliminate competition from the economy, shall be held liable for a punishment of 2years or fine or both upon conviction[318]. In 1992, the Competition Commission bureau issued certain guidelines under the name Predatory Pricing Enforcement Guidelines which mandated for fixing the market particularly with respect to the extent of product and geography along with enumerating a two stage procedure to determine the case of predation in the economy. The first measure was to ascertain whether the firm alleged to have been engaged in predatory pricing has a significant market control and as the second stage it would analyse the relation between the price charged and the cost of production of the commodity so as to differentiate between predatory pricing and the normal price competition of the economy. By the concept of market power, the Competition Bureau conclusively believes that the dominant firm has the potent to limit the competition by imposing the monopoly power over the market coupled with the ability to recoup the losses from the profit incurred and thereby eliminating the existing and the entrant firms. The recoupment can be assessed by the existing market environment which facilitates the effective entry into the industry which also includes the potential re-entry of the firm which were forced out of competition[319]. If the combined consideration of all the factors establishes that the entry into the market is difficult, then it would strengthen the Bureau's concern that the predator could have long term harmful effects of anti-competitiveness on the economy.

[318] THE COMPETITION BUREAU, https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04267.html (last accessed on 5th June 2021); Under the impugned legislation, fine is generally imposed only in lieu of or in addition to punishment.
[319] R v. Consumers Glass Co, (1981), 33 O.R. (2d) 228.

After ascertaining the level of market competition, if the Bureau concludes that the firm was guilty of preforming anti-competitive activities to undermine the economic stability, the Commissioner would next consider whether the firm has employed unreasonable price in order to capture the economic hegemony. This was analysed by the Bureau by inspecting whether the firm could cover the cost of supplying the impugned products which is the popular cost-based test. the underlying principle in employing this test of analysis is that every business would aim at covering the cost of its products unless a proper justification has prompted them to act otherwise and the Predatory Pricing Enforcement Guidelines regards the use of average variable cost test and average total cost test as a measuring scale to determine the level of predation. The cost price tests would consider various factors like the accessibility to price data and cost data, the random fluctuations in demand, period of alleged predation and the time taken by the business firm to construe the business performance and implement the needful measures. As per the statute of Competition Act of Canada, if the product is sold above the cost price them it can never be accounted as predatory price[320] and the selling price if below the cost is also per se not a predatory price[321]. The court has also given the exception of reasonable business justification while selling products like perishable commodities below the cost price so as to meet the situation's exigency. In the case Boehrinher Ingelheim Canada Inc. v. Bristol-Myers Squibb Canada Inc[322] the court opined that if a product is being sold at a rate below the cost price to meet the competitor's price would not be unreasonable.

5.2.2 Implications of Competitive Acts

The provisions of Competition Act gives details about criminal predation and non-criminal or civil abuse of dominance that deal with the anti-competitive low pricing aspects employed by the firms in the economy. Depending on the facts and circumstances entailed in the given dispute, the Commissioner of Competition determines whether the matter has to be proceeded in a civil procedure or criminally. The administrative reviewability of abuse of dominance started since 1986[323] but it underwent a significant change in 2009 with the introduction of administrative monetary policies into the competition regime[324]. With the more stringent

[320] R v. Hoffman La Roche Ltd, 125 D.L.R. (3rd), 1982. Ontario C.A. 607-651.
[321] *Supra* note 319.
[322] Boehrinher Ingelheim Canada Inc. v. Bristol-Myers Squibb Canada Inc , 83 C.P.R. (3rd), 1999, Ontario Court, General Division 51-72.
[323] LAWS JUSTICE, www.laws.justice.gc.ca/eng/acts/C-34/index.html (last accessed on 6th June 2021).
[324] It was introduced in the case Commissioner of Competition v. Reliance Comfort Limited Partnership, CT-2012-002; The Commissioner of Competition v. Direct Energy Marketing Limited, CT-2012-003.

methods of enforcement employed by the Canadian Competition Bureau, the predatory pricing mechanism has gained practical importance in the Canadian economy. For the basic level of ascertaining predation, it requires the finding of a Canadian Competition Tribunal which affirms the fact that an individual or a group of them tend to exercise monopoly over a particular class of products by engaging in anti-competitive practices that aids in considerably deteriorating the level of competition in the economy and as a measure of remedying, the tribunal can initiate an act of deterrence or impose an AMP that dissuades the firm from further proceeding in the direction of anti-competitiveness[325].

The predatory pricing of Canadian jurisprudence is confined to the provisions entailed in the combines Investigation Act under section 33 A (1) (c), which was later numbered as section 34 (1) (c), having a significant level of similarity with the provisions enumerated under section 50 (1) (c) of the Competition Act. The first instance of predation was recorded in the case R v. The Producer's Diary Ltd[326] which dealt with the issue to regulate the competition policy practices employed at the Ottawa Diary industry. The situation brought forth the instances where there occurred a significant dip in the wholesale prices at which the product was sold by the producer to the retail sellers. The Court of Appeal considered the issue of interpretation of the term policy in pursuance of the enactment of Comines Investigations Act and thereby held that the initiative of price hike was exceeding the nominal effort to counter the temporary expediency to tackle the aggressive anti-competitive move which was targeted sharply at the customer[327]. Such allegations were effectively countered by the court stating it to be a purely defensive action against the producers and thereby dismissed the case instituted against the producers. This was indicative of the fact that the court would consider if the price hike was aggressive or defensive which is equally significant as to finding the predatory nature of the defendant. The second instance was brought before the court when the defendant company distributed valium tablets free of cost as a new competitor firm made an entry into the market. The case marked a new epoch in the administration of anti-dumping cases as it accounted for the first construal of elements constituting the offence of predation and also recorded the first instance of conviction for performing anti-dumping[328]. The grounds identified by the court include engaging in a business with a well-crafted policy to

[325] Baker Mackenzie, Eva M Warden, Arlan Gates, *The Dominance and Monopolies Review: Canada*, 4 WLR 38-44 (2020).
[326] R v. The Producer's Diary Ltd, (1966) 50 CPR (2d) 265 (Ont CA).
[327] *Id.* at 270.
[328] Mc Fetridge & Wrong, *Predatory pricing in Canada: The law and the economics*, 63 CAN. BAR REV. 685 (1985).

sell articles at a price which is unreasonably lower than the normal value existing in the economy coupled with the anti-competitive effect of the predatory policy or anti-competitive *mens rea*[329]. Initially the bone of contention among the members of the court was regarding whether the firm was guilty of engaging in selling goods[330] but ultimately they conceded to the issue of unreasonably low prices at which the prices were being sold by the firm. Linden J observed that the economic laws were important to throw light upon the description of predatory pricing but can contribute nothing in the strengthening the legal framework of predation[331]. The court came to a conclusion that merely because the price at which the product was sold is less than the cost of production, it does not amount to predation but the degree of difference between the two values would certainly contribute to the likelihood of the price being labelled as unreasonable[332]. The court while drawing a distinction between offensive pricing and defensive pricing, also observed that the price determined in response to the competitor's price reduction is fair so long as the reduction is proportional and logically reasonable. They affirmed that the agenda of the firm has the required *mens rea* but not the desired effect of substantially lessening the competition and thereby eliminating the competitor permanently from the market.

5.2.3 The effect of COVID-19 wave

The recent development sector is seen firmly grounded on the aspects of pharmaceutical sector and the digital economy across the globe. The enforcement is not the sole reason to state that abuse of dominance is faced by various industries in the pharmaceutical sector, but also the guidelines issued by the Bureau shows that it has flagged its interest over these areas. For instance the Bureau highlighted 'Big Data and Innovation: Key themes for Competition Policy in Canada' in addition to the introduction of revised IP Enforcement Guidelines (IPEG). The Canadian Courts could infer that possible dominance of firms existed in the economy between those powers that were not in competition expressly. In August 2018, the Canadian Court rejected the leave application of Toronto Real Estate Board (TREB) by confirming the abuse of dominance over the residential real estate services of metropolitan area of Toronto. Prior to the decision of the tribunal, the Bureau sought to prohibit the restrictions imposed on the Multiple Listing Services (MLS) that provides access to selling

[329] *Supra* note 311 at 34-45.
[330] The main argument put forth by the defence side was that the firm did not enter into any sort of illegal sale of goods as they merely gave away the valium tablets which can never be drawn as a parallel to predatory pricing. This can prove beneficial for the determination of unreasonableness of the sale.
[331] George A Hay, *Economics of Predatory Pricing*, (1982) 51 ANTIRUST LJ at 361, 362.
[332] *Supra* note 309 at 41-42.

inventory, broker compensation alleging that it deters the use of internet based services in the regime of database and thereby makes the information available to external parties at low cost[333]. But the tribunal reversed the dictum observing that TREBS was not competing with its members and thus mandated the requirement of engaging in anti-competitive activities[334]. The Bureau recently concluded two investigations in the pharmaceutical sector during the span of 2019 and 2020 where the first one regarding the possible anti-competitive risk involved which ultimately led to the alleged exclusion or predatory impact of biologic drug with respect to the bio similar firms. The latter one was dealing with the denial of access of brand drug samples by a brand name pharmaceutical manufacturer required by the generic drug manufacturers to secure the market approval where the investigation was later discontinued when the branded drug samples were provided[335]. In the press release, the Bureau expressed its anguish in the drug manufacturers resorting to the same conduct even after its repeated guidance and issued a warning that the explanation regarding failure to supply the sample will be treated with high degree of scepticism[336].

The focus on digital economy by 2019 and making it the primary objective after the inception of COVID-19 pandemic has seriously championed a new culture of competition for the country. In a similar in vein, the Bureau has drafted certain guidelines to initiate criminal investigation with regard to merging partners who are competitors and have entered into agreements which goes beyond the acquisition, amalgamation or combination of agreement. To be precise, when the parties agree to shut down the competition and overlapping transactions amongst their firms once the merger has been complete. The present economic thought processes are employed to develop a legal system so as to identify and deter predatory pricing and at the same time protect effective competition in the economy. The Canadian examples provide ample proof to substantiate the fact that as we can eliminate predation from the economy, we can protect the beneficial level of competition. Out of the umpteen numbers of allegations waged against predator firms, only a few of them have been brought before the court for consideration and amongst it only a single case has resulted in

[333] Toronto Real Estate Board v. Commissioner of Competition, 23 August 2018, case 37932.
[334] This decision was also affirmed in the case The Commissioner of Competition v. The Canadian Real Estate Association, Consent Agreement, CT-2010-002.
[335] THE CANADA HEALTH SERVICES, https://www.canada.ca/en/health-canada/services/drugs-health-products/medeffect-canada/notice-clarification-drug-manufacturers-sponsors-risk-management-plans.html (last accessed on June 6th 2021).
[336] THE CANADA COMPETITION BUREAU, https://www.canada.ca/en/competition-bureau/news/2020/04/competition-bureau-warns-pharmaceutical-industry-that-any-further-obstruction-to-the-manufacture-of-generic-alternatives-will-not-be-tolerated.html (last accessed on June 6th 2021).

the conviction of guilty. But the basic idea of not preventing predation to the fullest is to preserve the competition level of the economy which has been successfully upheld in the Canadian economy[337]. Thus it is safe to infer that the predatory protections are warranted and the anti-trust doctrines can never neglect the threat imposed against such basic economic principles of preserving competition.

[337] Kara Beitel, *Predatory Pricing in the Canadian Context*, 12 DALHOUSIE J. LEGAL STUD. 203 (2003).

5.3 JAPAN

General classification of predatory conduct may be predatory pricing and non-predatory conduct where unjust low price would determine the predatory pricing as per the unfair trade practices stipulated under section 19 of Antimonopoly Act of Japan. Under the mandate of the same section, non-predatory price conduct is signified by the interference of the competitor's transaction. Both the sections come under the umbrella term of private monopolisation as dealt under section 3 of the Act which makes the ground of restricting competition substantial in any particular field as an important determinant factor to check predatory conduct than unfair trade practice. Both administrative actions and criminal sanctions are imposed to curb those private monopolistic activities that hinder the economic development.

5.3.1 Analysis of existing regime

The tenets of Competition Law in Japan has a long legacy of sixty two years as it witnessed its dawn with the heavy influence of US Anti-trust laws together with fairness oriented regulations like the unfair trade practice regulations[338]. The orthodox mixture of anti-trust policies and fairness oriented aspects has together resulted in number of roadblocks in the implementation of the Antimonopoly Act. The implications were given with many other hurdles with the mixing of US influenced criminal penalties with European influenced surcharges. Through the rejection of certain industrial policy interpretation of the Antimonopoly Act, the Fair Trade Commission of Japan has contributed immensely for the development, enforcement and strengthening of the impugned statute. The statute contains four pillars that deal with four significant areas namely the mergers and stock acquisitions, unreasonable trade restraint, monopolisation and unfair trade practices[339]. Eventhough the concepts of monopolisation, unreasonable trade restraint and mergers and stock acquisition are inspired largely from the provisions of US Anti-trust laws, the unfair trade practice is a unique creation of the Japanese government which was later inspired and adopted across the south Asian countries[340].

[338] ACT CONCERNING PROHIBITION OF PRIVATE MONOPOLIZATION AND MAINTENANCE OF FAIR TRADE, Act No. 54 (1947, revised 2005) [hereinafter Antimonopoly Act or AMA], http://www.jftc.go.jp/e-page/legislation/ama/amended-ama.pdf. (last accessed on 7th June 2021).
[339] Toshiaki Takigawa, *Competition Law and Policy of Japan*, 54 ANTITRUST BULL. 435 (2009).
[340] *Id.* at 437.

Antimonopoly Act focuses on addressing severe issues that negatively affect trade by deterring the entrepreneurs either as individuals or as a community of entrepreneurs combining together or conspiring from entering into such businesses that would potentially affect the level of competition in market negatively with respect of any field of trade. When the cost required supplying the product is lower and then the price is much likely to constitute exclusionary principle which is identical to the average variable costs. But it does not amount to exclusionary conduct when the total cost is lower than total cost necessary to supply the product and much greater than that cost which would be created if the product is not supplied and there is practically less possibility to supply the product for a considerably long period of time in high volume. A typical example of such a case is the USEN Corporation case[341] which was primarily engaged in cable music broadcasting to retail music offices, lowered the amount charged from the customers as listening fee considerably when compared to its rival Cansystem which made the customers to shift their usage to the respondent's company and extended the promotional period to six months to attract more listeners. This led to the exclusion of the rival and thereby the Commission held it to be a clear case of exclusion and the appellants were entitled to compensation.

The concepts of monopolisation and unreasonable trade restraints is often observed to be coinciding on various matters but however, certain policy areas which are oblivious to the competition laws are dealt by the regulations that cover unfair trade practices[342]. They directly aim at protecting the small scale and medium sized industries along with the protection rendered to the consumers which has incurred the wrath of many economists across the world for the wide coverage of the Antimonopoly Act under its regime of construing the veracity of illegal conducts. The statute signifies that the unreasonable restraint of trade and monopolisation are two concepts which can be termed as illegal only when they oppose the public interest[343] which would ultimately portend the risk of making the anti-competitive policies subordinate to the State and individual policies. To preserve the notion of public interest as intended by the framers, the Japanese Free Trade Commission has construed it to be ornamental preservation of competition being the equivalent of public interest. The Supreme Court has stated that public interest may override the main aim of

[341] USEN Corporation case JFTC recommendation decision, 13 October 2004.
[342] Ying Bi, *Rising Mega RTA: China-Japan-Korea FTA under the New Trade Dynamism*, 8 WIS.L.REV. 299 (2015).
[343] JFTC, GUIDELINES TO APPLICATION OF THE ANTIMONOPOLY ACT CONCERNING REVIEW OF BUSINESS COMBINATION § IV.2 (7) (revised, Mar. 28, 2007) [hereinafter Business Combination Guidelines], available at http://www.jftc.go.jp/e-page/legislation/ama/RevisedMergerGuidelines.pdf (last accessed on June 10th 2021)

preserving free competition under exceptional situations by giving priority to the ultimate interest of the consumers and the development of the national economy[344]. Thus, with the verdict, the normal defences against invocation of public interest such as safety were treated as interpretations of unreasonable trade restraint, monopolisation and unfair trade practices.

With regard to the aspect of private monopolisation, a very celebrated case against Hokkaido Shimbun Press Co., Ltd[345], the newspaper publishing company was alleged to be engaged in detrimental competitive activities that ultimately impeded the entry of Hakodate Shimbun-sha Co., Ltd in the Hakodate area. The series of actions alleged to be contributing to the deterrence of Hakodate Shimbun-sha Co from entering into the market was that it tried to register a trademark in the same lettering and font as used by the appellant, preventing the appellant from acquiring new newspaper agents by engaging in unfair practises to influence them, fixing the advertising rates of small and medium enterprises much lower than the appellant considerably for a longer period of time so as to expel them from the arena of advertisement. According to the facts as mentioned above, respondent practically confines competition in the field of publication of the general daily newspaper in the Hakodate Area against the interest of the public by excluding appellant's business activities through a series of exercises called the measures for Hakodate, such as the applications for registration of the trademark of several newspaper titles considered to be used by the appellant, taken to prevent an entry of appellant and make its business activities difficult, which falls under the category of "private monopoly" provided for in the clause 5 of Section 2 of the Antimonopoly Act and violates the provisions of Section 3[346]. In the case Paramount Bed Co Ltd[347], the impugned company entered into exclusionary practice by employing unfair trading practices by giving false information about the content of specification[348]. Usually a case of exclusionary principle comes under the regime of Intellectual Property Rights only if it is proved beyond reasonable doubt that the act seems to be the exercise of rights and thus the Antimonopoly Act was used for adjudication. An individual refusal to deal usually has an element of free trade in it and is therefore pertinent to consider the individual effects while considering the

[344] The Oil Cartel case, 38 (4) KEiSHU 1287, 1311 (Sup. Ct., Feb. 24, 1984).
[345] HOKKAIDO SHIMBUN PRESS CO., LTD V. ODORI- NISHI CHUO, https://www.jftc.go.jp/eacpf/cases/HokkaidoNewsCase.pdf (last accessed on June 10th 2021).
[346] Mitsuo Matsushita and James L. Hildebrand, Antimonopoly *Law of Japan--Relating to International Business Transactions*, 4 W. RES. J. INT'L L. 124 (1972).
[347] Paramount Bed Co Ltd case, No. 3 Recommendation decision 1998.
[348] Christoph Rademacher And Tsukasa Aso, *Japanese Design Law And Practice*, KLI, 234 (2020).

provisions of Antimonopoly Act[349]. Furthermore, individual refusals to deal with are those acts which can be grouped and perused under the monopoly afforded by IP rights which is inclusive of those acts that prevent the use of design rights. As aforementioned, the individual restraints on trade by individual entrepreneurs require consideration in terms of acts recognisable as the exercise of rights and the refusal to deal infringe fair and free competition[350].

Article 21 of the Antimonopoly Act stipulates that the Act will not apply to acts recognisable as the exercise of rights by right holders[351]. The impugned Article does not relate to acts in concert- restraints on trade and boycotts conducted in concert do not fall under acts recognisable as the exercise of rights. It is true that acts in which competitors from patent pools to manage and operate patents or other rights and grant licenses can fall under acts recognisable as the exercise of rights. Having said that since the formation of patent pools per se is not the exercise of rights the Antimonopoly Act will apply when patent pools are are formed based on an agreement that violates the Act[352].

5.3.2 Changes brought with the change in technology

By 2019, an amendment was being proposed to the Antimonopoly Act which was presented before the National Diet and ultimately affirmed and enacted by the House of Councillors. The main aim of the proposed amendment was to efficiently deter the unreasonable restraint of trade thereby invigorate the economy and enhance the consumer interests by ensuring free and fair competition across the market. It also thereby ensured the increment of incentives in cooperating to the investigations pioneered by the Japan Free Trade Commission and also imposed certain amount of surcharge by considering the extend of violation[353].

On 2015, the OECD first issued an Action plan to address the challenges of the digital economy which have the intention of creating a consensus by 2020 before many countries take unilateral decisions on digital tax. As there are more and more people, countries need to

[349] REPORT ON BASIC ISSUES REGARDING THE ANTI-MONOPOLY ACT (June 26, 2007) [hereinafter Cabinet Office Report], available at http://www8.cao.go.jp/chosei /dokkin/kaisaijokyo/finalreport/finalreport en.pdf. (last accessed on 10th June 2021).
[350] Leegin Creative Leather Prods., Inc. v. PSKS, Inc. 127 S. Ct. 2705, 2720 (2007) .
[351] C, Guidelines for the Use of Intellectual Property under the Antimonopoly Act § 2.1 (Sept. 28, 2007), available at http://www.jftc.go.jp /e-page/pressreleases/2007/September/070928 IPGuideline.pdf (last accessed on 10th June 2021).
[352] Wholesale Stationers v. Pac. Stationery & Printing Co., 472 U.S. 284, 295 (1985).
[353] PRESS RELEASES, https://www.jftc.go.jp/en/pressreleases/yearly-2019/June/19061907.html (last accessed o 13th June 2021).

develop a framework to regulate and obtain a considerable amount of tax from the revenue generated by such transactions. The development of such a framework is challenging. Taxation rules have been built all over the world. A source country can tax a Multinational Enterprise (MNE) once a 'nexus' established through physical Activities undertaken in the source country. After that, profits attributable to this presence are determined and taxed in the source country. Unlike traditional businesses, digital businesses have distinct characteristics. The current tax rules do not factor in these features, and there is a need to realign profits and taxes to 'value creation from digital business.

5.3.2.1 Effect of modernised tax collection

The GAFA tax, as applied by France has provisions which strictly demands information from tech companies about their transactions and is liable to fine, if the records are fault. On Dec 2018 the French finance minister Bruno Le Maire announced the introduction of a GAFA tax on tech giants, which target only those profitable companies that have massive annual global revenue. The tax came into effect on July 2019, by imposing 3 % tax on digital companies whose global revenue exceed 750 million Euros and domestic revenue of 25 million Euros. The tax will collect about 500 million Euros, which is expected to solve the current economic problem which in turns fuels the yellow vest protests[354]. The decision of French to impose tax affects the majority of the tech giants which have headquarters in the USA. The French government through economic minister tweeted that although France would welcome OECD guidelines, they will implement their own national decisions which are a common way of threatening France on international trade issues between respective nations[355]. France was inspired from such a proposal placed in European Union which failed miserably[356]. In many countries of European Union, people are against American companies paying little or no tax because of the brick and mortar model laws. They demand new laws such as GAFA which creates a new taxation system evidently that collects tax out of thin air. This unilateral decision of France has hit the digital companies hard as they were hoping that OECD and G20 guidelines would have been more flexible and convenient as it would have meant a

[354] Agence France-Presse, *France to introduce tax on global internet technology firms*, LIVE MINT (Dec 18, 2018), https://www.livemint.com/Politics/Zag39IyZPanr0mNFR0VFbL/France-to-introduce-tax-on-global-internet-technology-firms.html. (last accessed o 13th June 2021).
[355] *Id.* at 3.
[356] Jacob Jarvis, Donald Trump calls 'American wine better than French wine' as he vows retaliation on new digital tax, Evening Standard, https://www.standard.co.uk/news/world/donald-trump-calls-american-wine-better-than-french-wine-as-he-vows-retaliation-on-new-digital-tax-a4199421.html (last accessed o 13th June 2021).

standard tax for all member nations. European Union also has a certain number of countries which have clear opposition against the GAFA tax with Ireland being a major critic of the tax justified by the fact that Ireland hosts European headquarters of the majority of American digital giants. The Asian countries took a different stand on GAFA and the idea of digital tax. It was first introduced in Israel as a value-added tax payable on digital services from 2016, and Saudi Arabia followed in 2018. Russia introduces a value-added tax payable on B2B digital services from 2017. India and Singapore are the Asian nations who have shown interest in GAFA because of the massive potential of revenue from the tax due to the enormous number of consumers availing service, with India being more potent than anyone else. On May 27th, 2020, The Act on Improvement of Transparency and Fairness in Trading on Specified Digital Platforms was proposed before the National Diet in the form of a Bill which was approved by the House of Councillors and is believed to provide some degree of regulation on the GAFA and Rakuten[357].

5.3.3 The level of COVID impact

With the pandemic situation, many industries have been affected detrimentally and were forced to expel their employees. By April 2020, the Japanese Commission gave a brief clarification if the manufacturers have kept a ceiling price to sell facemask and sanitizer in the retail stores, then that does not constitute a violation of the competition policies of the country[358]. Further, if two or more country combine together to boost their trade, then that does not amount to deterrence to healthy competition in the economy unless and until they ensure free and fair trade development in the economy[359]. The International Competition Network lays down certain considerations to include temporary collaborations between the partners to ensure successful distribution and supply of scarce products as they would ensure the health of citizens.

The Antimonopoly Act, with its unblemished legacy, has been improvised gradually by the Japan Free Trade Commission decisions and the Court verdicts. But it became rather more complicated in its implementation as a result of a sharp parallel drawn with the antitrust policies and the unique concept of unfair practices by the Japanese. It is highly the need of the hour to modify the unfair trade practices in tune with the modern interpretations such that it reflects the economic realities by analysing different legal systems across the globe,

[357] https://www.meti.go.jp/english/press/2020/0218_002.html (last accessed o 13th June 2021).
[358] https://www.jftc.go.jp/oshirase/coronaqa.html (last accessed on 12th June 2021) .
[359] https://www.jftc.go.jp/soudan/shinsaikanren/index.html (last accessed on 12th June 2021).

particularly in United States and European Union. The countries like United States, Japan and European Union haven essentially accepted on similar note about their ideas with regard to the mergers and acquisition. Thus, an economic analysis of various aspects can give a firm footing with respect of the common competition law standards across different global market zones and territories. By increasing the amount of surcharge levied, the sanctions against violations have been underpinned because strengthening the sanctions against stronger cartels appeared necessary and the increment in surcharges were admissible. But once such increment in surcharges is extended outside to the regime of stronger cartels, it can seriously impede the vigorous competitive conduct. In place of such extension, encouragement can be provided by facilitating the suits for damages particularly allowing class actions to be resorted with the courts.

5.4 UNITED STATES OF AMERICA

Predatory foreclosure may be defined as a unilateral action of firm mainly aimed at reducing the competition over the market by imposing the costs on their rivals. However, such measures may or may not involve their own prices under consideration. The normal predatory foreclosure strategies would involve the loss of money at least for a temporary arrangement[360]. The best example of such foreclosure strategy is predatory pricing where the prices are fixed by the predatory firm much below the marginal cost with the aim to recoup more profit than the loss incurred and deter the further entry of rival firm to the predator's market zone by establishing a monopoly[361]. In order to establish the existence of predation in the economy, the plaintiff has to prove that the defendant firm has priced their commodities much below the marginal cost and the pricing claim must additionally pass the recoupment test eventhough the requirement of recoupment test is not mandatory but it serves as a better shield against confiding aggressive pro-consumer competition coupled with an anti-competitive conduct[362]. The demand of the recoupment test is for the plaintiff to demonstrate that predatory pricing is one of the plausible rational strategies[363].

The difficulty to ascertain the appropriate measure of cost is one if the major criticism levelled against the classic predatory pricing theory[364]. The existence of entry barriers to the market zone for a long run and the fact that the below pricing can be attributed with efficiency justification adds to the criticism[365].

The important concern is that if the predation is too hawkish then it has the potential to ban those prices which aim legitimately at a healthy competition[366]. In the Brooke Group case it was noted ironically that the anti-trust suits themselves would be employed as efficient tools to keep the predatory prices high in the market zone when the standards of predatory pricing tools itself were low[367].

5.4.1 Analysing through the Airlines decision

[360] Frank X. Schoen, *Exclusionary Conduct After Trinko*, 80 N.Y.U. L. REV. 1625, 1628 (2005).
[361] Thomas F. Cotter, *Cargill, Inc v. Monfort of Colorado, Inc.: The Supreme Court Restricts Private Antitrust Challenges to Horizontal Mergers*, WIS.L.REV. 503, 522 (1987).
[362] Alexander C. Larson & William E. Kovacic, *supra* note 351 at 3.
[363] Kenneth L. Glazer, *Predatory Pricing and Beyond: Life After Brooke Group*, 62 ANTITRUST L.J. 605, 606 (1994).
[364] Robert D. Joffe, *Antitrust Law and Proof of Consumer Injury*, 75 ST. JOHN'S L. REV. 615, 625 (2001)
[365] Thomas F. Cotter, *supra* note 361 at 510.
[366] Aaron S. Edlin, *supra* note 36 at 916.
[367] Supra note 60,at 226–227.

A celebrated case decision that dealt with the predatory foreclosure was American Airlines case[368] which was decided by the Department of Justice where the division alleged that the decisions of American Airlines involved certain level of incremental short run losses and they went on to further investigate that such incremental losses could be made good in a long run by employing the method of recoupment of lost profit. It was more on an incremental addition to capacity[369] than a loss of money on market wide basis that occurred in this instance which makes a sharp distinction between the predatory pricing techniques as described in theory. Tracing the history of the working of American Airlines, they had a well-established hub at Dallas–Fort Worth Texas Airport with adequate capacity to fix fare for 30 city pair routes. With the emergence of the Low-Cost Carriers, the subsistence of major airlines was under threat. The Low-Cost Carriers surfaced severe competition as they accounted to have considerably less amount as operating costs when compared to the major lines in the field. This was clearly exhibited when an internal task force was constituted by the American Airlines as a consequence of the establishment of a mini hub by ValueJet in Atlanta that led to the loss of $282 million annual revenue from the account of American Airlines[370]. The Task Force ultimately concluded that any effort of recoupment would add capacity to significantly reduce the traffic which a Low-Cost Carrier could capture and would ultimately account to be very expensive due to the short-term profitability nature of this technique[371]. Realising the future possible dearth in the revenue that it can incur due to the emergence of Low-Cost Carriers, it went on to add significant capacity to the routes threatened by the nascent competitors. The Division investigation yielded evidence for five separate episodes in which the American Airlines added excess capacity so as to eliminate the competition from burgeoning Low-Cost Carriers. The American Airlines created 3 to 5 extra seats for additional passenger gained to the route and thereby overrode their capacity planning models. It was also observed that the airlines reduced their capacity with the exit of each Low-Cost Carriers from the route and the additional capacity cost exceeded the revenue incurred from the capacity thereby exhibiting a money losing technique which is indicative of

[368] *Supra* note 250.

[369] Incremental addition to capacity means a possible future increase in technical capacity that may be offered based on investment or long-term capacity optimisation and subsequently allocated subject to the positive outcome of an economic test. https://www.acer.europa.eu/Official_documents/Acts_of_the_Agency/Annex1%20to%20Recommendation%20042015/Annex%201-ACER%20Recommendation%2004-2015%20on%20the%20amendment%20to%20the%20network%20code%20on%20CAM%20in%20gas%20transmission%20systems.pdf (last accessed on 12th June 2021) .

[370] *Supra* note 238 ("[T]he factual record reflects that Northwest's internal documents . . . recognize the 'low price . . . traveler' or 'leisure traveler' as a distinct and relevant market ..... ").

[371] SA Sutton, *DOT Could Resurrect Contentious Airline Competition Guidelines*, 10 WLNR 44 (2000).

predation technique[372]. While developing the theories, another case was given a celebrated effect. The verdict of the court in Brooke Group[373] case held that it is the plaintiff to prove that the defendant has priced significantly below the appropriate measure of cost coupled with a severely dangerous possibility of recoupment of losses in the near future[374]. The main question posed by the case was the method to show that the price is fixed to be much lower than the marginal cost. The possible alternative was to employ the Average Variable Cost as the proxy which proved that the airline's route wide performance was greater than the Average Variable Cost which ultimately proved it to be profitable. The second question that was taken up in pursuance of the case was the probability of recouping incremental losses. The allegation was that the profit incurred by the investment of the airline was profitable on individual routes eventhough it was primarily aimed at deterring future entry of firms into the market. The District Court failed to appreciate the second question but affirmed that the parties were successful in establishing that the first question regarding the usage of Average Variable Cost as an alternative was a better solution in the instance of this dilemma and conclusively rejected the out-of-market recoupment policy by affirming that the recoupment must be employed in individual predation routes for substantiating the allegation.

As per the contentions made by Division, the main aim of predation was to exclude competition of the market and it absolutely makes no sense in business or economic aspect. The addition of costly, unfilled capacity was the method of strategy used by the airlines in establishing the monopoly over their market zone by stealing the passengers from existing Low-Cost Carriers. Eventhough the strategy was calculated to be detrimental in the short run, considering the predatory foreclosure, the losses that occurred in the five routes were acceptable as it secured considerable revenue from the hub[375].

The Court of Appeals held that eventhough the courts must give-up the incredulity attached with such predation cases and approach in a cautious and pragmatic sense by affirming the

[372] John Gallagher, *Spirit Sues Northwest in Detroit: Discounter Calls Giant Predatory*, WASH. & LEE L. REV., (2000). (stating that "[t]he Justice Department sued American in May 1999" for alleged monopolization, and noting that Northwest had received an "information request . . . regarding its conduct on routes where it competed with Spirit").
[373] *Supra* note 60.
[374] In Brooke Group, the plaintiff alleged sacrifice in generic cigarettes and recoupment prospects in branded cigarettes. The Supreme Court found such schemes within the statute and wrote that assessing recoupment "requires an estimate of the alleged predation and a close analysis of both the scheme alleged by the plaintiff and the structure and conditions of the relevant market" and the Microsoft plaintiffs claimed recoupment in operating systems as a result of anticompetitive behaviour in middleware.
[375] German A. de la Reza, *Antidumping Rules in Trade Negotiations: The Case of the Western Hemisphere*, 6 ROMANIAN J. EUR. AFF. 71 (2006).

sense that predatory pricing can bring about in the multi-market system. As the Court considered the possibility of masking the possibilities of predatory scheme, the complete reliance on Average Variable Cost method as an alternative for calculating the cost was rejected at the first instance. The court also opined that majority of the cost tests were flawed factually as they relied more on calculating cost allocation which proved to be non-accurate in the impugned decision[376]. Thus from the decision of the court, it is clear that incremental cost analysis is more acceptable and that the multi-market recoupment theory is viable in the legal parlance.

5.4.2 The effect of COVID-19

The spread of SARS CoV-2 was devastating that it left significant impact on every economy across the world coupled with significant number of human causalities associated with it[377]. The competition authorities found it a tough nut to crack to monitor the implementation of various policies amidst the health crisis, deteriorating economic stability and declining markets. It was imperative to maintain a level playing field so as to felicitate the recovery of economy and respond to the rapid evolving problems by adhering to the tenets of Competition law. The main concern of Competition authorities is if the existing balance would be misused in the name of the pandemic to violate competition law and exploit vulnerable consumers through excessive pricing, an improper collaboration between competitors, exchanging commercially sensitive information, minimum resale price maintenance or other anticompetitive conducts. The authorities have enhanced and improvised the monitoring mechanisms prioritised the competition law policy enforcement against the possible exploitation against the consumers and breach of the existing policies of Competition law owing to the current situation. During the era of Great Depression, instead of reinvigorating the enforcement of anti-trust laws the US government adopted a pragmatic approach by suspending laws and legalising the cartels that covered a wide swath of industries[378]. The reluctance of the Supreme Court in ascertaining the horizontal price fixation as an illegal practice has caused the economy to suffer serious anticompetitive effects both in the medium and short run. Such governmental activities together with the emergence of cartels has resulted in delayed economic recovery post the great depression period and thus

[376] Gregory J. Werden, *The American Airlines Decision: Not with a Bang but a Whimper*, 18 ANTITRUST LJ 32-35 (2003).
[377] European Commission, European Political Strategy Centre. 2019. EU Industrial Policy After Siemens-Alstom: Finding a New Balance Between Openness and Protection. Publications Office of the European Union.
[378] Hemphill, C. Scott, *The Role of Recoupment in Predatory Pricing Analysis*., STAN. L. REV.53 (2001).

the USA has realised that the prosecution of antitrust activities and the illegal cartels is as necessary as in the time of economic deterioration as in the times of economic prosperity. The protection of the plight of consumers and preservation of anticompetitive policies were of primary concern and they monitored goods especially in the online sale and delivery platform which has gathered more importance since the eruption of the pandemic[379]. An expedited disposal of antirust disputes was sought for by the US Federal Trade Commission and Justice Department thereby ensuring that the nationwide as well as the global measures are enough to tackle the deadly virus infection and thereby help effected undertakings deal with this unprecedented crisis by maximum possible adherence to the competition policy objectives. With this aim, many countries have constituted special task forces within their jurisdiction to monitor the increase in prices of food, sanitary products to maintain the level of competition in the market and provide detailed information regarding the application of the competition rules along with the investigations carried out and the procedural matters involved in the current emergency situation.

[379] Cary, George S., Maurits Dolmans, Bruce Hoffman, Thomas Graf, Leah Brannon, Richard Pepper, Henry Mostyn, Alexis R. B. Lazda, Savannah Haynes, Kristi Georgieva, Jan Przerwa. 2020. Exploitative abuses, price gouging & COVID-19: The cases pursued by EU and national competition authorities. e-Competitions Competition Law & Covid-19. Art. No 94392.

5.5 UNITED KINGDOM

The most remarkable feature of common law development was that it made the aspects of competition law free from all interference and was deeply rooted in statutes. This is highly similar to the concept of Scottish economist Adam Smith who advocated for Laissez Faire and free market system in the 19th century. The aspects of competition law dealt under the criminal law does not make it mandatory to consider the breach of competition rules to be as severe as considered in the former UK restrictive trade practices which constituted a contempt of court with the probability of imposing fine and imprisonment for senior managers of the firm engaged in the anti-competitive activity[380]. The breach can account for administrative fine which may be up to the limit of 10% of the total company's annual turnover and breach of prohibition under the Competition Act, 1998 may amount to imposition of fine by the Director General of Free Trade which may not exceed 10% of the annual turnover calculated over the past three years from the calculation year and debate still exists among the policy makers whether such acts should be penalised. The Competition Act enumerates special provision under section 72 for body corporates and partnerships for offences under the act like the falsification or destruction of any document and under section 43 with regard to extending the shadow of doubt and make the individual officers, partners or directors of the alleged firms liable for the anti-competitive act committed by them. In order to create a deterrent effect of the enactment and thereby to establish punishment under criminal law for those individuals engaged in cartels the government has many allied proposals[381]. As the provisions of competition laws are designed to protect the individual property and interests, they have fewer roles to play from the viewpoint of tort laws. But a category of tortious law depicts the implementation of competition law, collectively known by the term economic delicts[382]. The conspiracy to injure is the aspect used to determine the purpose of the legislation in a comprehensive manner[383]. It has been confirmed in numerous cases[384] but the limitations are first explained in the case Mogul Steamship Co Ltd v. McGregor Gow & Co[385]. A shipping conference was held to regulate the freight and the plaintiff company acquired the rights to trade tea at a considerably lower fare in China tea

[380] Re Supply of Ready Mixed Concrete (No 2), Director General of fair Trading v. Pioneer Concrete UK Ltd and Another [1995] 1 All ER135.
[381] HM Treasury and DTI, 'Productivity in the UK: enterprise and the productivity challenge', Productivity and Enterprise: A World Class Competition Regime, 3 UKCLR 33 (2001).
[382] CARTY, H, AN ANALYSIS OF ECONOMIC TORTS, 56 (Oxford University Press, 2001).
[383] 4 THOMSON, J, DELICTUAL LIABILITY, (Edinburgh: Butterworths, 1994).
[384] Lonrho plc v. Fayed and Others, [1994] 1 All ER 188.
[385] Mogul Steamship Co Ltd v. McGregor Gow & Co, [1892] AC 25.

trade. The competitors attempted to eliminate the plaintiff company from the market zone and thereby establish a monopoly over the business. This was quoted to be a clear case of predation and the company filed for conspiracy to injure. It was held by the court that eventhough it amounted to a clear case of predation, but the requirement would be fulfilled if the conspiracy was for an improper purpose. There is a clear evidence of cartel but there was no instance of improper purpose even if it aimed at restriction of competition to protect legitimate interests and thereby no liability was ascribed. As per the common law system of remedy for an anti-competitive act under tort law is that of passing off where the basic premise is that the goods of one company or individual is not allowed to be mistakenly believed to be someone else's. By this regulation, no company or individual is allowed to borrow the goodwill and legacy of trade from another company. Thus passing off is one such principle which is considered to be falling under general principle against unfair competition[386]. The third area of concern for common law is the contract based remedy that allows parties to escape a contract that puts unreasonable embargo on its trade relations. Reasonableness between parties and reasonableness in public interest are the two basic tests upon which this principle forms its basis. The doctrine was given its importance in the famous case Esso Petroleum Co Ltd v. Harper's Garage (Stourport) Ltd[387] where the subject matter of concern was the purchasing agreement that dealt with the purchase of petrol from Esso Company. The effect was limited[388], the agreements restraining trade finds its relevance as it was contended that the long term agreements in restraint of trade was in existence due to less bargaining power among the member nations. Eventhough it was found that the agreements involving the plaintiff parties were invalid under litigation but alternative claims have been made by them under Article 81 Community law and the common law restraint of trade doctrine to avoid contractual obligations[389].

Prior to the Competition Act of 1988, there was no means of redressal for the complainant within the borders of UK. A monopoly behaviour or merger can be complained and brought forth before the authority as per the tenets of the Fair Trading Act. However, after that, there is a slight possibility of action. The involvement of discretion in every stages, from the decision making whether to refer the case to the competition commission or not, whether the

[386] Evven Warnink BV v. J Townend & Sons (Hull) Ltd (No 1) [1979] AC 731; Haig & Co Ltd v. Forth Blending Ltd 1954 SC 35; and Scottish Milk Marketing Board v. Dryborough & Co Ltd 1985 SLT 253.
[387] [1968] AC 269.
[388] Texaco Ltd v. Mulberry Filling Station Ltd [1972] 1 All ER 513.
[389] Panayiotou and Others v. Sony Music Entertainment (UK) Ltd [1994] 1 All ER 755; Schroeder Music Publishing Co Ltd v. Macauley [1974] 3 All ER 616.

impugned behaviour is against public interest or whether the ultimate enforcement action is taken. The possible alternative available to a complainant or a party subject to investigation is to seek judicial review. Still, the courts have been very unwilling to interfere with indiscretion under the public interest based legislation[390]. In addition to it, the Fair Trading Act, 1973 does not contain any provision enunciating the rights of redressal expressly. It has been held concerning the only proper form of breach under the Act, the act of breach of an order or an undertaking, the power to seek enforcement has been circumscribed with the provisions[391]. This is totally having a different perspective under the Competition Act, 1988 where the complainant can satisfy the criteria of interested third party, then the Director General's decision regarding the prohibitions. As per the official pronouncement, the Act mainly focuses on the enforcement by enabling the third party to sue. The Act does not clearly mention the creation of third-party remedies, which effectively means that the right to seek a prescription, including damages, will be based on standard methods of interpretation for the design of statutory liability. However, in the only judgment under either prohibition to date, in Claritas case[392], a private right of action was not brought before the court or disputed. If remedies are granted, the same complex issues as exist under Community law, such as the range of parties able to recover damages, will need to be resolved. The intention of Government authorities is to improve the position of complainants seeking redress by considering, for instance, the institution of a specialist competition court or tribunal[393].

5.5.1 The Impact of COVID-19

Little did someone contemplate that something as small as a virus could wreak havoc on the world economy and health systems. On 12th March, 2020, the World Health Organisation declared the spread of COVID-19 as a pandemic[394]. Since then it has been a great turmoil for the entire world. The high population densities at our megalopolises caused the vulnerability of the population to climate change, disasters and other social issues to increase manifold. Leaving no certainty about its end, COVID-19 has left each and every sector completely baffled qua their normal functioning. All nations have taken severe precautionary methods against the pandemic by restricting the public gatherings and social arrangements into the online mode with the exception of certain necessary services like the health sector, postal

[390] R v. Secretary of State for Trade ex p Anderson Strathclyde plc [1983] 2 All ER 233.
[391] Mid Kent Holdings plc v. General Utilities plc [1996] 3 All ER 132.
[392] Claritas (UK) Ltd v. The Post Office Postal Preference Service Ltd [2001] UKCLR 2.
[393] Enterprise and Productivity: A World Class Competition Regime, CM 5233, 31 July 2001, paras 8.6–8.11.
[394] THE WORLD HEALTH ORGANISATION, https://www.who.int/ (last accessed on 2nd June 2021).

services, banking institutions and pharmacies. Confining to one's home, people became less active in the markets and it caused the manufacturers and sellers to face severe backlash from the profits of their business. The widespread restriction on travel and mobility has caused many factories to shut down due to lack of labour coupled with erosion of confidence level, heightened insecurity level and great financial turmoil. This situation thus triggered the importance in the cooperation of undertakings to cope up with the extraordinary situation or to collaborate with the other competitors to overcome the challenge posed by the pandemic. The competition rules of UK were relaxed considerably so as to enable the essential business by reducing the supply chain issues that arise due to the outbreak of the disease[395]. It was analysed by the policy holders that the stringent enforcement of competition law would impede the cooperation and coordination among the existing market sectors thereby making it difficult to ensure the constant supply of groceries and such other essential items. The government initially relaxed the competition law restrictions imposed over the market structure for a temporary period so that the supermarkets can work in an integrated manner to feed the entire population of the nation[396]. The diary industries were concentrated more so as to avoid the wastages and minimise the loss suffered to meet the future market demand[397]. The Competition and Market Authority of UK has stated that where there is no legal relaxation, they would not undertake a mechanism against the cooperation between business and product rationing which is necessary to protect the consumers but at the same time, the authority would not tolerate unscrupulous collusion like revealing long-term business strategies which is not necessary for to meet the current exigency[398] and ultimately adopted the guidelines issued by the authority for smooth conduct of business in the economy[399]. The guidelines sets out a framework for the regulations imposed under the Competition Law and the arrangements restricting competition along with the criteria for the application of prohibition under various agreements. The government machineries also made certain statutory instruments to exclude the application of the tenets of competition law regarding groceries, to certain categories of contracts thereby prioritising the application of the

[395] THE DEPARTMENT OF JUSTICE, www.justice.gov/opa/pr/department-justice-issues-business-review-letter-medical-supplies-distributors-supporting (last accessed on 15th June 2021).
[396] https://www.gov.uk/government/news/supermarkets-to-join-forces-to-feed-the-nation (last accessed on 15th June 2021).
[397] THE GOVERNMENT OF UK, https://www.gov.uk/government/news/dairy-industry-to-join-together-to-manage-milk-supply (last accessed on 15th June 2021) .
[398] THE GOVERNMENT OF UK, https://www.gov.uk/government/news/covid-19-cma-approach-to-essential-business-cooperation (last accessed on 15th June 2021).
[399] CMA approach to business cooperation in response to COVID-19, 25 March 2020, CMA118.

formulated guidelines[400]. Along with groceries, the health services rendered to patients across England was also under consideration and the Isle of Wight ferry routes which dealt with the cooperation among ferry operators to maintain a crucial lifeline between the island and the mainland[401]. However, it has been confirmed that the pandemic has not brought any relaxation in the standards by which the investigation and assessment of the merger is conducted in order to preserve the interests of consumers for a long run by employing strict measures of merger investigations[402]. The UK CMA guidelines also attach a short and precise reference guide to assess mergers and the failing firm claims[403].

There is growing interest in the positive contribution that competition policy could provide in combating the COVID-19 pandemic. The effectiveness of national health policy responses could be reduced by the demand and supply shock and competition law obstacles. Consequently, this appealed to the need to relax competition law enforcement in allowing undertakings in the health sector to temporarily coordinate and cooperate, as is the case in the retail and food industry, to meet consumers demand. Competition authorities worldwide have announced that they would not intervene if such conduct were to occur if necessary to ensure the supply and fair distribution of scarce products to consumers. This means that, due to the exceptional circumstances resulting from COVID-19, the rules on restrictive agreements will be pragmatically and less strictly enforced. Such clarification is significant for undertakings in such time of great difficulty and uncertainty because it confirms the issues presented by the crisis and serves the greater public interest during this crisis. The assignments are also warned that they must not exceed the limits of what is necessary to tackle the crisis in their business. They are not allowed to use the crisis for anticompetitive and non-essential collusion, such as price-fixing and exchange of sensitive information. When it comes to excessive pricing, relaxation of competition law does not cover any abuse of dominance, and it would not tolerate it under competition law. This seems reasonable considering the necessity that products protect health and other scarce products remain available at competitive prices and without discrimination. That is why several competition authorities, as mentioned above, in the short run, have put particular focus on excessive pricing practices. For merger control, undertakings must continue to notify mergers where the notification obligation applies, but notifications may be delayed, and electronic filings are required. They

[400] Between Grocery chain suppliers and Logistic service providers; Competition Act 1998 (Groceries) (Coronavirus) (Public Policy Exclusion) Order 2020.
[401] Competition Act 1998 (Solent Maritime Crossings) (Coronavirus) (Public Policy Exclusion) Order 2020.
[402] CMA, Merger assessments during the Coronavirus (COVID-19) pandemic, 22 April 2020, CMA120, par. 21.
[403] CMA, Annex A: Summary of CMA's position on mergers involving 'failing firms'.

are also encouraged to carefully assess the timing of their transactions due to the competition authorities' current crisis and limited working policies. Regarding the substantive assessment of mergers, the merger control rules are not softened or suspended in times of economic crisis, including the failing firm defence criteria. It is considered that those rules are flexible enough to take financial crises into account, which seems justified.

Thus it is evident that in the short run, the role and focus of competition authorities should be to facilitate cooperation among undertakings and eliminate excessive pricing to ensure critical goods and services reach the market promptly, at competitive prices and without discrimination. Historically, this seems the proper response to the economic crisis because, in the long run, the negative consequences of the opposite approach would be harmful, such as fewer competitors, reduced innovation, and higher prices. Therefore, the competition authorities must stay the course while, at the same time, retaining a degree of flexibility, so that competition law does not obstruct economic recovery. According to the recommendations, restoring effective competition in the medium to long term is the primary tool that ensures the speedy recovery and revival of the economy.

5.6 CONCLUSION

The concepts of Competition laws are often associated with the laissez faire concept both at the national and the international scenario. The faith in free market economics often leads to distrust amongst the regulatory authorities of the competition authority which is rooted on economic freedom and limited government intervention. The Competition Policies and its implications are deeply influenced by the cultural, political and historical background of the country in responding to the various models of markets and their influence on economy[404]. Thus it reflects the political atmosphere existing at the geographical area in responding to the competitive market. The main debate which was seen in US regarding the scholars of Harvard school and Chicago School was the level of intervention of the state in regulating the economy. Through the scholars of Harvard partially submitted to the claim of State's intervention, the Chicago School was in complete agreement to the timely monitoring of the State in the policies of the firms with respect of maintenance of Competition level in the economy. Recent discussions focussed on a third way between the Capitalistic economy and State economy which is slightly more than the usual concept of mixed economy but throws more focus on the developments of Competition law and the doctrinal developments of anti-trust principles[405].

With the boom of the commerce sector in each country due to the immense focus on trading has grown in majority of the political structures, the scope of national systems in contributing to the competition laws have become significant[406]. The aim of developing national competition was to expose the domestic realities more transparently so that the investments can be made more equitable[407], the real concern lies where it has resulted in competitive distortions due to the national protectionism being employed in each country. The general conclusion reached between the economists is that instead of focusing on a global market with uniform application of competition policies, it would be more acceptable if the free trade

[404] HELM, D, THE ECONOMIC BORDERS OF THE STATE, IN THE ECONOMIC BORDERS OF THE STATE, 1-4, 5 (New York: Oxford University Press 2019).
[405] LARNER, RJ AND MEEHAN, JW (JR), ECONOMICS AND ANTITRUST POLICY, 179-209 (New York: Quorum, 1989).
[406] Baker, DI, *US: international co-operation on competition law policy,* 4 MCGILL LJ 473–480 (2017).
[407] Nicolaides, P, *Competition policy in the process of economic integration, an exploration of the forms and limits of co-operation* ; 5 MCGILL LJ 473–480 (2014).

market mechanism is being concentrated at the international market which enables even the under developed nations to come up and contribute their part to the world economy[408].

At present, the Community is at a crossroads concerning its enforcement of Community competition law. The fundamental problem is the lack of resources available to the Commission, through the DG for Competition, to deal with the constantly increasing demands of competition law enforcement. The trend towards increased recognition of the defence rights during the Commission investigative and decision-making processes has been made to ease concerns that the process is unfair for undertakings under investigation[409]. In addition, the proposed enlargement of the European Union to accommodate the new Member States is significant. This is likely to dramatically affect Commission workload even though the Commission has required acceding countries to adopt competition laws modelled on the Community system. In this context of further enlargement of the European Union, the proposals set out in the White Paper of 1999 and further detailed in the Draft Regulation are understandable. The aim is to enhance the existing decentralisation policy with greater involvement by the national courts and NCAs through the removal of the Commission's monopoly to grant exemptions under Art 81(3). It is almost certain that a finalised Regulation will introduce a radical change in Community competition law enforcement. It will take several years for the effectiveness of the new system to be assessed, but revised Notices on Co-operation between the Commission, the national courts and NCAs, which the Commission is still to produce, will be vital to the operation of the new system.

[408] De Leon, I, *The dilemma of regulating international competition under the WTO system*, 3 ECLR 162 (1997).
[409] Montag, F, *The case for a radical reform of the infringement procedure under Regulation* 8 ECLR 428 (1997).

6. CONCLUSION AND SUGGESTION

With the closer analysis of each of the jurisdictions handled, it is evident that not all courts and judicial systems worldwide recognise the aspect of predatory pricing in the same sense. Considering the condition in various jurisdictions, the interpretation of predatory pricing issues varies with the variation in the situation. For instance, in the United States of America, the main aim of the statute is to prevent monopolisation. In contrast, Article 102 of the Treaty on Functioning of the European Union (TFEU) deters the abuse of dominant position like unfair pricing. The United States jurisdiction allows action by private parties in case of any violation rather than counting on the Competition Commission directly. The interpretation regarding the implementation of predatory rules is diverse due to the diversity of social values and public policy aspect across territories. The aspects of fairness in the market and the interest of consumers are given prime in the European Countries, whereas the American Courts exclude it. Through the celebrated case of Brooke Group Ltd v. Brown and Williamson Tobacco Crop[410], the American Court has held that the lack of possibility of successful recoupment is an essential factor to determine the predatory pricing allegation.

In contrast, the price testing laws are fundamental to satisfy the predatory pricing allegation. Successful recoupment is not given much importance even though it varies with various circumstances[411]. As per the tenets of American law, the effect of price fixation upon competitors is less considered, but the European jurisdiction considers it serious and places severe sanctions if it leads to eliminating any of the competitors from the market zone. Thus, European law condemns the violators who eliminate the competitors by driving off the level of competition from the market, and the American jurists seem to abide by the principle of "survival of the fittest".

Canadian law emphasises predatory pricing cost, intent and recoupment before imposing sanctions on the violators of competition. Canadian law protects competitor rather than competition. In the USA, the intent is not a factor to determine predatory pricing. In the UK, these protracted and expensive features of the American experience do not apply to a lesser extent and allegations of predation can be settled speedily if the parties consent. The American two-tier test for predation runs contrary to the fundamental goal of European law

[410] *Supra* note 60.
[411] *Supra* note 59.

market integration and efficiency. The adoption of this test in Europe may enhance the administrative capacity of the officials.

India at times rely on foreign laws and judgments as section 4 of the Competition Act does not mention any precise rule to classify predatory pricing whether with or without intention. According to Indian law, which is the same as US and EU competition law, just holding a dominant position does not restrict competition. In Re: Johnson and Johnson Ltd[412] Indian Court borrowed the European Court of Justice. The US Supreme court's decision followed the recoupment test and held that pricing below cost to eliminate competitors is predatory pricing. Price cutting in good faith to benefit consumers cannot be condemned under predatory pricing is provided in section 4(2) (a) of the Competition Act, 2002 and 2(b) of the Clayton Act of US. In MCX Stock Exchange Ltd v. National Stock Exchange[413] pricing below cost was considered predatory like the US case, Pacific Bell Telephone Co. v. Link Line Communications, Inc[414] and Europe‘s Wanadoo case[415]. After analysing these judgments, it could be concluded that India follows the test of recoupment and elimination of competitors derived from the US and European Union. However, there is no stance regarding below cost as to whether average variable cost or average total cost is the benchmark to determine predation. Though the laws of all the countries strive for the same end of protecting competition, their means are different. As we look to the experiences of other countries, predatory trade across the border should be tackled by competition laws other than bilateral Free Trade Agreement.

6.1 SUGGESTIONS

There is a consensus that low-quantity, high-price equilibrium on the market resulting from profit maximisation by a dominant firm or a monopoly entails a lower level of consumer welfare than a purely competitive equilibrium. There is also a consensus that the goal of competition law is to protect consumer surplus. In a significant number of countries inspired by European Union competition law, competition authorities can sanction abuses of dominance, and one example of abuse of dominance mentioned in several national laws is unfair or excessive pricing. In many of these jurisdictions, there are several instances of decisions that have been taken by competition authorities or courts to sanction excessive or

[412] Re: Johnson And Johnson Ltd, 1988 64 CompCas 394 NULL..
[413] MCX Stock Exchange Ltd v. National Stock Exchange, CCI Case no: 13/2009.
[414] Pacific Bell Telephone Co. v. Link Line Communications, Inc, 555 U.S. 438 (2009).
[415] France Telecom SA v. Commission, (2009) C-202/07.

unfair prices due to a dominant position even if it is also clear that most competition authorities will only exceptionally enforce this type of provision, preferring to focus on exclusionary practices. The use of competition law provisions on abuse of dominance to sanction dominant firms which practice excessive and unfair prices remains a highly controversial tool. Indeed, the concepts of excessive or unfair prices are not grounded in economic analysis. From the economic standpoint, price levels reflect the underlying conditions of technology and competition among firms on the supply side and demand characteristics. Therefore, high prices are a symptom rather than the cause of a competition failure.

The issue that competition authorities should focus on and remedy is the cause or causes of the competition failure. The decisions on excessive or unfair prices necessarily require elements of subjectivity not only in the interpretation of the concepts of excessive or unfair prices but also when comparing the price-cost margin or the profitability of the dominant firms to what would be the price-cost margin or profitability of an efficient firm in competitive conditions. Such comparisons can be misleading, among other reasons, because accounting practices do not accurately describe economic costs. It made profit maximisation by a dominant firm a violation of competition law when profit maximisation is the driver of competition runs the risk of distorting competitors' incentives on markets. As they put an implicit or explicit cap on the price that the dominant firm can charge and as they reduce the profitability prospects of potential entrants, decisions of competition authorities sanctioning excessive or unfair prices can decrease the incentives to invest or to innovate for both the dominant firms and for their competitors or potential entrants, leading to overall reduced efficiency despite the direct gains of consumers. This means that competition authorities should assess the indirect effect of their decisions on unfair or excessive prices, which is a task particularly daunting. Even if they do not reduce efficiency, competition authorities' decisions on excessive or unfair prices, because of the complexity of the analysis they require, will generally not provide legal predictability to dominant firms that want to stay within the limits of the law. Finally, competition authorities should try to remedy the causes of high prices rather than focus on the prices themselves. If they regulate prices, they are bound to have to reconsider their complex and partly subjective analysis whenever cost or demand conditions change. In the rare cases where no structural or behavioural remedy is available, and price control is the only possible remedy, competition authorities should advocate creating a sectoral regulator or the extension of the powers of an existing regulator.

In many countries, competition authorities and sectoral regulators must consult one another on subjects of common interest. Their consultations with the other institution or institutions are made public, and although they are not binding, they must be taken into consideration by the requesting institutions. These mechanisms ensure that the sectoral regulator will hear the competition authority's voice. When competition authorities have discretion concerning the cases they pursue, several reasons why taking up cases of abuse of dominant position through excessive or unfair price should be given a low priority. Indeed, they entail serious risks of costly errors for the competition authority; they are very resource-intensive and require, among other things, certain skills which the staff of the competition commission may not have; and competition authorities have alternative tools to deal with malfunctioning markets. Suppose the intervention of competition authorities in excessive or unfair price cases cannot be ruled out in countries where the law explicitly provide for the possibility of such interventions. In that case, competition authorities should exercise self-restraint by using this tool only in the limited number of cases where the dominant firm's position has not been acquired through the granting of an intellectual property right or competition on the merits but results from past legal protection or past anticompetitive practices, where the dominant firm has either a monopoly or a super dominant position, where the dominant firm is protected by insurmountable barriers to entry, where the dominant firm is not and cannot be regulated by a sectoral regulator, where the dominant firm charges prices or exhibits price-cost margins which are much higher than in the benchmark industries and were no structural remedy to reinvigorate competition is conceivable. Rather than enforcing provisions against excessive or unfair prices, which are blunt and unwieldy, competition authorities can be at the forefront of the fight against high prices due to competition failures, either if they have powers to undertake market investigations or if they have the power to advocate based on market studies. Those two forms of action allow the competition authority to concentrate on the causes of the market failure rather than on prices and propose a wider range of remedies than is generally the case with enforcement decisions.

However, one prioritisation criterion is likely to push competition authorities to take up excessive pricing cases. It is the desire to promote the reputation of the head. Being reluctant to take up excessive price cases and to go after dominant firms or monopolists charging high prices is unlikely to make competition authorities popular, and competition authorities may be tempted to give in to this pressure even if they have misgivings about their chance of success to get the necessary support for their other enforcement activities. However, there are

alternative ways for competition authorities to be at the forefront of the fight against excessive prices. What economic analysis suggests is not that competition authorities should be disengaged from trying to alleviate the problem of high costs charged by monopolists or firms with dominant positions but that intervening by using an enforcement tool such as the pursuit of violations for excessive prices or imposing remedies in the form of price regulations are dangerous ways to go about it because these tools are clumsy, costly and risk failing or doing more harm than good to economic efficiency. However, competition authorities usually have a variety of tools at their disposal. Enforcement of the provisions of the laws is one tool. Competition authorities often also have other tools that do not require them to look for violations of the law but allow them to advocate for competition or impose conditions to improve the functioning of markets following a market investigation. The provision of advisory opinions or the undertaking of a market investigation is usually referred to as the non-enforcement tools of competition authorities. Thus, one-way competition authorities can deal with high prices by investigating markets where there is a dominant position and increased costs to determine the source of the competition failure in those sectors and either adopt remedies or advocate for appropriate remedies.

6.1.1 The International Competition Policy Agreement

The potential benefits that can be offered by the International Competition Policy Agreement (ICPA) must be balanced with the dangers that might be caused due to the hasty adoption. Eventhough the International Competition agreement id touted to create benefits, it lead to a less competitive world trading system and decreased level of world welfare. The effect of ICPA is highly dependent on the decisions taken by the concerned national and international competition authorities and global regulatory powers in implementing and effectuating such policies. There is still a high level of uncertainty in deciding the feasibility of introducing the agreement in the form of a supra-national authority. If the ICPA is being employed to resolve the trade issues within the framework of WTO, then the agreement must be enforced without a protectionist bias in at any stage which is difficult to be ensured in this globalised world.

The remedying of international price predation and preservation of consumer welfare are the two significant objectives of competition laws and anti-dumping policies. The facilitation of competitive market behaviour of foreign and domestic firms occurs when the competition policies and anti-dumping measures complement, reinforce and support each other. As technological advancements crossed our development path, various policies have evolved

with conflicting circumstances and different policy measures[416]. The Competition law principles cater to economic efficiencies and consumer welfare, and the anti-dumping policies would protect domestic firms.

Concerning the standard of injury, anti-dumping policies result in injury, which is comparatively mild compared to that which is inflicted by the principles of competition law. Price discrimination, irrespective of whether it was performed to increase the competitive nature of the market zone or not, is condemned under the anti-dumping policies. In contrast, those price discriminations performed to eliminate an existing firm or deter the entry of a new firm, thereby creating a monopoly over the trading aspects in the market zone, would be penalised under the competition laws. Thus, anti-dumping policies do not tackle the issues of abuse of dominant power. The anti-dumping laws permit price and quantitative trade restrictions, which are condemned by the competition law policies. The abuse of provisions of anti-dumping laws is rampant in the majority of the jurisdictions, such that scrutiny of the provisions of competition laws may not be justifiable[417]. In order to reduce the arbitrariness and overt discretionary power of trading principles, national laws could be refined such that they would not burden the consumers of the territory of the importing nation[418]. Various scholars have suggested removing the stipulations of anti-dumping provisions from the realm of the World Trade Organisation[419].

To make the international trade transactions more transparent and equitable, the member countries have to report the prices, dumping margins and the duties imposed by the country over the imported materials to the World Trade Organisation repository. The implementation of predatory pricing is not the sole intention behind the enactment of anti-dumping policies. Anti-dumping action harms exporting and importing country by implementing mistaken policy to deter predatory pricing[420]. The World Trade Organisation does not determine whether a firm has priced below the marginal cost or fixed their price to harm a domestic industry, unlike the tenets of Competition laws. The main issue associated with the anti-

[416] Crane, D. A.. *The Paradox of Predatory Pricing*. 3 CORNELL L. REV. 65-69 (2005).
[417] Prusa, Thomas J. *Anti- dumping: A Growing Problem in International Trade*, 6 UTIL. POLICY 683-700 (2005).
[418] The definition of anti-dumping could be amended by replacing the protection of producer by a national economic welfare. The definition of domestic industry for examining the injury downstream users of the like products also should be included.
[419] Lloyd, P.J. and Vautier, K.M., *Promoting Competition in Global Markets: A Multi-National Approach*, 5 U. PA. L. REV. 668-677 (2018).
[420] Caves, R. E., *Pioneers of Industrial Organization. How Economics of Competition and Monopoly Took Shape*, 4 UTIL. POLICY 224–31 (2019).

dumping policy is that it curbs those discriminatory prices which are not predatory but aimed at promoting healthy competition without a predatory intent. It would be better if the reforms are implemented with maximum caution and transparency. If the competition laws implemented replaces the anti-dumping laws, which would ultimately enhance competition and consumer welfare, a more egalitarian economy with more trade links can be established. Thus, it would be better to embark trust over the antitrust laws and dump the anti-dumping policies.

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