
Workshop to Review the Progress of Research Studies

Study on “Antidumping (‘AD’) &
Competition Law

Economic Laws Practice
New Delhi, Mumbai & Ahmedabad

Scheme of Presentation

- I. Setting the Context
- II. Historical Evolution
- III. Interface between Antidumping & Competition Law
- IV. Relationship between Substantive Provisions & Rules
- V. Issues for Advocacy
- VI. The Final Word



I. Setting the Context

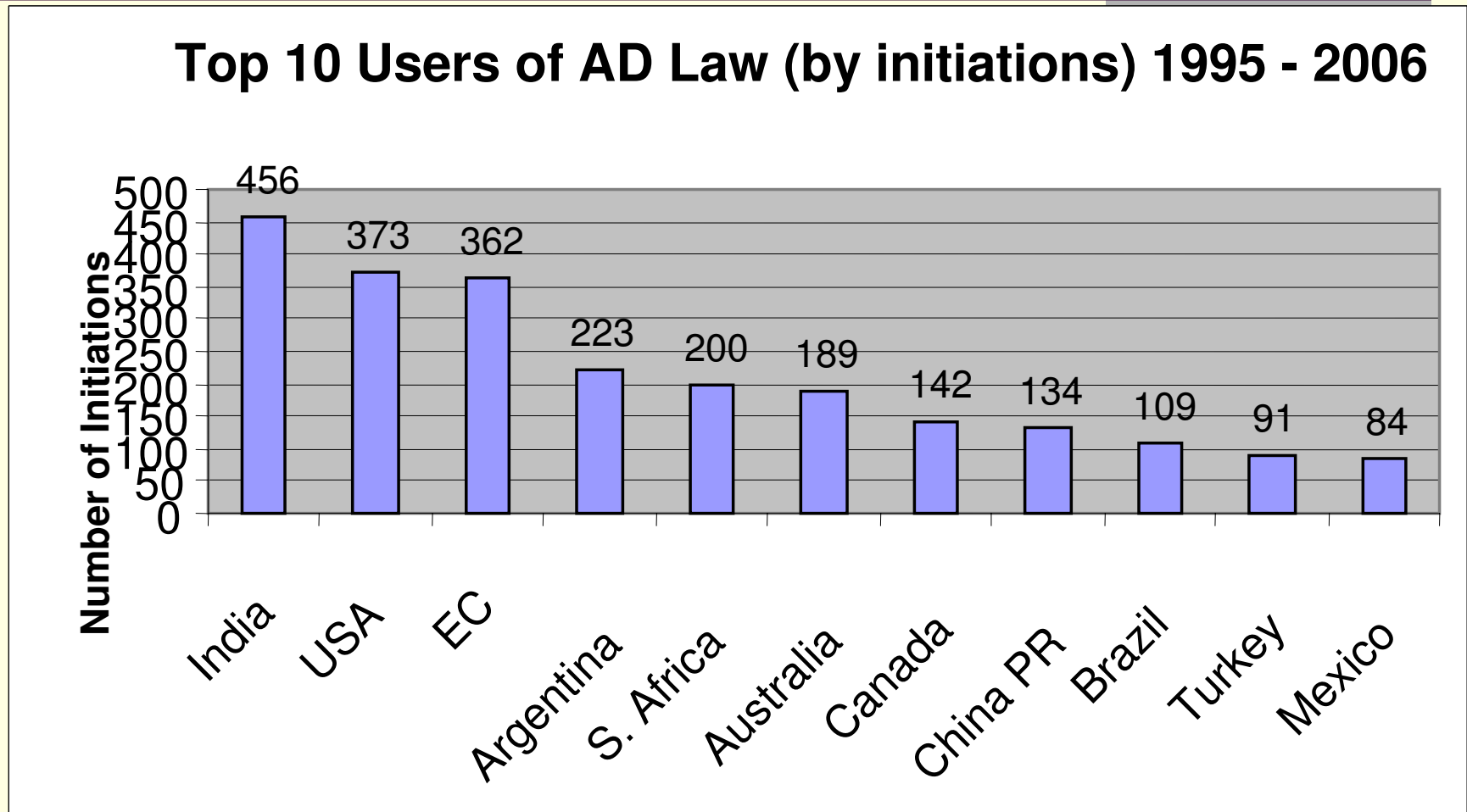
- i. Setting the context
- ii. Top ten users of AD laws
- iii. Setting the perspective
- iv. Research outline

I. Setting the Context

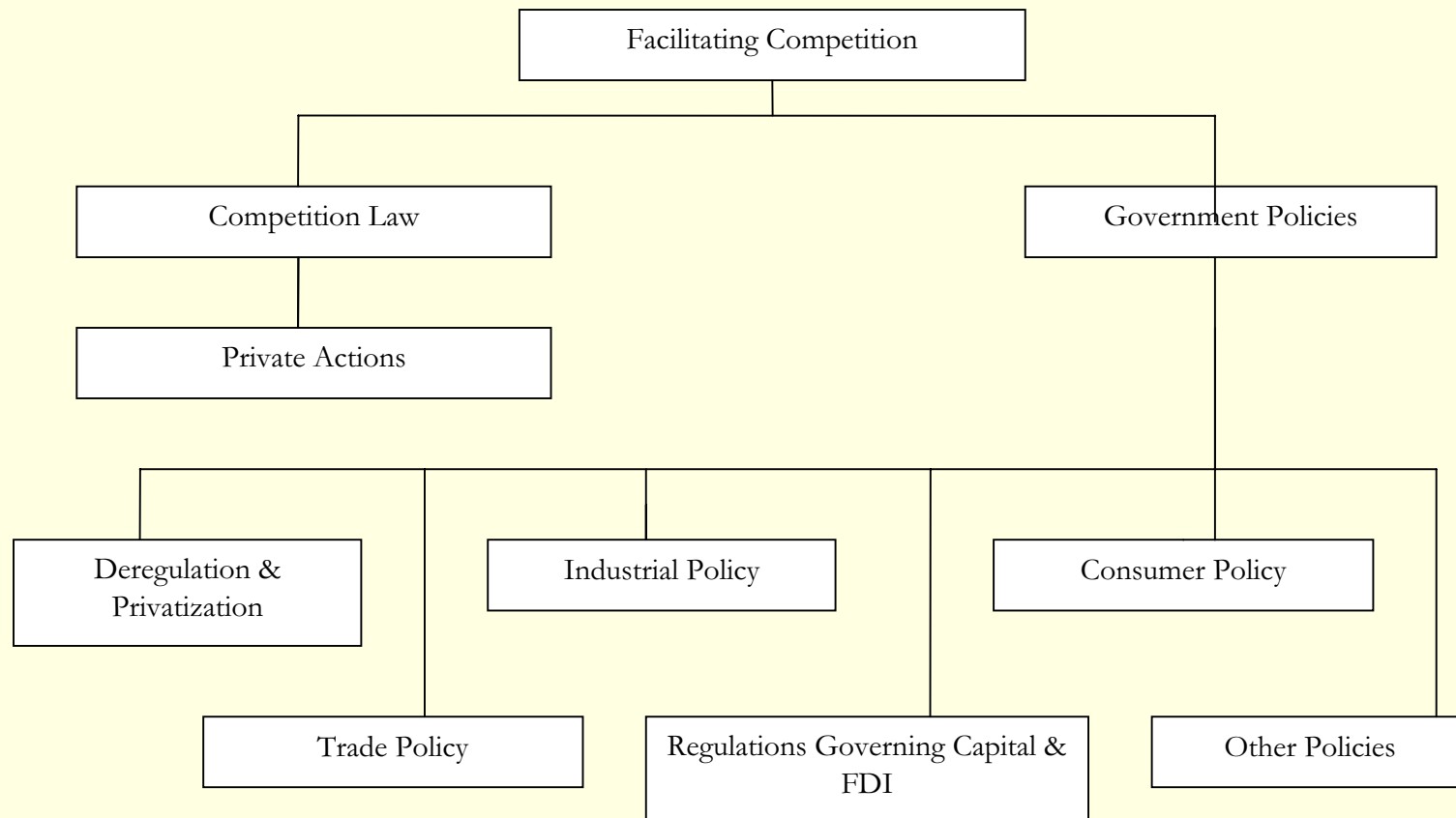
- Unlike other jurisdictions, in India antidumping law has been in force longer than a modern competition regime
- This creates the peculiar position where an all encompassing new competition legislation needs to work with an entrenched body of law and procedure which operates in an overlapping field
- Rather than replacing the old law, the new law needs to co-exist with its predecessor, which covers a narrower sphere



I. Top Ten Users of AD Measures



I. Setting the Perspective



I. Research Outline

In order to assess the overlaps, conflicts & complementarities between the two laws, the study has:

	Analyzed the objectives of the two sets of laws
	Analyzed the conduct sought to be addressed under the two laws
	Analyzed the substantive provisions & rules on procedures under the two sets of laws
	Reviewed how jurisdictions globally, addressed the overlaps & conflicts between the two laws
	Identified possible areas of concern for the future functioning of the competition law regime in India
	Identified issues for advocacy



II. Historical Evolution



II. Historical Evolution - I

- The earliest competition laws can be traced back to the Canada (1889) and in USA 1890
- Sitting on the borders of the US, Canada felt the need to enact its first AD law in 1904, apparently to restrict US imports
- In 1916 the US enacted an AD law, which addressed predatory imports, requiring *intent* to injure the domestic industry



II. Historical Evolution - II

- Soon several countries enacted their own competition laws: Germany (1909); Austria, Italy, Switzerland, France (1930s)
- US and Canada maintained parallel AD and Competition statutes for the early part of the 20th Century
- The “Effects Doctrine” emerged in the US Alcoa case in 1945 which extended the application of the Cartel ban under the Sherman Act to foreign enterprises. Other countries rapidly followed suit and today countries like India have formally incorporated the effects doctrine in to the legislation



II. Historical Evolution - III

- AD became part of the GATT 1947
- Competition Law is not part of the multilateral agenda till date
- With the “effects doctrine” now well entrenched in competition law and jurisprudence, a wide variety of cross boarder anti competitive conduct is covered, including price discrimination and predatory pricing



III. Interface between Antidumping & Competition Law

- i. Competition law- objectives
- ii. Competition law- tools
- iii. Antidumping law- objectives
- iv. Antidumping law- analysis
- v. Predatory pricing v/s antidumping
- vi. Economic Rationale for dumping
- vii. Areas of overlap

III. Competition Law – Objectives

Stated Objectives	US	EC	Australia	South Africa	India
Promotion of Competition and prevention of anti-competitive practices	✓	✓	✓	✓	✓
Protection and promotion of Consumer Interest	✓	✓	✓	✓	✓
Achieving Economic efficiency	✓			✓	
Public welfare-welfare of employees, producers		✓	✓	✓ ✓	
Competition Advocacy					✓
Geographical and regional Integration		✓			



III. Competition Law - Tools

Competition law specifically targets:

- Anti Competitive Agreements
- Abuse of Dominant Position
 - Unfair & Discriminatory Pricing
 - Predatory Pricing
- Combinations



III. Antidumping Law - Objectives

Objectives	The US	The EC	Australia	South Africa	India	WTO AD Agreement
Remedying the injury to the domestic industry due to dumping	✓	✓	✓	✓	✓	✓
Public interest		✓				
Address predatory pricing	✓ (Only in the AD Act of 1916)					
Consumer welfare		✓				



III. Antidumping – an Analysis

- Anti dumping targets only price discrimination across borders
- It permits deviation from the two fundamental pillars of the WTO – MFN and Bound Rates
- Deemed to be a “trade remedial measure” it is designed to prevent the export of goods in to a foreign market at prices less than the “normal value.” Put simply, if an article is sold in the exporting country at 200, but exported at 150, even though it may cost 100 to make, it is dumping

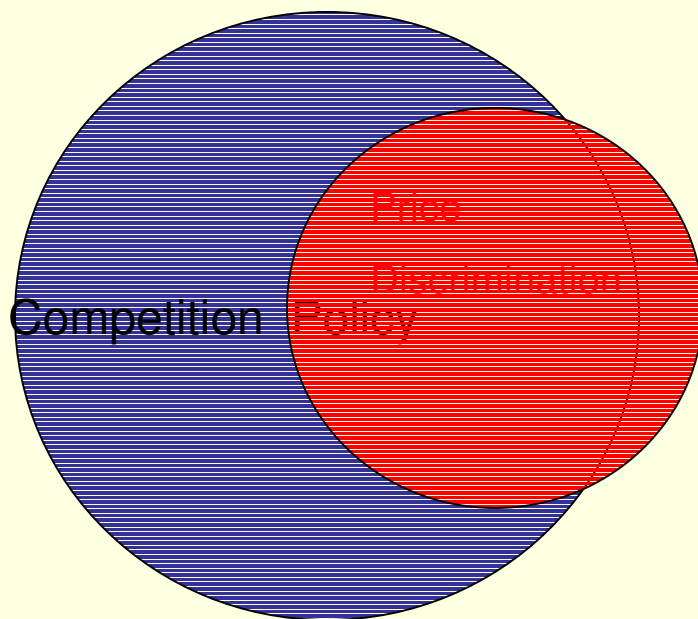


III. Normal Value - Dissected

- Normal value is defined as the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country (Article 2.1, WTO Antidumping Agreement)
- Sales below per unit costs (fixed and variable costs) are made in substantial quantities when the authorities establish that the weighted average selling price of the transactions under consideration for the determination of the normal value is below the weighted average per unit costs, or that the volume of sales below per unit costs represent not less than 20 percent of the volume sold in transactions under consideration for the determination of the normal value (Article 2.2.1 of the WTO Antidumping Agreement and footnote 5)



III. Areas of Overlap



- Competition law addresses all forms of price discrimination. Coupled with the “effects doctrine” national competition law applies to cross border trade
- By contrast AD addresses only one, but measures price discrimination by domestic selling price or total cost of production



III. Predatory Pricing v/s Dumping

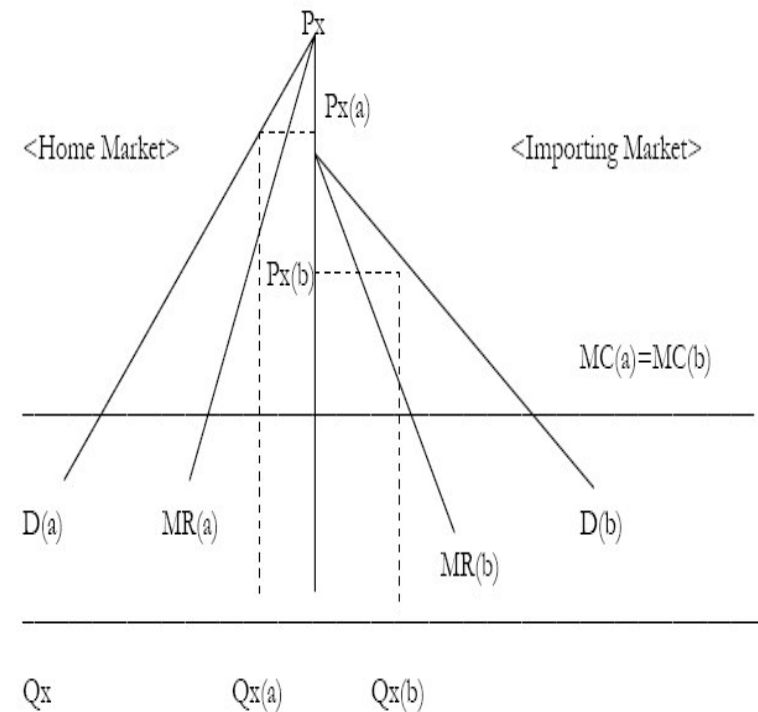
Predatory Pricing	Dumping
Dominance a Precondition	No need for Dominance
Intent required	No need for any Intent
Sales below variable costs are predatory, and thus violative	Sales below normal value are violative. Analysis includes sales below total costs – fixed and variable
Conduct must be likely to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



III. Economic Rationale for “Dumping”

- A rational enterprise will seek to achieve an optimal cost of production
- Surplus production will be absorbed by export markets where prices will be a factor to interaction of market forces – i.e. demand elasticity and market structure/ competition – just like in the home market
- Antidumping duties prevent this from occurring

International Price Discrimination



III. Antidumping – an Economist’s View

“Administrative protection in the form of antidumping suits and Countervailing duties is a case in point. While these forms of protection have often been imposed under the label of promoting “fair trade,” oftentimes they are just simple guises for inhibiting competition. Typically, antidumping duties are levied when foreign average prices are below average cost of production. But that also describes a practice that often merges as a wholly appropriate response to a softening in demand. It is the rare case that prices fall below marginal cost, which would be a more relevant standard

Antidumping initiatives should be reserved . . . for those cases where anticompetitive behavior is involved

Contrary to popular notions about antidumping suits, under U.S. and WTO law, it is not required to show evidence of predatory behavior, or intent to monopolize, or of any other intentional efforts to drive competitors out of business”

- Remarks of Federal Reserve Chairman, Alan Greenspan Before the Dallas Ambassadors Forum, Dallas, Texas, April 16, 1999



III. Antidumping – A Perception

“Antidumping law, as practiced today, is a witches’ brew of the worst of policy making: power politics, bad economics, and shameful public administration”

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



IV. Relationship Between Substantive Provisions & Rules on Procedures



IV. Relationship between Substantive Provisions & Rules on Procedures-I

- Measuring the degree of discrimination
 - Use of cost of production of the product as the relevant benchmark
- Possibility of the procedure for the determination of 'dumping' informing the procedure for examination into 'price discrimination'
 - Determination of dumping
 - 'Domestic industry' determination vis-à-vis 'relevant market' determination
 - Calculation of normal value
 - Comparable price
 - Ordinary course of trade
 - Related party transactions
 - Sales at prices below cost
 - Determination of export price
 - Adjustments to selling price
 - Calculation of dumping margin/predatory pricing



IV. Relationship between Substantive Provisions & Rules on Procedures-II

- Injury analysis vis-à-vis ‘appreciable adverse effect on competition in the relevant market in India
- Remedies against the practice of ‘price discrimination’
- Extra-territorial applicability of antidumping & competition law
- Judicial position with respect to the interaction between the two laws:
 - Haridas Exports v. Float Glass Manufacturers Association
 - Extramet Case
 - Ferrosilicon Case



IV. Relationship between Substantive Provisions & Rules on Procedures-III

Material Injury

Evaluation of actual or potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments.

Appreciable Adverse Effect

- Creation of barriers to new entrants in the market;
- Driving existing competitors out of the market;
- Foreclosure of competition by hindering entry into the market;
- Accrual of benefits to consumers;
- Improvements in production or distribution of goods or provision of services;
- Promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.



IV. Relationship between Substantive Provisions & Rules on Procedures-IV

Remedies under Competition

- Punitive remedies
- Designed to be a deterrent
- Overall view to preserve competition in the market
- Limited only by national law
- One time levy

Remedies under Antidumping

- Protectionist levies
- Designed to remedy the dumping
- Overall view protect Domestic Industry
- Limited by margin of dumping
- Levy imposed for five years



IV. Relationship between Substantive Provisions & Rules on Procedures-V

European Jurisprudence:

Grain Oriented Electrical Sheets from Russia—

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

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



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IV. Relationship between Substantive Provisions & Rules on Procedures-VI

European Jurisprudence:
Personal Fax Machines –

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



V. Issues for Advocacy

- i. Issues for advocacy with policymakers
- ii. Issue for advocacy- interaction between competition & antidumping
- iii. Issues for Advocacy – Common Concepts between AD & Competition
- iv. Issues for Advocacy with Private Enterprises

V. Issues for Advocacy with Policy Makers

- The law and procedures on antidumping is such that it lends itself to misuse & may result in undue protection of inefficient domestic industry
- Such undue protection may adversely affect the conditions of competition in India
- Antidumping law needs to be applied judiciously and subject to over all competition objectives



V. Issues for Advocacy – Interaction Between Competition and Antidumping

- Possibility of reference by the Designated Authority to the CCI
- Possible negative impacts of the imposition of antidumping levy on competition in markets
- The impact of prolonging antidumping levies beyond required period
- Impact of price undertakings on competition
- The protection of Domestic Industry characterized by Monopoly/Duopoly/Oligopoly
- Use of review powers to mitigate anti-competitive conditions
- Uniform application/determination of common concepts



V. Issues for Advocacy – Common Concepts between AD & Competition

- Criteria used for the determination of ‘domestic industry’ may inform the way ‘relevant product market’ is determined under competition law
- Criteria for the determination of ‘normal value’ may be used under competition law for the determination of ‘selling prices’ of the product alleged to be sold at discriminatory prices
- ‘Fair comparison’ standards as employed in antidumping investigations may be used under competition law while investigating into ‘price discrimination’
- Comparison of prices on the basis of ‘weighted average’ or ‘transaction-to-transaction’ basis



V. Issues for Advocacy with Private Enterprises

- Undue protection in the form of antidumping duties may be inimical to the conditions of competition
- Repeated successful petitions by monopoly or oligopoly producers may attract the attention of domestic industry
- Ill effects of antidumping levies in the long for the industries seeking protection
- Use of data submitted before the antidumping authorities as evidence under competition law



VI. The Final Word

Hon'ble Supreme Court of India on the
Debate

VII. Hon'ble Supreme Court on the Debate

The Hon'ble Supreme Court of India had while addressing an allegation of international price predation in the case of **Haridas Exports v. Float Glass Manufacturers Association** under the MRTTP expressly stated that:

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

The availability of goods outside India at prices lower than those which are indigenously produced would encourage competition amongst the Indian industry and would not per se result in eliminating the competitor . . .”





Thank You

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