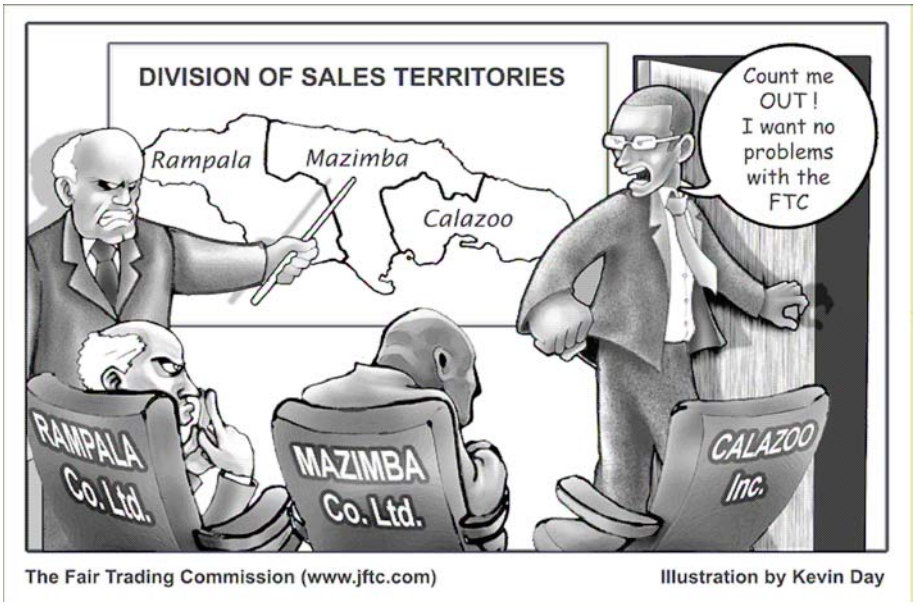
Study of Cartel Case Laws in Select Jurisdictions – *Learnings for the Competition Commission of India*



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ABBREVIATIONS

ADM	Archer Daniels Midland Company
CCI	Competition Commission of India
CAT	Competition Appellate Tribunal
CADE	Administrative Council for Economic Defence
CBI	Central Bureau of Investigation
CAG	Comptroller and Auditor General of India
DNA	Daily News & Analysis
DGS&D	Directorate General of Supplies & Disposals
DG (IR)	Director General of Investigation and Registration
FBI	Federal Bureau of Investigation
FTC	Federal Trade Commission
ICN	International Competition Network
MRTP ACT	Monopolies and Restrictive Trade Practices Act 1969
MRTPC	Monopolies and Restrictive Trade Practices Commission
OPEC	Organisation for Petroleum Exporting Countries
OECD	Organisation for Economic Co-operation & Development
PIR	Preliminary Investigation Report
RBI	Reserve Bank of India
SDE	Secretariat of Economic Law
SEAE	Secretariat of Economic Assistance
UNCTAD	United Nations Conference on Trade and Development

EXECUTIVE SUMMARY

In 1990s, there were about 30 countries with a competition law also referred to as antitrust or antimonopoly or fair trade laws then. At present, there are over 100 countries in various stages of enactment of a competition law. The competition laws across the world differ in various aspects; however, there is one feature that unites them, i.e. *condemning cartel agreements*. Cartels are the most egregious of all competition law violations: they are the most widely prevalent entities in markets for consumer goods or inputs and services essential to other sectors of the economy.

Chanakya (Kautilya), Prime Minister of Mauryan King Chandra Gupta's Indian empire in 400 BC, in his monumental treatise *Arthashastra* (an ancient Indian book on economic governance) displayed the lack of trust in traders. As Chankaya was aware of trades' propensity to form cartels in order to fix prices and make excessive profits, he prescribed heavy fines to discourage such offences with a view to protect consumers. His fears were recently echoed by the Indian Prime Minister Dr. Manmohan Singh, who called upon corporate India to 'desist from non-competitive behaviour'. Dr Singh asserted, "The operation of cartels by groups of companies to keep prices high must end. It is unacceptable to obstruct the forces of competition from having freer play". The fact that cartels are a problem that has survived the ravages of time is now well known. Almost 90 years of the last century, in particular, saw a global resurgence of international cartels, which were evident thanks to the numerous efforts to uncover them by competition authorities. It is believed that the US and EU authorities have prosecuted about 100 international cartels during this period.

The widespread prevalence of cartels in US and EU in conjunction with beliefs that as few as one in six or seven cartels are detected and prosecuted gives a rough indication of their high incidence. In comparison, detection has been much lower in the developing world. This, arguably, was not due to the fact that cartels are less common in the developing economies, but because the law enforcement agencies have not been well equipped to tackle them.

The experience in dealing with cartels in India so far has not been quite satisfactory under the Monopolies and Restrictive Trade Practices Act 1969 (MRTP Act).

Nevertheless, it would be relevant to study the strengths of the Indian Competition Act, 2002, as amended in 2007 (Competition Act) with reference to the cases that were brought under the MRTP Act as well as study the experience of enforcement in select jurisdictions such as US and Brazil. This will help to derive operational guidelines for the Competition Commission of India (CCI). However, the Competition Act is better equipped when compared to the MRTP Act, in areas such as institutionalised and clear definition of cartels, wider power and better tools, e.g. leniency, penalties, interim relief, etc., for CCI to investigate and prosecute cartels.

A similar situation has been found in other countries as well, including large economies, such as Brazil and the US. Their competition authorities have overcome and remedied past problems by adopting new tools and good practices, such as penalties with high deterrent effects, elaborate leniency programmes, effective use of dawn raids and "*parallelism plus*" approach for identifying cartels (which requires showing some evidence beyond that of the firms' parallel behaviour in order to prove that an antitrust violation has occurred).

The Competition Act increases the possibility of dealing successfully with cartels. However, the CCI needs further strengthening through 'functional' guidelines for its activities. Besides, there is a need for the CCI to participate in international efforts against cartels such as at United Nations Conference on Trade and Development (UNCTAD), Organisation for Economic Co-operation & Development (OECD), International Competition Network (ICN), etc., in order to improve their understanding of the taxonomy of cartels. Most importantly, CCI should undertake advocacy activities to create a competition culture and awareness about disadvantages of cartels and the harm they cause to the economy, which could help to promote detection and prosecution of cartels in India.

I. INTRODUCTION

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices. It is impossible indeed to prevent such meetings, by any law, which either could be executed, or would be consistent with liberty and justice. But though the law cannot hinder people of the same trade from sometimes assembling together, it ought to do nothing to facilitate such assemblies, much less to render them necessary. – Adam Smith

I.1 Definition of Cartel

Firms generally detest competition, as it drives away profits and takes away their freedom over market activities, such as pricing and output from their control. In any market therefore, competing firms have an incentive to coordinate their production and pricing activities so as to mimic like a monopoly, in order to increase their collective and individual profits by restricting market output and raising the market price. Collusion among independent firms in the same industry to co-ordinate pricing, production or marketing practices in order to limit competition, maximise market power and affect market prices is referred to as a "cartel".[1]

A cartel can be a result of either explicit agreements or implicit collusion. Explicit agreements occur when the cartel members actually meet to decide how to control the market. Because such collusion is illegal in jurisdictions with effective competition laws, such a formal agreement is likely to be highly secret and would be a result of covert meetings, which might involve nothing more than a "casual" lunch among company presidents, a "chance" meeting at a conference of industry executives, or company decision-makers skulking around back alleys in the dead of the night discussing price charges[2].

Firms that engage in explicit collusion are usually shrewd enough to avoid the documents falling in the hands of anti-trust authorities. Implicit collusion, also termed tacit collusion, occurs when the members through their actions show their willingness to engage in collusive behaviour. An example of tacit collusion is price leadership

[1] Canadian Economy online, available at http://www.canadianeconomy.gc.ca/english/economy/cartel.html
[2] Available at, http://www.amosweb.com/cgi-bin/awb_nav.pl?s=wpd&c=dsp&k=collusion

where one firm takes the lead of setting a price that will boost profits for the entire industry and other firms then go along with this price, knowing that they stand to benefit by doing so. With no formal agreement, prosecuting firms engaging in implicit collusion is difficult and it has been used as a defence mechanism even by explicit cartels.

A cartel needs to be profitable for members to take part in it, given that it is illegal and has risks associated with its formation and existence. The decisions to engage in the agreement are functions of the associated risks and factors such as the probability of being detected by the competition agency and the penalties or fines to be imposed play the largest role. Other factors which are considered by the members include the gains in profits associated with cartel formation, costs of coordination and monitoring for the cartel, the opportunities to cheat and the extent to which the cartel can punish cheating members.

I.2 Types of Cartels

There are basically two types of cartels; domestic and international cartels (see Box 1). An international cartel consists of a group of producers of a certain commodity located in various countries, who agree to restrict competition among themselves in matters of markets, price, terms of sale etc.

Box 1: International Cartels – India's Approach to Legal Enforcement
Till date, almost nothing has been done on international cartels, in India. However, it is not as though India has remained untouched by international cartels. A study done by Simon Evenett and Julian L. Clarke estimates that the overcharges in India during the conspiracy period of the vitamins cartel were US$25.71mn. There may have been other cartels that have impacted India adversely. There may be many such cartels in the future as well. What then is India's legal and institutional capacity to deal with international cartels? CUTS, an India-based public interest organisation collected some information on the vitamins cartel and passed it on to the competition authority i.e. MRTPC for further action. However, the MRTPC came

to the conclusion that no case could be made in this regard. The grounds for arriving at such a conclusion were, however, not known. Many of the companies involved in this case have commercial presence in India and the issue of jurisdiction, in all probability, would not have been a hindrance. The old competition law of India (Monopolies and Restrictive Trade Practices Act) provided for the initiation and follow-up of anti-cartel enforcement, but only through general provisions against restrictive and unfair trade practices.

The new Act, however, specifically addresses cartel concerns. Considering the transnational nature of international cartels, the incorporation of the effects doctrine (that is inquiry into acts taking place outside India, but having an effect on the markets in India) in the new Act is facilitative to anti-cartel enforcement. However, India must ensure that the law is duly implemented. India must also develop effective techniques for investigating international cartels.

Source: Chowdhury. J, (No.5/2006) "Private International Cartels – An Overview", Briefing Paper, CUTS C-CIER

The agreement can be at the level of Governments, where countries, who have a common resource in high demand, decide to agree on common marketing strategies, and a good example is the Organisation for Petroleum Exporting Countries (OPEC), as given in Box 2. An international cartel may also be a result of agreements among private producers of a common product or service in different countries, and this is known as a private international cartel.[3]

Box 2: OPEC: The Oil Cartel

"OPEC has set itself a clear-cut and seemingly simple goal. Its eleven member countries aim to keep the international price of crude oil within a range of US$22-28 a barrel. To do that, the countries control the amount of crude oil they export and avoid flooding or squeezing the international marketplace. Established in 1960, its members account for over half of the world's crude exports. But the oil market is notoriously difficult to balance - demonstrated by the rollercoaster

[3] Gandolfo, G (1998), "International Trade Theory and Policy", Springer

of prices over the last few years.

Hawks and doves

Member states of OPEC do not necessarily have identical interests and often find it difficult to reach consensus on strategy. Countries with relatively small oil reserves or others like Iran and Nigeria with large populations and few other resources, are often seen as "hawks" pushing for higher prices. Meanwhile, producers like Saudi Arabia and Kuwait, with massive reserves and small populations fear that high prices will accelerate technological change and the development of new deposits, reducing the value of their oil in the ground. US pressure has come to bear on the two latter producers as probably the most likely to see the advantages of higher production and lower prices. And the need to maintain good relations with other member countries and with the US is almost always a part of price considerations. There are also ongoing disputes over whether member countries are actually sticking to the agreed quotas.

Greed

OPEC is often portrayed in the West as a greedy and untrustworthy cartel, cynically manipulating the price of oil. But many of the so-called 'oil-rich states' are rich in very little else. Crude oil is their only export, making them uniquely vulnerable to world oil prices. So when prices fell to US$10 a barrel in 1998, it had a devastating effect on their economies. Tony Scanlan, of the British Institute of Energy Economics, says: "In the US, *OPEC is viewed as a cartel* and therefore something to be smashed - which is not a helpful way of thinking about it. “The one thing the OPEC countries all have in common is their absolute reliance on one product - oil."

According to Mr Scanlan, the OPEC countries can not afford to treat oil "as just another commodity". "When the price falls it creates real pain. They have to feed and give welfare to their people, the same as Western countries," he says.

In search of stability

Part of the West's fear of OPEC dates back to the oil shock of 1973 that sent the global economy into crisis. The finger of blame was also pointed at OPEC when prices spiked in the send half of 2000 and prompted fuel protests across much of Europe. But the west is gradually waking up the fact, that in recent years, OPEC has been trying to insure market stability through its price range mechanism. And, as more sources of oil come to market, consumer countries are also less reliant on oil from OPEC countries."

Source: http://news.bbc.co.uk/1/hi/business/689609.stm

Although it was only very recently that the extent of harm caused by international cartels has been documented, international cartels are by no means a recent phenomenon or a by-product of liberalisation, as its cross border dimensions would seem to suggest. International private cartels are at least 125 years old. However, there was a lull in their formation after the 1940s and 1950s. The 1990s again saw a global resurgence in international cartels (Connor, 2003). Liberalisation, however, may indeed have facilitated the success of cartels owing to markets opening up across the world, making it possible to engage in transnational anti-competitive practices on a much larger scale than before, and garner larger profits thereby. International cartels today definitely undermine international integration and decrease the benefits of liberalisation to consumers.[4]

A domestic cartel on the other hand involves an agreement among competing firms in a particular sector in the same country, regarding marketing strategies. Both domestic and international cartels can be further categorised as import cartels, export cartels, rebate cartels etc, depending on whether the agreement is between international or national companies. Import cartels involve agreements on common strategies for imports such as limiting the aggregate amount of specified imported goods, determining the sources of supply for such imports and/or fix the prices and terms of purchase the cartel members will pay for such imports, etc. Export cartels are arrangements between competing firms relating primarily or exclusively to export

[4] Chowdhury, J (No.5/2006), "Private International Cartels – An Overview", Briefing Paper, CUTS C-CIER

activity, while a rebate cartel would involve members agreeing on rebate strategies and terms.[5]

There are typically four types of cartel conduct:

- price fixing;
- market sharing;
- output restricting; and
- bid rigging.

The first three types of conducts usually include all firms in a market, or a majority of them, coordinating their business, whether *vis-à-vis* price, geographic market, or output, to effectively act like a monopoly and share the monopoly profits accrued from their collusion. The fourth and last type of cartelised behaviour usually involves competitors collaborating in some way to restrict competition in response to a tender invitation and might be a combination of all the other practices.

However, barring some exceptions most cartels are unanimously condemned by competition experts and authorities as the worst of all antitrust abuses, especially those involved in price fixing. No expert has satisfactorily established that consumers will benefit from price fixing. On the contrary, economic analysis has shown that cartels are inefficient and reduce consumer welfare. It is, therefore, not surprising that competition authorities around the world have the closest meeting of minds on the baleful influence of cartels.

Many experts consider anti-cartel activity the most important function of a competition agency. They feel that, because cartels cause the greatest harm to consumers, finding and prosecuting these agreements should be one of the top priorities of competition officials. Prosecuting cartels may be the most difficult of the tasks assigned to competition authorities as cartels are conceived and carried out in secret. Cartel operators, knowing that their conduct is unlawful, do not willingly cooperate with competition officials in the course of investigations. Thus, obtaining evidence to prove

[5] A rebate is a return or a reduction by a seller to a buyer of some part of the purchase price. It may be given: when the buyer has purchased a certain quantity (quantity rebate); when he has purchased exclusively from the seller or from a group of which the seller is a member (loyalty rebate); or when he has performed a particular function in the distribution of the product, for example wholesaling (functional rebate)

the existence of cartel agreements requires special investigative tools and skills. The different types of evidence that can be used in cartel detection are described below:

I.3 Existence of a Cartel: A Classification of Evidence

The existence of a cartel may be proved by direct evidence, indirect (circumstantial) evidence, or a combination of both. *Direct evidence* includes written agreement among cartel members, statement of a cartel member who attended a meeting and reached an agreement with competitors, a memorandum written within a company to report a meeting with competitors where an agreement was reached, records of telephone conversations with competitors, or a statement of a person who was approached by the cartel to join it.

On the other hand, direct evidence is scarcely found, as cartel members tend not to agree orally instead of entering into an agreement. *Indirect (circumstantial) evidence* may be useful in supporting direct evidence. It may also prove the existence of a cartel by itself, but it is important to be careful in interpreting indirect evidence.

"Another type of evidence is circumstantial evidence. The American philosopher Henry David Thoreau wrote that circumstantial evidence can be convincing, as when you find a trout in the milk. He meant that in this case there is no possible explanation except that someone put the trout into the milk. Circumstantial evidence is most useful when there is only one explanation for a fact. It is possible to apply this principle to investigating cartels. One should look for behavior that makes sense *only* if there is a cartel. For example, if all the competitors in a market announce on the same day that their prices will increase by exactly the same amount, it is suspicious behavior. It leads one to suspect that they all agreed to raise their prices. But there are other possible explanations, such as an input price increase that affected all of them equally, or a sudden change in demand for their product, or a sudden change in the price of a substitute product. Further investigation may eliminate the other possible explanations. As fictional English detective Sherlock Holmes said, "when you have eliminated the impossible, whatever remains . . . must be the truth". If all the other logical explanations are eliminated, the only logical explanation for the sudden identical price

increase announcements is that the competitors all discussed and agreed on the price increases. That would be circumstantial, or indirect, proof of a cartel agreement".[6]

The following example (see Box 3) is an excerpt from a closing argument to a jury in a cartel case. It illustrates some of the ways in which the existence of a cartel can be proved and some of the arguments and inferences that are used in proving the fact.

Box 3: US vs. Midwest Steel Drum Manufacturers Association, et al

Closing Jury Argument (excerpt) of Richard Byrne, prosecutor
(U.S. District Court, Chicago, 1992)
[Defendants were charged with forming a price-fixing cartel in the steel drum (barrel) industry in the Midwest.]

May it please the court:
I can make more money for Van Leer Company by meeting one-on-one with my competitors than I can in 20 meetings with my customers. These words spoken by defendant Bruil perfectly summarise this case.

They perfectly summarise the goal behind the defendants i.e. price fixing scheme to make more money by selling drums at higher prices to unsuspecting customers.

These words perfectly summarise how these defendants and their co-conspirators sought to do business. Not by out-hustling the competitors, but by meeting with them in secret. Not by aggressive, old-fashioned American competition, but by fixing prices and reaching agreements.

You have heard extensive eyewitness testimony about the underhanded ways in which this conspiracy was formed and carried out. Secret meetings held in hotel rooms, confidential mailings made in plain unmarked envelopes, forming a phony trade association to give themselves a cover to meet and talk behind closed doors, denials of collusion when confronted by customers.

[6] Craig W. Conrath (2003) "Practical Handbook of Antimonopoly Law Enforcement for Economies in Transition or Development", Department of Justice (DOJ)

Are these the actions of honest men who are conducting legitimate business and obeying the law, or are these the actions of businessmen who are trying to hide what they were doing, who didn't want to get caught?

Ladies and gentlemen, the case against these defendants is straightforward. It is a case about crimes committed by executives who agreed to fix prices, who agreed to defraud their customers. It is about the adoption of identical price lists by seven different companies. It is about an 18-month conspiracy in which these defendants met in secret, agreed in secret, fixed prices in secret. Now, you have heard about these actions not from people who were guessing or who were speculating as to what happened, not from people who did not know what happened behind those closed doors. You heard about this underhanded conduct from the very people who engaged in it with these defendants, the very people who went to these meetings, the very people who agreed with these defendants, the very people who pled guilty and went to prison because of it.

Not only have you heard witness after witness describe for you the meetings that were held, the agreements that were reached, but you have seen the overwhelming paper trail that corroborates this testimony. Falsified expense reports, whited-out price fixing notes, staggered announcement dates for the identical price lists, a home telephone line installed primarily to contact competitors about prices.

* * *

The second price increase is the centerpiece of this case. The second increase was the agreement to reach published list prices. This is the agreement that was reached at the January 26 meeting at Columbus. That was the agreement where they agreed to charge US$19.80 for that standard drum. That was the meeting at which these competitors agreed not to deviate from list price that they agreed to stagger the announcement dates so that their customers would have no idea that they had reached an agreement.

It was at this meeting at which the competitors discussed sending a delegation to Chicago to affirm Van Leers support for this agreement, and it on February 10, 1989, in a private ritzy club, in a small wood-panelled room, at a white cloth table, that this delegation from Columbus met with Van Leer.

It was at the Union League Club on February 10th that defendant Bruil affirmed Van Leers support for this price list agreement. Ladies and gentlemen, you have heard about this meeting on February 10 at the Union League Club from four of the six witnesses who were there. All four told you that it was a done deal when they left that meeting.

And when you go back into that jury room and you discuss whether a price fixing agreement existed, I want you to look at all of these price lists. I want you to page through them. Look at the similarity of the format, the identical prices charged for the basic drums, the prices charged for the extras that are all identical, the prices charged for drop trailers. Look at the date. Look at the effective date of each of those price lists, April 01, 1989.

The third and last price increase was the decision to increase prices for 1990. It was at a Midwest Steel Drum Association meeting on November 13, 1989 that the agreement to increase list price occurred. And it was an agreement to announce an increase of a dollar a drum again on the standard drum. And what did each of the conspiring companies do after this Midwest Association meeting in November? Each and every single one announced a dollar increase to list price.

But this 1990 price increase, they had some trouble implementing it in the marketplace. They faced some stiff competition from those drum companies who were not a party to their little agreement. All those competitors who were not party to their little agreement gave them tough competition.

Keep in mind the instructions on the law that you will receive from the judge. It is the agreement to fix prices that is the crime, not whether it was implemented, not whether it was successful.

* * *

Soon it will be your turn to review this evidence. The case will be yours. You are the triers of fact who must go back into that jury room and return with a verdict. The evidence in this case is very strong, and we are confident that once you have had that opportunity to go back and discuss the facts, you will find beyond a reasonable doubt that the defendants are guilty of the charges against them.

Source: Craig W. Conrath (2003) "Practical Handbook of Antimonopoly Law Enforcement for Economies in Transition or Development", Department of Justice (DOJ)

This report begins with a theoretical discussion on general characteristics of cartels, necessary conditions for cartel formations and similar issues followed by a brief review of factors necessary for the detection of cartels and the various instruments used for cartel investigation around the world, such as leniency, whistleblower protection, and dawn raids. The following section deals with cartel case selection and prioritisation. Sanctions are also discussed in this regard, as an effective tool to prevent the formation of cartels, due to their deterrent effects when used appropriately. Next, the old MRTP Act is analysed, together with some select cases, which have been tried under this Act. Based on this analysis information is used inductively to detect factors that have allowed or encouraged the formation of cartels in India, including any policy, regulatory or legislative factors, and/or signals that suggest the existence of cartels in certain industries/sectors. These are then used to derive strategies for future cartel prosecution in the country.

Subsequently, the Competition Act with its various provisions is described. The Act is assessed to see whether it overcomes the difficulties presented by the MRTP Act. Where and when possible, references are made to the experiences of two other large economies, the US and Brazil, on the basis of two country papers prepared by consultants engaged in this project, for comparison as well as for deriving appropriate learnings. The paper ends with a few recommendations regarding policy and operational matters for the CCI for implementing its mandate under the Competition Act with respect to cartel cases in India.

II. UNDERSTANDING CARTELS

II.1 Cartel Conducts

The most common practice undertaken by cartels is price-fixing. This is the term generically applied to a wide variety of concerted actions taken by competitors, which have a direct effect on price. The simplest form is an agreement on the price or prices to be charged to some or all customers. In addition to simple agreements on what price to charge, the following are also considered price-fixing:[7]

- Agreement on price increase;
- Agreement on a standard formula, according to which prices will be computed;
- Agreement to maintain a fixed ratio between the prices of competing but non-identical products;
- Agreement to eliminate discounts or to establish uniform discounts;
- Agreement on credit terms that will be extended to customers;
- Agreement to remove products offered at low prices from the market so as to limit supply and keep prices high;
- Agreement not to reduce prices without notifying other cartel members;
- Agreement to adhere to published prices;
- Agreement not to sell unless agreed price terms are met; and
- Agreement to use a uniform price as starting point for negotiations.

Next on the list are cartel agreements that divide markets by territory or by customers among competitors. If anything, such arrangements are even more restrictive than the most formal price-fixing agreement, since they leave no room for competition of any kind, and hence are often held illegal *per se* by competition laws around the world. A *per se* rule for evaluating hard core cartel conduct focuses solely on whether certain conduct took place. In many jurisdictions, hard core cartel conduct is *per se* illegal because of its pernicious effect on competition and lack of redeeming economic value. In the US, a cartel agreement is illegal *per se* or by itself. This means that no argument can justify a cartel agreement and no proof of harm is required. Harm is presumed, because this type of agreement always raises prices and never provides any significant benefits to consumers. Courts adopted this presumption after acquiring experience of

[7] Rai, Q & Saroliya (2003), "Restrictive and Unfair Trade Practices – Where Stands the Consumer?" CUTS, India, p. 16

judging such agreements and after comprehending the probable effects of such agreements.

Thus, the *per se* approach does not require an agency to prove harm to competition and does not allow parties to claim an efficiency justification. Certain agreements are conclusively presumed to be unreasonable and therefore illegal, without elaborate inquiry about the precise harm they have caused or business excuse for their use. Under a *per se* analysis, companies cannot escape punishment by demonstrating the alleged reasonableness or necessity of the challenged conduct. For example, price fixing cannot be justified by arguing that it was necessary to avoid cutthroat competition, or that it resulted only in reasonable prices.

In other jurisdictions, various effects tests are needed to analyse hard core cartel conduct. Instead of only ascertaining whether specific prohibited conduct took place, such tests go a step further and require that a certain effect be shown. For example, some jurisdictions require a showing of an undue or substantial lessening of competition or allow an "efficiency defense". In addition, some jurisdictions utilize a hybrid approach by allowing the prosecution of certain types of cartel behavior, such as price fixing or bid rigging, on a *per se* basis and other types of cartel conduct, such as output restrictions or market allocations, on an effects basis. An effects approach that allows for justification of hard core cartel conduct appears to be contrary to the consensus that such conduct is devoid of pro-competitive benefits.

Under the third category of cartelist behaviour, output restriction, enterprises producing and supplying the same products/services agree to limit their supplies to a lower proportion of their previous sales. The ultimate objective of limiting supplies is to create scarcity in the market and subsequently raise prices of products/services.[8]

The fourth type, bid-rigging cartels, as mentioned in the preceding section, involves coordinated actions of firms *vis-à-vis* tenders for procurement and sales through auction. It involves competitors collaborating in some way to restrict competition in response to a tender issued by a public authority or a private entity. Bid rigging, also

[8] CUTS (2001), "Competition Policy and Law Made Easy", p.8

known as collusive tendering, may include various types of agreements, of which the most significant are the following:

- Sub contract bidding where some of the bidders opt out of the process under agreement that some parts of the bid will be subcontracted to them.
- Complementary Bidding where some of the bidders submit bids which are either too high or contain unacceptable conditions, so that a pre agreed winner will get the contract. This would be after an agreement among the competitors that all but one competitor will submit a tender with terms which they know will be unacceptable to the tendering body. Such bids will to create the appearance of genuine competitive bidding.
- Bid rotation where competitors agree to take turns at being the lowest bidder to give each an opportunity to win a contract.
- Bid suppression where some of the competitors simply decide not to participate so that a designated competitor's bid is accepted.
- Market division where competing firms allocate specific customers or types of customers, products, or territories among themselves and bids are rigged in accordance with such allocation.
- Common bidding where firms agree to submit common bids, thus eliminating price competition.[9]

Bid rigging, as is the case with all other cartel-type behaviour, can be difficult to detect and prosecute. However, as most competition laws broadly prohibit anticompetitive agreements and concerted practices among competitors, there need be no legally binding or formal agreement or any punishment or other enforcement mechanisms envisaged for a bid rigging offence to be established. Often, the mere exchange of information between competitors before the award of a tender is enough to establish irrefutably that bid rigging has occurred.[10]

[9]Available at, http://www.jftc.com/news&publications/Publications/PDF%20DOCUMENTS/Bid-rigging%20-%20an%20Offence%20Against%20Comp..pdf

[10] Competition Law Gram (3/2006), "Constructing the Olympics: Why Colluding for Contracts May Land You in Jail", Lawrence Graham LLP, London, Vol. I, p.2

II.2 Necessary Factors for Establishing Cartels

Three major factors are necessary to establish a cartel includes:

1. The cartel must be able to raise price above the non-cartel level without inducing substantial increased competition from non-member firms.
2. The expected punishment for forming a cartel must be low relative to the expected gains.
3. The cost of establishing and enforcing a cartel agreement must be low relative to its expected gains.

Only if a cartel is expected to raise the price above the non-cartel level and keep it high do the firms join. An increase in price will bring about an increase in revenue only if the demand curve facing a cartel is inelastic. Given the inverse relationship between price and quantity demanded, this increase in revenue is accompanied by a fall in quantity demanded. But a fall in quantity demanded and consumed implies that costs of production also fall. To summarise, a rise in price brought about by cartel formation works in the case of inelastic demand as a rise in revenue accompanies a decline in total cost of production leading to a rise in profit levels. An inelastic demand curve in the long run requires the coincidence of the following three factors:

1. very few close substitutes in the cartelised product market;
2. large market share of cartel members and
3. substantial barriers to entry into the market for the cartelised product

Empirical evidence has also shown that cartels are more likely to be formed in concentrated industries. Similarly, cartels are also often found in smaller geographical areas, since the market, being small is more likely to have few firms, who have a large share of the business. Of the global cartels studied recently, cartel members usually controlled over 90 percent of market sales in the cartelised product. Moreover, when entry caused the cartel's share to drop below 65 percent, cartel activity typically ceases.[11] Cartelisation also requires product homogeneity, as firms have more difficulty agreeing on relative prices when each firm's product has different qualities or properties. Each time a product is modified, a new relative price must be established. It is also easier for a cartel to spot cheating by members when all it has to examine is a single price.

[11] Supra note 8

Second, cartels are formed if members believe that expected losses from cartel membership are less than expected benefits. This is largely dependent on the perceived likelihood of being caught (the lag between the formation of the cartel and the time at which the potential members expect, on an average, to get caught) and the severity of the expected punishment. A high chance of being caught and large expected penalties reduces the expected value of forming a cartel in the first place. The probability of being caught depends on several factors, including the extent to which the competition law covers cartels, enforcement priorities of the competition authorities and the cartel's capabilities and available resources in addition to the incentives that members can have to inform on each other. Participation by members therefore requires that they at least have an idea of the probability of being caught so that they can estimate the net benefits from cartel formation.

Last but not the least, even if a potential cartel could raise prices in the long run, and not be discovered, it would not fructify if the cost of initial organisation, as well as the associated monitoring costs are too high as compared to the expected gains. Firms have to constantly monitor each other's behaviour to guard against cheating and such activity has associated costs which can be substantial to the extent that the members can agree on a contributory scheme to fund the exercise. For costs of running a cartel to be minimal, there should be only a small and manageable number of firms involved. Setting up a secret meeting without the government's knowledge is also relatively easy and less costly if there are few firms involved.

Even if a market consists of a small number of firms, producing a homogeneous good without close substitutes and characterised by an inelastic demand curve with no threat of entry, a cartel cannot succeed if members can and want to cheat on the agreement. Thus, cartel agreements are easier to enforce if detection of cheating by members is easy. Some of the factors that lead to the formation of a cartel also help it to detect cheating and enforce its agreement. The following four factors aid in the detection of cheating:

1. smaller number of firms;
2. no independent fluctuation of prices;
3. wide knowledge of prices; and

4. product homogeneity among cartel members at each point in the distribution chain.

The above-mentioned factors could be used by competition authorities as strong benchmarks to prioritise their enforcement activities *vis-à-vis* cartels. With relatively few firms, the cartel members may more easily monitor each other, and increases in a firm's share of the market (an indication of price cutting) is easier to detect. If a market has frequent shifts in demand, input costs, or other factors, prices in that market have to be frequently adjusted. In that case, cheating on a cartel arrangement may be difficult to detect, because it cannot be distinguished easily from other factors that cause price fluctuations.

Similarly, cheating is easier to detect if prices are known. Some cartels have even arranged for firms to inspect each other's books. In some cases, with the government's help, for example, they often report the outcome of bidding on government contracts, so that cheating is instantly observable by the cartel members.[12] Public availability of information can greatly simplify the enforcement of cartel agreements. Publicly announcing price increases and decreases well in advance is one method of making price information available to all interested parties.

If some firms are vertically integrated (the same firm produces inputs, manufactures the product, and sells at the retail level), it may be difficult for the cartel to determine at what point in the distribution chain cheating occurs. In contrast, if all firms sell to the same type of customers (for example, at the retail level), cheating is easier to detect.

II.3 Problems of Cartels[13]

In order to know how to identify cartels, it is important to understand how they operate. It is particularly important to understand the problems that cartels face, because that is often the key to finding evidence of their existence. A cartel must over come speed breakers i.e. problems if it is to succeed. It must be in a position to raise prices above the competitive level and keep them up there long enough to earn monopoly profits, in order to be successful. To be a successful cartel, first, all the relevant and significant

[12] Of course in this case, the same mechanism might help competition authorities to look out for signs of possible collusions.
[13] Supra Note 6

players in the market must be a part of the cartel. Second, the players as part of the cartel must agree on what price to charge, or the allocation of market share among members or some other parameter. Third, the players must make sure that none of them should try and cheat on the cartel by cutting its price a little bit, thereby making significant additional sales. Each of these problem areas is likely to create evidence of the existence of the cartel.

II.3.1 Agreement of All on the Cartel Agreement[14]

If there are substantial competitors who are not members of the cartel, it cannot function successfully for long. Such outsiders may sell for a lower price than the cartel members. This situation puts pressure on the cartel members to reduce their price. If an outsider competes more directly with some cartel members than others, the outsider will create pressure on those members to reduce their prices. This fact may create internal conflict within the cartel.

Therefore, there are strong reasons why the cartel wants all significant competitors to join the cartel. Attempts to include all firms may create evidence of the cartel. First, there may be documents within the cartel firms complaining about the outsider's failure to participate in the cartel. Second, there may be letters or other documents directed to the outsider that refer to or explain the cartel. Third, an outsider who was approached about joining a cartel can report what he or she was told about the cartel in the attempt to get him or her to join.

It is often fruitful to invest in efforts especially to find outsider firms that were approached but did not join the cartel. Because they remain outsiders, they often are willing to provide truthful information. It also is useful to talk to firms who were approached and did join, because they usually were given complete information in order to be convinced to join. As an investigative tool, it is useful to have the authority to promise such people or firms that they will not be punished if they tell the truth about what happened.

[14] Supra Note 6

It is however important to note that a cartel can sometimes operate without including all possible firms. A competitive fringe of small firms sometimes exists outside a cartel. If they cannot expand their output easily, the cartel can function without including them.

II.3.2 Reaching the Agreement[15]

The cartel must agree on its fundamental terms. For example, a price fixing cartel must agree on what price to charge. This may not be easy because different firms may have different incentives. A firm with higher costs will prefer a very high cartel price, while a firm with lower costs will want a lower price (that will still earn it a monopoly profit).

If several products are involved, the cartel members have to agree on a complicated schedule of prices. If one firms' product is not identical to other firms' products, they must agree on the ratio of the prices. They may have to decide if certain extras, such as delivery costs are included in the cartel price, or are priced separately. The more complicated the agreement that is necessary, the more meetings or telephone calls that are necessary. The more complicated the agreement, the more likely it is that they have created documents discussing, recording, or implementing the terms of the agreement. Similarly, a cartel that allocates customers or geographic territories or bids must agree on the allocation. They probably will have to bargain to determine who gets the most desirable territories, for example, or who wins the largest bids. These discussions, too, may generate evidence.

It is useful to ask cartel participants about intra-cartel conflicts about the terms of the agreement as such events are bound to be remembered. A study of the process of reaching the cartel agreement may produce evidence. Travel and similar records may show that meetings occurred. Documents may record the agreement, especially if it is a complicated agreement.

II.3.3 Policing the Cartel[16]

Cartels are inherently unstable. Generally, each member is capable of producing and selling more than the amount the cartel agreement will allow. This is because a cartel operates by raising price. Once the price is raised, a smaller amount of the product will be sold. Any one of the cartel members can increase its profits greatly if it could make

[15] Supra Note 6
[16] *Ibid*

more of the product and sell it a little bit below the agreed price. But if they all do this, the cartel will break down. Therefore, it is in the cartels collective interest to make sure that no member cheats by lowering its price. Cartel members can also cheat on the cartel in a variety of other ways: offering secret discounts; raising the quality of their product; not charging for delivery; and so on. It is typical for cartels to experience such cheating, and typical for them to take steps to police such cheating, that is, to prevent it, or to detect it and punish it. Some of the best evidence of a cartel agreement can be found in such policing conduct. For example, cartel members may communicate with each other about suspected cheating, they may selectively lower prices in a cheaters area, or they may threaten a cheater.

Having understood what cartels are, it is necessary to understand how does one go about detecting cartels? The next section explains various methods which can be used for the detection of cartels.

III. DETECTING A CARTEL

Detection of cartels is a challenging task. It involves knowing where they are most likely to form and operate. This has been worsened with the advent of globalisation; economic transactions have moved on from ink-paper to digital forms and beyond the physical boundaries of a nation state to where various stakeholders in the market can produce, sell and buy goods from stakeholders of different countries. Distance is no more a problem. The common consumer is subject to a higher degree of abuse, since firms have also become more powerful and better equipped to enforce their cartel agreements. Anti-cartel enforcement and the protection of consumer interest become extremely difficult when they cannot be governed by the laws of a single nation.

Large firms may decide independently to behave as though they had a cartel arrangement without a formal meeting; that is, each one can cut its output and hope that the others will do the same. Inevitably, in markets with an oligopolistic structure, firms take their rivals' actions into account. When firms in an oligopolistic market coordinate their actions despite the lack of an explicit cartel agreement, the resulting coordination is sometimes referred to as tacit collusion or conscious parallelism, which is not actionable under most competition laws.[17] In almost every country with a competition law the existence of an agreement must be proved. In other word, the sole existence of parallel prices is not sufficient to convict firms in a cartel case, but unfortunately parallelism is often used as an effective defence tool, beating the competition authorities with less investigative power, or experience.[18]

[17] The determination whether cartels unreasonably restrain the trade depends on the nature of agreement and on the surrounding circumstances that give rise to an inference that the parties are involved in some pernicious activity. There has to be an *explicit* agreement to purchase or sell the goods only at price or on terms or conditions agreed upon between the sellers or purchasers on which the goods are to be sold. Existence of an agreement (oral or written) is one of the essential conditions is to be fulfilled to establish a cartel.

[18] The Korean Fair Trade Commission (KFTC), for example, has many a time proved a cartel case based on circumstantial evidence related to price. They even enlisted some model cases in their internal guidelines - "Guidelines for Collaborative Acts". Accordingly, cartels may exist when parallel behaviours of enterprises in questions cannot be explained by market forces: (i) when price is identical or remains rigid despite changes in supply & demand, differences among suppliers of raw materials, and geographic distance between suppliers and consumers; (ii) when price changes are identical even when production costs vary due to differences in raw material costs, production processes, wage increases, and bill discounting rates; and (iii) when large price increases cannot occur in a short period of time without collaborative actions, given market conditions. Cartels may also exist when parallelism in actions among enterprisers is almost impossible without an agreement, considering structure of the industry in question, for example when prices of each enterpriser are identical, even with significant degrees of product differentiation; or when suppliers show identical actions, even when it is hard for them to do so.

As clear as it may sound, cartelist behaviour is difficult to detect, and even when detected, might be countered by various defences, (which will be discussed subsequently). To make it worse, cartels can occur in almost any industry and can involve goods or services at any level along manufacturing, distribution or retail lines. However, there are some sectors, which are more prone to cartel formation than others because of the industrial structure, and the way in which firms operate.

US and European courts have adopted a "*parallelism plus*" approach which requires showing the existence of "plus factors" beyond merely the firms' parallel behaviour, in order to prove that an antitrust violation has occurred.[19] This has been adopted in some cases in Brazil as well. In all these jurisdictions, there is an inclination to consider parallel behaviour as a first clue pointing to the presence of collusion. In other words, even though parallelism does not suffice to prove unlawful conduct, it may contribute to forming a suspicion of illegality.

In the US, the Department of Justice (hereinafter referred to as "DOJ") will investigate to check if there are sharp price increases (particularly after low prices) or stable prices in a slumping industry, parallel prices, concentrated sellers (10 or less) or an industry association, high barriers to entry,[20] joint sales agencies or inter-company sales (information sharing), homogenous products/commodities,[21] relatively sophisticated intermediate goods and services (chemicals, pharmaceuticals, plastics), relatively predictable and stable market (moderate growth) and market participants, social or cultural cohesiveness.[22]

In Brazil, the Secretariat for Economic Monitoring (SDE) is known to have developed a method to analyse complaints submitted, taking into consideration pricing behaviours and profit margins. Such a method – which is a first attempt to reach a filter and is still under discussion – is three pronged. Complaints are only prosecuted if cumulative conditions based on economic analysis are met. First, the profit margin tendency is

[19] Paolo Buccirossi (2006). "Does Parallel Behaviour Provide Some Evidence of Collusion", LEAR – Rome <http://www.bepress.com/cgi/viewcontent.cgi?article=1027&context=rle>

[20] It is important to note that in the *Vitamins* cartel, entry was slow and impeded by sunk costs and excess capacity.

[21] In the vitamins industry, for example, it is clear that for a given grade of bulk vitamin there is little or no differentiation across producers. Vitamins are widely viewed as "commodities," that is, products so homogeneous that delivered price net of discounts is the only factor driving buyers' decisions.

[22] Camatsos, S.G. & Foer, A. (2007). "Cartel Investigation in the US", American Antitrust Institute, Paper done for this project.

verified. If the profit margin decreases over time, the market is considered to be under a competitive behaviour, in which case the complaint is dismissed. Second, it is necessary to analyse whether the margin increase, if it has occurred, is linked to the reduction of price spread. If not, the case is dismissed. Third, if there is such a margin increase, then it has to be verified whether the margin and price dispersion behaviour follow the same pattern within a state geographical area. If they do, the case is dismissed.

Therefore, only in cases where there is a margin increase linked to the reduction of price spread not following the official established price by the State, the investigations will be continued.[23] This method, however, appears to be very intensive in statistical methods and might prove difficult to follow if a competition authority is not endowed with good staff strength in economics and statistics. Given below is an example (Box 4) where the parallelism plus factors have been used in Brazil. The main lesson from the example is that the parallelism plus doctrine can be successfully implemented in developing countries, including India, as a tool in detecting and prosecuting cartels.

Box 4: Parallelism Plus Doctrine in the Steel Manufacturing Sector
In a leading case in Brazil the Administrative Council for Economic Defence (CADE) adopted the "parallelism plus doctrine"[24] to prove the occurrence of a collusion amongst the three biggest Brazilian steel companies in order to raise plain steel prices to the same level at the same time.[25] CSN readjusted its prices in August 1st 1996 (3.63 percent for hot rolled steel sheets and 4.34 percent for cold rolled steel sheets) while Cosipa readjusted its prices in August 5th 1996 (3.59 percent for hot rolled steel sheets and 4.31 percent for cold rolled steel sheets)

[23] DAF/COMP/GF/WD (2006). 37,"Contribution from Brazil", Roundtable on Prosecuting Cartels Without Direct Evidence of Agreement, Global Forum on Competition

[24] See, among others, Kovacic, W., "The Identification and Proof of Horizontal Agreements under the Antitrust Laws" – Antitrust Bulletin 5. 1993: "Courts generally have geld that a pattern of 'conscious parallelism' or oligopolistic interdependence, without more, does not permit an inference of conspiracy on the whole, courts require plaintiffs who emphasise parallel conduct to introduce additional facts, often termed 'plus factors', to justify an inference of collective actions".

[25] Administrative Proceedings nº 08000.015337/94-48, Respondentes Companhia Siderúrgica Nacional – CSN; Companhia Siderúrgica Paulista – Cosipa e Usinas Siderúrgicas de Minas Gerais – Usiminas. Reporting Board Member Ruy Santa Cruz

and Usiminas readjusted its prices in August 8th 1996 (4.09 percent for hot rolled steel sheets and 4.48 percent for cold plated steel sheets).

The new prices were preceded by communiqués sent to buyers in July 17th 1996 (CSN) and July 22nd 1996 (Cosipa and Usiminas). Besides a meeting was held in the Ministry of Finance's Secretariat for Economic Monitoring (SDE) in July 30th 1996. Representatives of the three companies and one of the steel producers' association (Brazilian Institute of Metallurgy (IBS) informed the government body that they would raise their prices. The Secretary replied that the practice would be eligible for cartel.

This case was decided under the parallelism plus theory. So the plus factors found as sufficient to conclude that there was a collusion were: a) the fact that the first company to raise the price was the company with the lowest market share; b) there wasn't an increase in costs that could explain the joint increase of prices; c) the companies used the same way at almost the same time to communicate the price raising; d) the joint meeting at SDE.[26] Defendants suited an injury against the condemnation. The Federal Court Decision of First Degree however found that the CADE´s decision was correct. The Judge decided that the conduct for conscious parallelism without rational economic explanation could be used to condemn a cartel.

Source: Grinberg, M (2007), "Cartel: A view from Brazil", Paper done for CUTS International

One of the principal methods of cartel detection and prosecution including leniency, is discussed in Section 4. Agencies need to have a variety of effective investigative tools and approaches at their disposal to detect cartels and cannot rely on one tool or approach. The extent to which there is a perceived risk of detection depends on many factors, including a history of agency detection and a belief that the agency has strong

[26] Concerning this aspect, the following understanding was adopted: if the companies asked for a joint meeting to communicate the price rises, they must have to know that each one will raise their prices. So, this fact was an evidence of the collusion.

tools to use. If an agency does not have sufficient capacity or means to detect cartels, its leniency program is likely to be ineffective. To optimise its level of detection, an agency needs to find, among other things, the right complement of reactive and proactive detection methods.

III.1 Factors Facilitating Cartels

III.1.1 Role of Trade Associations

The organisation cost of a cartel is significantly lowered where a trade association exists. Trade associations, by lowering the cost of meetings and coordinating activities among firms in a market, facilitate the establishment and enforcement of a cartel. Having undertaken analysis of 82 cases (see Annexure I) we found instances where associations of Lorry Owners, Tyre Industry, Mill Owners, Cement Manufacturers, Kirana Merchants, etc have formed a cartel and have been investigated by the MRTPC. Thus, in the near future it is important for the CCI to keep a check on the activities and behaviour of various different trade/business associations that exist in India. It is important to note that though most industries have trade associations that meet regularly, though not all trade/business associations necessarily form cartels. CCI could target individual members of the trade associations and give them the incentives to seek protection as a whistleblower and reveal the formation of cartels.

III.1.2 Public Policies and Cartels

Government policies[27], especially those that make prices readily available to all interested parties or those that divide markets into small segments, also facilitate cartel activity. Many of our government policies are framed and implemented to promote competition; however, there can be exceptions. One example observed in India is the policy and practice of State Governments to give preference to local units in their procurement policy. Under such a policy, price and/or purchase preference is given to small scale sector units, with the objective of protecting and promoting such small scale sector units. In the context of the overall development policy of the state, such policies may be desirable. However, concerns arise, when the policy creates conditions for formation of a cartel of local manufacturers, which is solely dependent on Government's patronage (see Box 5).

[27] Dayal, P and Agarwal, M (2006). "State Government Policies and Competition", Towards a functional competition policy for India, Pradeep S Mehta (Ed), CUTS International & Academic Foundation.

Box 5: How Government is Wasting Rs 800 cr a Year

A Daily News & Analysis (DNA) investigation captures the annual loss on government purchases of Rs 800 crore or more made through the Directorate General of Supplies & Disposals (DGS&D) rate contract. The DNA report found that prices for 9 out of 10 items in the DGS&D's rate contract were higher than the open market prices. The DGS&D has signed contracts with eight manufacturers spread over India, of which seven have quoted the same price of Rs 12,896 for 800 kva inverters. Hence, the government is paying 25-30 percent more for bulk purchases.

DNA found the prices of 800 kva inverters in the open market to be 16-25 percent less than what the government was paying. For a laptop with Intel Core Duo technology, the retail price lies between Rs 33,000-43,000 against the DGS&D's recommended pricing of Rs 53,000. Though prices of computer desktops have dropped significantly, it is not indicated in the contract, and DGS&D will continue to buy them at Rs 38,500 till September 2008. In Delhi, dealers were ready to drop the price to Rs 12,000. Still the DGS&D annual report claims: "For the IT directorate, prices are stable due to fierce competition".

If the competition is so fierce, then how are all manufacturers selling a basic Celeron laptop at Rs 38,870?" asks an anonymous official within the DGS&D, who believes that cartels have colluded to keep rate high.

Moreover, value of orders routed through the DGS&D has steadily increased over the last 10 years from Rs 2,075 crore in 1996-97 to Rs 3,053 crore in 2005-06. Why does a 25-litre geyser on the DGS&D rate contract cost between Rs 2,900-3,200 when the same can be purchased for 10-20 percent less? "The prices in the rate contract do not have to match retail prices of the product in the market." says a manufacturer.
The Central Bureau of Investigation (CBI) is presently investigating at least eight cases against DGS&D officials.

Source: http://sify.com/finance/fullstory.php?id=14582443

In such cases, the government ends up paying higher price for a product, which is often of poor quality, as seen in the following example.

As per an earlier policy of the Rajasthan government (during the mid-1980s), a certain quota of barbed wire was to be procured from local manufacturers. This is supposed to have led to the formation of a 'cartel' under the name of Rajasthan Barbed-wire Manufacturers Association. This association hiked the prices and with an implicit arrangement allotted the total requirement of barbed wire amongst its members. As collusion killed competition it led to poor quality of barbed wire being produced. But the Government was tied to its policy and had to buy barbed wire at a price above the open market level. These local manufacturers depended solely on the Government's patronage, rendering them uncompetitive. Over time, the Government changed its procurement policy, leading to closure of local units and the association folded.

III.1.3 Excise Policy

Another sector in India, where cartelisation has been encouraged due to faulty government policy is the distribution and marketing of liquor. In certain states, licenses for liquor sale in large geographical areas are auctioned; competition is thereby restricted to a small number of players, who have the muscle power and the money to run the business. Thus over a period of time, it leads to cartelisation which in turn leads to a loss of government revenue and poor consumer choice. Some state governments have sought to tackle this collusive practice by allotting liquor trade licenses through a lottery system. This has helped in keeping a check on collusive practices. Such licence systems have been found to be successful in states such as Madhya Pradesh, Uttar Pradesh, Maharashtra, West Bengal, Andhra Pradesh, Karnataka, and Kerala.[28]

III.1.4 Government Procurement Policies

Another area of government procurement where there are cases of collusion is construction contracts. All the projects are generally taken up by government agencies through the medium of contractors. Except in some cases, the works are awarded through a system of (open and widely publicised) competitive bidding, which may be international or domestic. The system of competitive bidding is sound. Notice inviting tenders, for a particular work, are published in newspapers. Bids are opened in front of all the bidders, and the lowest bidder is determined through a transparent system and awarded the work. Be that as it may, this seemingly faultless system may not yield the desired results, because of cases where contractors collude and there is a tender mafia

[28] Supra Note. 27

at work. As a result of these distortions, competition is subverted and the bidding system fails to produce efficient results. Additionally, there is now a trend towards awarding contracts in bigger packages, which leads to the exclusion of small contractors from bidding for the contract, thus restricting competition and providing large contractors with incentives to collude". [29]

The extent of the problem of procurement policies could be understood from the observations made by the Parliamentary Standing Committee on Railways in the year 2004, "The procurement of concrete sleepers has become a very sensitive matter, because a lot of unscrupulous existing manufacturers have formed a cartel to secure orders by unfair means or tampering with procedure and simultaneously keeping the new competitors out of the race. The Committee is constrained to notice that there exists a regional imbalance in the setting up of concrete sleeper manufacturing units. They also express their unhappiness that new entrants are not encouraged, which ultimately strengthen the cartel of old/existing manufacturers. In procuring 160 lakhs broad gauge sleepers, the Railways awarded contracts to the existing 71 firms and ignored the 24 new firms entirely".

The South Central Railways in India have taken necessary steps to create disincentives for firms to collude by mentioning very clearly in their tender notices for procurement of material that whenever, all or most of the approved firms quote equal rates and cartel formation is suspected the Railways reserve the right to place an order with one or more firms with exclusion of the rest without giving any reason. In addition to that, firms who quote in a cartel are warned that their names are likely to be deleted from the list of approved sources. However, whether the same is being implemented effectively, needs to be analysed.

CCI's recent initiative has been to draw the attention of the Reserve Bank of India to distortions in banking due to the limited presence of the private sector, high entry barriers for foreign banks and cartelisation among banks in setting interest rates. CCI pointed out that during the last 10 years; Reserve Bank of India (RBI) has given licence to only two private banks – Yes Bank and Kotak Mahindra Bank. Strict licensing norms for branches and automated teller machines and restrictions on locations have

[29] Supra Note 27

created high entry barriers. Further, it hinted at banks working as a cartel under the Indian Bank's Association banner in setting interest rates for savings accounts.

This particular study is not undertaking analysis of any particular policy of the government and whether the same facilitate cartels. However, it is highlighting examples of government policies facilitating cartels and that there is need for CCI to carry forward this work and do a more comprehensive analysis of various policies/practices at the level of States. However, as mentioned there are several existing policies, statutes and regulations of the Central Government restrict or undermine competition.

A review of such policies, statutes and regulations from the competition perspective (this is referred to as 'competition audit' in several countries) should be undertaken with a view to remove or minimise their competition restricting effects. Proposed policies, statutes, regulations that impact competition should be subject to competition impact assessment through an internal mechanism. Regulatory impact analysis should be a pre-condition for imposing regulation in any sector. Any privatisation attempt should take into account the competition dimension. The expert assistance of the CCI should be utilized in this exercise. Various states in India, should on their own, need to come forward to avail of the benefit of the expert advice of CCI in undertaking competition audit of their legislations, regulations and policies.[30]

The following section outlines and discusses the next step to be taken by a competition agency after detection of cartels, i.e. investigations to prove the cartel activities. Investigation includes collection of evidence as well as use of other tools which are at the disposal of competition agencies.

[30] 2007, "Report of the working group on competition policy", Planning Commission, Government of India

IV. INVESTIGATING CARTELS

Due to the inherently secretive nature of cartels, the evidence that can be collected to prove a cartel agreement is largely circumstantial. It may include evidence of parallelism plus factors (see Box 4) i.e. plus evidence of meetings or communications between competitors, but it is difficult to detect direct evidence of an agreement to form a cartel. As mentioned earlier, in most of the cases, it is legally possible to sustain a cartel prosecution without evidence of direct agreement, but it is risky to try to do so. The chances of failure are high. The case descriptions also include a few in which the circumstantial evidence was insufficient. The cartel prosecutor always strives for more direct evidence, but, as was noted above, such evidence is difficult to obtain, and doing so requires special techniques/tools, such as dawn raids, and leniency provisions, which shall be discussed in more detail subsequently.

Generally, many cartel investigations (see Annexure III) have been started once the competition authorities received a private notification or information about the existence of such alliances. An agency can first become aware of cartel activity through information, typically from a direct or indirect purchaser of the cartelised goods, or from a competitor who may be excluded from the cartel arrangements. Alternatively, information may originate from any member of the general public who may become aware of an issue or be suspicious of cartel activities. Agencies also tend to receive information about suspected cartel behaviour from consumers and disgruntled employees. Through rigorous filtering process, information is found relatively quickly to be without legal foundation.

This helps avoid diversion of valuable resources away from investigations into genuine cartel behaviour. Unfounded information generally arises because of confusion between illegal cartel behaviour and legitimate activities such as price-setting. In rare instances, information may be given as part of an attempt to cause trouble for a competitor. It is important to keep all possibilities in mind, particularly during the early stages of a case as more information is obtained about the behaviour and the parties involved.

Genuine information may take the form of customers complaining that they have been allocated or are locked into a specific supplier and are unable to go elsewhere. Alternatively, the customer may have been told by the supplier that his business was

won in some sort of backroom transaction with another supplier, or that the supplier was 'owed' some business by the other supplier. Procurers may spot unusual bidding patterns, such as rotation of bids between competitors. Agencies may use various measures to influence the focus/nature of the information through public identification of sectors on which enforcement efforts would be concentrated. In addition to encouraging information or leniency applications, agencies may encourage companies to comply with the jurisdictions' laws and regulations and may even have a form on their website for procurement authorities to furnish information if they suspect that bid-rigging has occurred.

It will usually be necessary to protect the identity of a complainant throughout the lifetime of a case to avoid the possibility of reprisals, particularly if the complainant is a rival competitor. One consequence of not revealing the identity of a complainant is that information provided by the complainant cannot be used in evidence but only as intelligence in the search for evidence. Some agencies recognise a complainant as being a third party to the case, with the right to make representations on key documents.

Despite being accorded top-most priority, cartel prosecution is still only one of the many tasks, though the most difficult one performed by the authorities. Limited resources with lack of information/data and the inherently secretive nature of cartels are the main reasons undermining the efforts of authorities to watch out for them though it is in the authorities' mandate to monitor the market. This is very much the case in India and Brazil and many other developing-country jurisdictions.

In the case of India, as will be seen in subsequent parts, most of cartel prosecution activities under the MRTP Act have been triggered either by anonymous complaints or on the basis of *suo moto* action taken by the MRTPC. The commission used its power to pursue the investigation and sometimes even expand the ambit of the case. Anonymous complaints or private information, though often denounced by the defendants as unreliable, in the case of a country like India, deserve worthy attention.

Brazil decided to have three agencies to deal with cartels as it was not sure that one agency could do a good job. The Administrative Council for Economic Defence (CADE) is the ultimate decision-making agency and the only independent one. The

investigation itself is, however, done by the Secretariat of Economic Law (SDE), of Ministry of Justice, which, at the end of any investigation, can either dismiss the case, with an automatic (*ex-officio*) appeal to CADE or send the case to CADE with a recommendation for punishment. Furthermore the Secretariat of Economic Assistance (SEAE), in the Ministry of Finance, which is in charge or supplying economic expertise and which, on some occasions, has triggered cases.[31]

It deserves mention that for its entire history CADE has been totally independent and free from political influence. One of the reasons may be the provision that the Commissioners cannot be dismissed during their tenures. SDE and SEAE can theoretically be subject to political influence, because they are located in the executive branch. However, there is a tradition of independent and technical analysis, although it is some times biased by a natural tendency to convict.

CADE has seven Commissioners, (including its President) chosen by the President of the Republic (normally upon recommendation of the Minister of Justice) from among lawyers and economists. Due to the low salaries and conflicts faced during and after the tenures most of the Commissioners come either from the civil service or academia. Successful lawyers and economists in the private sector usually do not accept such appointments because of the low salaries. SDE, the investigative body is usually managed by very young but talented and dedicated people. One hopes that these young people will stay on and improve the general culture of SDE. It is often odd for a senior lawyer to deliver his arguments before a recently graduated (sometimes pimpled) lawyer (or economist, as the case may be). Of course they do their best to compensate for the lack of experience with natural talent and thorough dedication. On top of these problems there is a very high turnover. SEAE on the other hand is a governmental body which has a career for its economists, who usually are experienced persons. However, all three organisations are under-staffed for the important job they have to perform.

Keeping track of the market is always difficult for these people, mainly due to the lack of resources. Information is often problematic as time and money required might be prohibitive. The private companies that submit their cases before the authorities are often the best source of information (because there is no cost) that the authorities find.

[31] Grinberg, M (2007), "Cartel: A view from Brazil", Paper done for CUTS International

This situation is changing, although slowly, with communications among the various Governmental bodies supplying information to each other.

Investigations can be triggered either by a private notification or by the authorities themselves (although it seldom happens), due to their general obligation to monitor the markets. The investigations follow some already known procedures, but generally there is an interested party supplying evidence against the accused parties. The investigative powers are almost unlimited – except for what is related to the due process of law – and they include deposition of witnesses, documents and others. After implementation of the Complementary Law, the possibility of unannounced raids, have become very popular. These raids are only possible after a judicial order and thus depend on the ability of the authorities to convince the judges.

But the main problem remains. The investigation is, as described above, totally administrative. However, due to a Constitutional provision, no exemptions for judicial reviews are granted to administrative acts or decisions and thus just about all decisions about cartels are being challenged before the Judiciary. There are many other problems, starting with the well known lack of structure of the Brazilian Courts. This is enhanced, in the case of competition issues, which require deeper economic analysis. Most of the Judges in the Brazilian courts do not have formal education in economics and they fail to undertake economic analysis. A relevant market definition, that is quite obvious and straightforward for a competition lawyer, may not be comprehended by a Judge; it must be remembered that Brazil is a civil law country with a codifying tradition (it is true that countries in Continental Europe also follow civil law but their historical background may have made things easier).

In the U.S., cartels are prosecuted as criminal offences under the Sherman Act. Section One of the provisions of the Sherman Act states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." Criminal violations of the Sherman Act are punishable by fines of up to US$100mn on corporate defendants and US$1mn on individuals. Fines may also be set at double the gross amount gained by the defendants or lost by the victim. Criminal violations by individuals of the Sherman Act are also punishable by up to ten years' imprisonment. If

a private civil suit follows a government action under the Sherman Act in which the defendant has been found liable, the plaintiff may use the earlier judgment as *prima facie* evidence of a violation. Private parties can obtain injunctive relief and are generally entitled to treble damages (a term that indicates that a statute permits a court to triple the amount of the actual/compensatory damages to be awarded to a prevailing plaintiff, generally in order to punish the losing party for willful conduct), as well as recovery of reasonable attorneys' fees, for violations of the antitrust laws. The U.S. Government can also sue for treble damages as compensation for injury to its business or property resulting from an antitrust violation.

As cartelisation is a criminal offence in US, the Antitrust Division of the Department of Justice (DOJ) [32], together with the US Attorney's office, is delegated with the authority to enforce criminal provisions on cartel members. Both the DOJ and the Federal Trade Commission can enforce the federal antitrust laws through civil means. However, the focus is always on the DOJ which brings almost all cartel cases before the federal courts. The FTC operates primarily through an administrative process.

a. Civil Action[33]

In investigating a civil charge, the DOJ examines records of a business by issuing a civil investigative demand (CID) before a formal complaint has been filed. The enforcement of a CID is analogous to that of a subpoena *duces tecum* issued by a grand jury. Its scope is similar to that permitted under the Federal Rules of Civil Procedure. It is a procedural device that allows the DOJ to obtain information needed to pursue possible antitrust violations. A CID enforcement suit must be brought before the federal district court that is responsible for the region, where the target company is found or transacts business.

After the civil suit has been filed, the Department can use the Federal Rules of Civil Procedure to acquire discoverable material. Civil action can be initiated for either injunctive relief under section 4 of the Sherman Act and section 15 of the Clayton Act, or damages under section 4A of the Clayton Act if the US Government itself was injured by the violation. Injunctions sought by government enforcement action

[32] Supra Note 22
[33] *Ibid*

generally focus on restraining anticompetitive conduct or behaviour. If the Department files a civil suit to recover damages, it is entitled to claim the same as that allowable to private parties when injured by reason of a price-fixing scheme.

Under section 4B of the Clayton Act, the statue of limitation for a civil antitrust action for damage is four years from the time the claim for relief accrues. Because suits for injunctive relief are equitable in nature, no statue of limitation governs the commencement of that suit.

b. Criminal Procedure

Although the DOJ has various tools for initial investigations, [34] it usually recommends a federal grand jury investigation into price fixing or bid rigging allegations. The grand jury is a group of 16-23 individuals who listen to a hearing of the case from the point of view of the government. There were approximately 56 sitting grand juries, around the U.S., investigating suspected international cartel activity as of the end of 2005. The grand jury investigation begins with the DOJ issuing subpoenas for documents in the name of the grand jury. In most cases, this is the first time that the defendant hears about the DOJ inquiry.

Having received the subpoenaed documents, the government starts the process of oral testimony and calls witnesses before the grand jury. The documents obtained may be used in examining these witnesses. On the completion of the hearings, the DOJ prepares a draft indictment and a detailed fact memorandum that is sent to the Assistant Attorney General for Antitrust. The defence counsel, who was not present at the grand jury hearing, may offer additional facts or arguments. The Assistant Attorney General will decide whether or not to indict certain individuals, or organisations, often after lengthy plea bargaining.

At the criminal trial, in a US District Court, the government is required to prove beyond reasonable doubt that the defendants have committed the acts charged in the indictment. There is also an appeal procedure available for defendants. However, the Court of Appeals does not sit for the purpose of reviewing the evidence in a jury case,

[34] Through: 1) the voluntary cooperation of the target, 2) by exploiting the investigative powers of the Federal Trade Commission, 3) by initiating a suit with a "skeleton" complaint in order to invoke the discovery provisions of the Federal Rules of Civil Procedure, 4) civil investigative demand (CID)

as long as there is some evidence at trial that supports the verdict. Further appeal to the US Supreme Court is theoretically possible but the Supreme Court rarely chooses to hear criminal antitrust appeals.

Given below is an example of the Vitamins Case litigation[35]. This is perhaps the best-documented global cartels case, which lasted from 1990 to 1999. The litigation also returned to victims an unprecedented total amount (if we consider all similar related antitrust cases in history) although arguably the total of damages and penalties worldwide were still less than the excessive profits gained through vitamin cartelisation.

Complaint

"The first suit in the case was filed in Alabama state court in 1997, on behalf of a class of indirect purchasers with a named plaintiff who had purchased vitamin products for use in his farming operations. The complaint alleged a conspiracy among the three major vitamins manufacturers, Hoffman La Roche, Rhone-Poulenc SA, and BASF AG. Apart from the allegations that the defendants were fixing prices, it was also alleged that the defendants participated in meetings and discussions of prices, had exchanged completely significant information, and monitored compliance."

"The first private complaint, in federal court, which was filed in March 1998, on behalf of a class of direct purchasers alleged that as early as 1990 and continuing into 1998, the Defendants conspired to fix prices, allocate markets, and engage in other collusive conduct with respect to certain vitamins, vitamin premixes and other bulk vitamin products. A subsequent filing in December 1998 on behalf of direct purchasers provided even more detail about an international cartel whose participants met regularly inside and outside the US to fix prices and allocate customers."

"To understand why there were so many different private cases; one must understand that the Supreme Court had held in 1976 that under the federal antitrust laws, only direct purchasers had the required standing to bring an antitrust action for damages resulting from alleged overcharges. Due to controversy immediately following this case, various states began passing "*Illinois Brick* repealer laws" permitting indirect

[35] Supra Note 22

purchasers to recover under state antitrust laws; in other states, courts interpreted existing statutes to permit recovery by indirect purchasers. These repealers were not pre-empted by federal antitrust laws. Thus, there is at least the theoretical potential for duplicative litigation and/or multiple liabilities in the state and the federal courts. Indirect purchasers could only bring their complaints in state courts while direct purchasers could bring federal, or state, complaints. Vitamins were sold to direct purchasers who re-sold them to indirect purchasers. Both categories of purchasers could and did allege damages against the cartel."

Investigation

"In 1997, a client of David Boies III, a son of a high profile attorney specialising in antitrust class action litigation, told him about what appeared to be secret price-fixing meetings in the vitamins industry. He began his own investigation and learned that vitamins manufacturers sell most of their output in dry powder form, eventually to be used for human and animal nutritional purposes in a wide variety of products. In the initial stages of this distribution process, most vitamins are blended into "premixes," which are combination of vitamins. Although the major vitamins manufacturers sell premix, there are also some independent blenders who buy vitamins straight from the manufacturers and sell them in blends. Boies began talking to these independent blenders and found out that these companies also suspected some collusion was occurring among the vitamin manufacturers. As time passed, his firm found more evidence, and by December 1997 decided they had gathered enough to file suit. The interesting statement made by Boies was that his firm uncovered and ultimately proved the collusion "without the benefit of government involvement."

During the same period, however, the Justice Department was also working on an investigation of price fixing in the vitamins industry. US investigations first got wind of the vitamins cartel and Roche's role in it in late 1996 from sources at Archer Daniels Midland Company (ADM) who was then cooperating with the DOJ in its investigation of the citric acid cartel. The FBI interviewed the head of Roche's Vitamins division in March 1997."

Evidence

"More evidence of the illegal activity began to appear in 1997, after the initial investigations. A partner in Boies' law firm, Boies & Schiller, claims to have discovered evidence of price fixing. He began hearing many complaints from Roche customers. Customers who purchased from Roche were not able to get price quotes from BASF or other suppliers. Buyers of vitamin C were threatened with unspecified retaliation should they try to resell purchased products."

"In late 1997 and early 1998, lawyers working for Roche heard about allegations that some managers in the company were fixing vitamin prices. This discovery seemed to be corroborating evidence because a top Roche official issued a directive specifically ordering that the conspiracy be stopped. This additional information led Boies & Schiller to file a civil price-fixing suit in 1998. The allegations made in the suit, and perhaps other allegations were forwarded to the DOJ and a grand jury was established."

"Then, in 1999, after the chloride cartel was revealed, the DOJ negotiated with Rhone-Poulenc, a French pharmaceutical manufacturer, apparently for admission into the leniency-program. This explains why this apparently important participant in the conspiracy was not charged. The Rhone-Poulenc managers agreed to attend a conspiracy meeting and tape record it. The evidence that the company revealed must have been highly incriminating because within two months, Roche and BASF pled guilty and received very high fines. The government noted that information provided by Rhone-Poulenc, "together with information being provided by others, led directly to the charges" and to the decision of the defendants "not to contest the charges and to cooperate with our investigation".

Likely Impact of the Vitamin Cartel

During the duration of the vitamin cartels, vitamin prices were increased from 60 percent to 100 percent. In terms of direct overcharges on buyers, the total amount worldwide was about US$7bn. Buyers in North America, the European Union (EU), and Asia incurred roughly 90 percent of the global cartel overcharges. The sales of these global cartels occurred in virtually every country in the world, but were concentrated in North America (20 percent), the European Economic Area (29 percent), and Asia (55 percent). For all of the cartels together the overcharges amounted to more than 40 percent of affected world commerce.

Outcome

Almost all of the private vitamins cases were settled. The only vitamins case that went to trial was the chlorine chloride conspiracy, where the jury decided that the cartel had overcharged purchasers as the defendants had conspired to fix the price of chlorine chloride. In 1999, six of the main vitamins companies agreed to a settlement in the private class-action litigation brought in federal court on behalf of direct purchasers of vitamins and vitamin premix. Later in 2000, the Justice Department announced guilty plea agreements from two Swiss nationals and two German nationals, of whom three were high officers in BASF's Fine Chemicals Division and one was in a similar position at Roche.

In the same year, two more German pharmaceutical manufacturers (Merck and Degussa-Huels Ag) were added to the list, along with two US firms (Nepera, Inc., and Reilly Industries). These guilty pleas involved the vitamin C and vitamin B3. Fourteen chemical companies were convicted by the US for price-fixing in the vitamins market. US fines for these fourteen companies and fifteen of the officers were US$915mn. Two firms received amnesties from the DOJ under the leniency program. Additionally, sixteen senior executives of the vitamins manufacturers were criminally indicted, of which fifteen received personal sentences.

IV.1 Tools to Undertake Cartel Investigation

IV.1.1 Dawn Raids

For most countries there is one most effective tool available to the cartel prosecutor – the "dawn raid",[36] or unannounced visit to the offices of suspected cartel operators for the purpose of seizing documentary or electronic evidence of a cartel agreement. Dawn raids are not too difficult to undertake, and can generally bring good results, especially in cases in which the alleged companies refuse to cooperate. More and more competition authorities across the world are employing the dawn raid tool to good effect. It is probably safe to say that an anti-cartel programme cannot be truly effective without the use of this evidence-gathering tool.

In today's world, with advancement in technology information relating to cartels can be stored electronically. For the information to be retrieved, it is required that the

[36] This term is most often used by the European Commission of its surprise early morning investigations

competition authorities must have staff, or access to individuals, with the necessary skills. This is why, in some jurisdictions, powers exist to listen to telephone conversations; to maintain surveillance, for example, of office premises to monitor who is attending meetings there; and even to require staff to attend meetings of a cartel and to report back to the competition authority of what had taken place.[37]

Finally, in order for a dawn raid to be effective, the fact that a competition authority is conducting an investigation must be held in strictest confidence even within the authority. That is, the suspected members of a cartel must have no prior knowledge that they are under investigation. This is a tricky point, since the procedures in most countries require that the competition authorities seek authorisation from courts in order to conduct dawn raids, once they think they have sufficient conclusive evidence of the violation. The longer and more complicated the process, the more players it involves, and there is a higher possibility that information might leak (see Annexure II titled, "Good practices relating to search and seizure"), which could be customised by competition agencies as per their own customs and requirements.

In the US, the tool closest to this is the use of search warrants in antitrust investigations. Unlike a subpoena (a command to a witness to produce documents issued by the grand jury) a search warrant typically does not provide the recipient with advance notice. It gives the law enforcement officers the benefit of surprise and consequently creates a much more volatile situation. In addition to search warrants issued by a court, several administrative agencies have the power to inspect the records of government contractors or participants in government programmes.[38] Besides, the DOJ can make use of informants, consensual monitoring/wiretap authority, and hidden microphones and video cameras.

The Civil Procedure Code of Brazil empowers the competition agency investigative powers as granted to a judge in a civil court. The Law gives the investigative authorities the power to search and copy whatever they feel is important, provided 24 hours notice is given to the relevant party. However, under certain circumstances, the law allows the

[37] On the powers to this effect in UK law, see Whish (2003). *Competition Law,* 5th edition, Oxford University Press, pp. 392-393.
[38] Supra note 22

authorities the power to search without giving prior notice if they have a judicial order to support their actions.[39]

In 2003, SDE undertook its first dawn raid, descending on the premises of contractor Sindipedras, which was quite successful. SDE has been investigating the members of a civil contractors' association on suspicion of bid rigging for three months. The raid was mounted on 16 July 2003 in connection with the alleged cartel and was authorised by a Federal Judge under the rules introduced in 2000, with the support of the Solicitor-General. According to local newspapers, the raid came as a total surprise. Five federal policemen accompanied the SDE and court officials and seized notebooks, tapes (See Box 6) and computer equipment. A formal investigation into the bid rigging has been opened by SDE. According to the authorities, the cartel was in operation for more than two years, resulting in artificially high prices in the civil construction sector and affecting public works in São Paulo.

Box 6: Our Competitors Are Our Friend, Our Customers Are the Enemy

The lysine tapes were undercover audio and videotapes recorded by US Federal Bureau of Investigation (FBI) agents with the help of a cooperating witness. The tapes captured an international cartel in the act of fixing prices and carving up the worldwide market for the feed additive – lysine – a product used by farmers around the world. The tapes further exposed the cartel mentality, which was so contemptuous of its customers, and antitrust laws that it adopted the slogan: **"**Our competitors are our friend. Our customers are the enemy:"**!**

The tapes provided conclusive evidence of the conspiracy. What has made these tapes such an effective deterrent is not just the unnerving notion that the FBI might be watching, but the fact that high-level executives went to jail and their companies paid heavy fines as a result of their cartel activity.

Source: Scott D Hammond, The Fly on the Wall has been Bugged, 2001

[39] Supra note 31

In India, the tool closest to dawn raids is visible in the MRTP Act under section 12 (5). If the Commission has grounds to believe that any books or papers are relevant to an inquiry and need to be produced, the section empowers the Commission to authorise any of its officer to undertake entry, search and seizure to recover such documents. In the Competition Act, as compared to the MRTP Act, the Director General would need to invoke Sections 240 and 240 A of the Companies Act, 1956 to undertake search and seizure, as he is given the powers of an inspector under the said sections.

IV.1.2 Leniency & Whistleblower Protection

In the increasingly sophisticated world of global competition law enforcement, it is becoming the norm for competition authorities to have an effective leniency policy (Annexure IV). The international explosion of leniency programmes is perhaps not surprising given the competition authorities' increasing focus on the elimination of cartels. The economic damage caused by cartels to the interests of consumers and the wider market is globally acknowledged. In the words of the European Competition Commissioner (*speech: "The First Hundred Days", Neelie Kroes, International Forum on European Competition Law, Brussels, April 07, 2005, SPEECH/05/205*): "Cartels attack free markets at their very hearts. They don't just mess up the grass on a level playing field – they blow great holes out of the surface. And it is consumers who are asked over and over again to pay the price of replacing the turf." The detection, prohibition and punishment of cartels are therefore now accorded the highest priority in key competition jurisdictions. However, the essentially covert nature of cartels often makes them difficult to uncover; the highly secretive co-operation between cartel members can result in arrangements with little documentary evidence, and third parties may not be sufficiently aware to alert the competition.[40]

Leniency is a generic term to describe a system of partial or total exoneration from the penalties that would be applicable to a cartel member, which reports its cartel membership to a competition enforcement agency. This is a definition, which has been used by the International Competition Network in its 2006 report on "Drafting and Implementing an Effective Leniency Programme".[41] The term 'leniency', thus, could

[40] ICN (2006). "Drafting and Implementing an Effective Leniency Programme", Anti-Cartel Enforcement Manual, Cartel Working Group – Subgroup 2: Enforcement Techniques, p.
[41] *Ibid*

be used to refer to total immunity and 'lenient treatment', which means less than full immunity from punishment.[42]

The terms 'immunity', 'leniency' and 'amnesty' are used in various jurisdictions to describe partial or total exoneration from penalties but are not synonymous in all jurisdictions. A leniency policy describes the written collection of principles and conditions adopted by an agency that govern the leniency process.[43]

Various jurisdictions have developed programmes that offer leniency, bearing several key objectives in mind. First and foremost is to be more proactive in prosecution – making conviction more likely by encouraging violators to confess and implicate their co-conspirators with first-hand, direct "insider" evidence that provides proof of conduct, which the parties want to conceal. Leniency programmes are also aimed at enhancing the likelihood of detection – promoting the discovery of conspiracies that would otherwise go undetected. The third goal of such programmes is desistance, i.e. destabilising existing cartels. The final rationale for adopting such programmes lies in its deterrence effect, which is to make cartels less profitable and hence prematurely stop the formation of cartel arrangements.

The programme elicits confessions, direct evidence about other participants and provides leads that investigators can collate as evidence. The evidence can be obtained more quickly and at lower direct cost compared to other methods of investigation, leading to prompt and efficient resolution of cases. Parties who provide the information are promised lower fines, shorter sentences, less restrictive orders, or even complete leniency.[44]

Competition authorities across the globe are persuading whistleblowers in approaching them to give information about companies coming together and forming a cartel. A whistleblower is an insider, typically a current or former employee, who reports cartel conduct in violation of the law to an agency. Such an individual almost always requires a guarantee of confidentiality and anonymity. However, some jurisdictions provide whistleblowers with legal protection from victimisation and dismissal.

[42] Supra Note 40
[43] *Ibid*
[44] *Ibid*

A whistleblower typically is an employee or ex-employee who resents his employer for some reason, such as a demotion or a dismissal. Whistleblowers are in practice often ex-employees and a fair amount of time may have passed since the whistleblower became aware of the cartel activity, so that any incriminating documents may no longer exist.

However, there are certain conditions required for grant of immunity, for example the whistleblower i.e. the individual must not be the ringleader of the cartel and he needs to cooperate with competition authority for the investigation against the cartel members. Once the conditions are fulfilled to the satisfaction of the competition authorities, complete immunity is available from any penalty that might have been imposed if the competition authorities discovered the relevant cartel without the whistleblowers cooperation.[45]

In short, there are two main dimensions to any leniency programme, which should be carefully devised:

- First is the criteria for being awarded amnesty, including the stage of the investigative process at which leniency is possible, the maximum number of firms that can apply for leniency, and the eligibility criteria for leniency.

- Second is the extent of waiver of penalties when amnesty is awarded to any firm. There is no single formula for all these details and different jurisdictions, which have adopted a leniency programme so far, have been very detailed about the different leniency treatments that can be given to different parties.

Treatment of Leniency under the Competition Act

The coordination game faced by cartel members in the face of a leniency programme is worthy of mention. Given a choice, each yet-to-be-detected cartel members would surely contemplate about whether or not to apply for leniency. In this case, there can be two solutions: the "No Report" solution – in which firms do not apply for leniency; and the "Report" solution – in which firms race to report to the competition authority. Besides, cartelised firms also face a 'prisoner's dilemma' (See Box 7) which might tilt

[45] Whish R. (2006). "Control of Cartels and Other Anti-competitive Agreements", Professor of Law, King's College London

the balance in favour of the "No Report" solution. Applying for leniency to the competition agency poses the risk of not getting the full leniency a firm wants to have, while being punished by other cartel members (for cheating) in case the cartel persists; whereas not applying poses the risk of the cartel getting prosecuted and being liable to heavy penalties.

Box 7: Prisoners Dilemma

Two suspects, A and B, are arrested by the police. The police have insufficient evidence for a conviction, and, having separated both prisoners, visit each of them to offer the same deal: if one testifies for the prosecution against the other and the other remains silent, the betrayer goes free and the silent accomplice receives the full 10-year sentence. If both stay silent, both prisoners are sentenced to only six months in jail for a minor charge. If each betrays the other, each receives a five-year sentence. Each prisoner must make the choice of whether to betray the other or to remain silent. However, neither prisoner knows for sure what choice the other prisoner will make. So this dilemma poses the question: How should the prisoners act?

The dilemma can be summarized thus:

	Prisoner B Stays Silent	**Prisoner B Betrays**
Prisoner A Stays Silent	Each serves six months	Prisoner A serves ten years Prisoner B goes free
Prisoner A Betrays	Prisoner A goes free Prisoner B serves ten years	Each serves five years

As can be seen, by staying silent (cooperating) both prisoners are better off than in the case where both decide to betray (deviate from the agreement, that is, competing). Nevertheless, if only one of the two prisoners betray while the other stays silent, the former would be free, which is still more desirable for him than having to stay in prison for six months. Exactly the same occurs in a cartel: while their members are better-off being part to the agreement than competing, deviating (for example by reducing one's price) could imply capturing a big amount of

the market demand and making big profits. In other words, the members of a cartel always have an incentive to deviate from their agreement which explains why cartels are generally difficult to sustain in the long run. Empirical studies of 20th century cartels have determined that the mean duration of discovered cartels is from 5 to 8 years. However, once a cartel is broken, the incentives to form the cartel return and the cartel may be re-formed.
Source: http://en.wikipedia.org/wiki/Cartel

The dynamics of the waiting/racing game then is that each firm does not report in the hope that all other cartel members will do the same; and if a firm believes that it is imminent that another firm will report, it races to report. The policy challenge of an effective leniency programme then, is to induce firms to stop waiting and start racing.[46]

In Brazil, in order to claim leniency, the application for delivery of information or any document that shows the evidence of a cartel, must be made by only one member of the cartel, there is no provision for the existence of second applicant. The information or document provided must not be known by the authorities; if it is known, then one cannot ask for leniency. For claiming immunity the same criteria applies. If authorities are aware of the information, then total immunity cannot be claimed; however, fines may be reduced depending on the effectiveness of co-operation and the good faith of the applicant. Thus, there is no time as to when one should approach the authorities to claim leniency or immunity. What is important to note, is that the authorities should not have prior knowledge of the cartel.[47]

Under the US system, the DOJ's Antitrust Division offers leniency to both the corporate - known as 'amnesty programme' (Box 8) and the individual - known as 'leniency policy'. The corporate can be granted amnesty before the investigation begins, provided that the corporation is not the ring leader of the cartel and is the first to give vital information about the cartel activity. Amnesty to a corporate can also be granted, after an investigation has begun provided that it was the first to come forward

[46] Harrington J (2006). "Corporate Leniency Programs and the Role of the Antitrust Authority in Detecting Collusion", Presentation at the CPRC/COE Symposium on Towards an Effective Implementation of a New Competition Policy
[47] Supra Note 31

and compensates the injured parties, where possible. In addition to that, the corporate directors, officers and employees are automatically granted amnesty once the corporation is granted the same.[48]

Box 8: US Corporate Leniency Policy

Type A immunity

An undertaking will qualify for immunity if all of the following conditions are met:

- The US Department of Justice Antitrust Division has not received information about the cartel from any other source.
- The applicant takes prompt and effective action to terminate its involvement in the cartel.
- The applicant reports its wrongdoing with "candour and completeness" and provides full, continuing and complete co-operation.
- Confession is truly a corporate act and not made up of isolated confessions of individual executives or officials.
- Where possible, restitution is made to injured parties.
- The applicant did not coerce another party to participate in, and was not leader or originator of, the cartel.

Type B leniency

If an undertaking does not meet all six Type A conditions, the applicant (whether before or after an investigation has begun) will receive leniency if all of the following conditions are met:

- The applicant is first to qualify for amnesty in relation to the cartel.
- The Antitrust Division does not have evidence against the applicant that is likely to result in a sustainable conviction.
- The applicant takes prompt and effective action to terminate its involvement in the cartel when it is discovered.
- The applicant reports the cartel with candour and completeness and

[48] Koob.C and Antoine, O (2006). "Getting the Deal Through – Cartel Regulation 2006", Global Competition Review

provides full, continuing and complete co-operation.

- Confession is truly a corporate act and not made up of isolated confessions of individual executives or officials.
- Where possible, restitution is made to injured parties.
- The granting of leniency would not be unfair to others, considering the nature of the cartel, and the applicant's role and timing in it (that is, the Antitrust Division retains a degree of discretion for granting leniency).

Source: www.practicallaw.com/leniencyhandbook

Leniency to individuals is granted on the condition that the DOJ is not aware of the information made available by the individuals. Moreover, leniency requires that the individual concerned is not the ring leader of the cartel activity.

Leniency programmes in the US are quite successful. From 1993 to 2004, the DOJ automatically granted 100 per cent fine discounts and immunised all corporate officers for the first qualifying leniency applicants; second applicants received substantial discounts of 70 per cent to 80 per cent. In the late 1990s, the DOJ was receiving about 25 amnesty applications per year. Efforts undertaken by the DOJ to publicise that policy significantly contributed to the increased prosecution of corporations and responsible managers. The incentives for companies engaged in an illegal cartel to come forward and blow the whistle are now a major factor threatening existing conspiracies. The rewards for amnesty applicants to cooperate with the government and private parties increased in 2004. They now include damages in civil cases being trebled, and joint and several liabilities eliminated. These provisions are subject to a sunset provision, which will require their review by 2009.[49]

The Competition Act in India has been empowered with a leniency provision. The leniency provision, as per existing provisions in the Act, provides specific relief to the first party who 'spills the beans' in cases of cartels and before the beginning of the investigation.

[49] Supra note 22

The party desirous of taking shelter under the leniency provision has to proceed carefully as conditions precedents for availing of the concessions are:

- That full and true disclosure is made before initiation of investigation/enquiry;
- The disclosure is vital in busting the cartel;
- That the benefit of lesser penalty is limited to the party who made the disclosure first; and
- The benefit can be rescinded if there is non-compliance of conditions subject to which lesser penalty was imposed.

However, without strong penalties and a vigorous enforcement programme by the agency, there is no incentive for cartel participants to self report their breach of competition laws. The corollary being that no leniency policy, no matter how generous or well drafted, will be effective unless there is fear of imminent detection and prosecution.

Box 9: Three Prerequisites for Successful Implementation of a Leniency Programme
High risk of detection: Agencies must adopt a strong enforcement programme to fight cartels. Agencies have to commit to vigorously investigating cartels and ensuring action establishing the infringement is taken. Those participating in cartels must perceive that there is a real risk of detection, in the absence of a leniency application, and that subsequent enforcement action will necessarily follow. This encourages them to come forward before they are caught. In addition it is also effective if a leniency policy can create a race between the company and its employee or, indeed, between members of the cartel to be "first in the door", i.e. to be the first in disclosing vital information regarding the cartel activity. **Credible threat of sanctions:** The sanctions imposed on cartel participants must be significant. If sanctions are inadequate, cartel participants will not come forward since the benefits from leniency seem small or non-existent. Essentially, the expected value of the cartel for cartel participants should not be greater than the cost of

getting caught. Thus, the likelihood of getting caught must be high. The main purpose of sanctions is the deterrence to form cartels. The decision to form or join a cartel is primarily a financial one. An effective deterrent is therefore the one that takes away the financial gains that otherwise would accrue to the cartel members. Sanctions also provide an incentive to the cartel participants to cheat with the other cartel members and provide information to the investigators. Sanctions take an approach, which is called the "carrot and stick" approach. The cartel investigation requires that the "stick" be the possible sanction and it should be sufficiently severe to give effect to the "carrot" i.e. the opportunity to avoid the sanction by co-operating. Thus, for both deterrence and co-operation purposes the potential sanction must be severe if it has to be effective.

Transparency and certainty: There must also be transparency and certainty in the operation of a leniency programme. Agencies need to build up the trust of applicants and their legal representatives by applying a programme consistently. An applicant needs to be able to predict with a high degree of certainty how it will be treated if it reports misconduct and what the consequences will be if it does not.

Finally, a couple of other measures could be used to complement the adoption and implementation of an effective leniency programme:

- The competition authority should manage the pre-investigation phase (during which they have some suspicion about the existence of a cartel but have not launched an investigation) to induce cartel members to come forward for leniency. This is to tackle the racing/waiting game as mentioned above, since once the investigation has started, incentives to come forward for leniency would be weak. This is because after the investigation has started and the commission has relevant information about the cartel activities full immunity is not granted to whistleblowers. They could be allowed partial immunity but that would also depend on how vital the information is and their

willingness to cooperate till the end of the investigation.

- Programmes should be developed to encourage buyers and uninvolved company employees to report. The result of an empirical survey of price-fixing conspiracies in the US during 1963-1972 showed that, out of forty nine cases examined, ten were detected by a complaint from a competitor, seven were detected by complaint from a customer, three by current or former employees, and one by an anonymous informant; a total of 42.8 percent. This is, therefore, not only a rich source of information, but also it also helps to reduce the costs of implementing a leniency programme.

In addition to collecting and disseminating information about cartels some screening could be done. For instance, for markets with characteristics that make these prone to cartelisation, the authority should have a clear strategy for targeting its leniency programme. The authority should also screen government purchases for collusion and require price data from past offenders and screen them for any further collusion. The relevant data regarding government purchases could be derived from various government procurement agencies or else the CCI could request the Comptroller and Auditor General of India (CAG) for test checks of large procurement orders placed by government departments or undertakings.

Source: ICN (2006), "Drafting and Implementing an Effective Leniency Programme", Anti-Cartel Enforcement Manual, Cartel Working Group – Subgroup 2: Enforcement Techniques, p.2

V. CARTEL CASE SELECTION AND PRIORITISATION

Though investigation into cartels and collection of evidence is important it must be realised that case selection for such investigation is equally important, Competition agencies need to prioritise their case selection, given their limited resources. The following factors need to be considered by competition authorities for case selection and prioritisation[50].

[50]Available at http://www.reseauinternationaldelaconcurrence.org/media/library/conference_6th_moscow_2007/21Anti-CartelEnforcementManualChapter4onCartelCaseInitiation.pdf

V.1 Public Interest

Cartels are usually of major public interest or concern due to the extensive harm caused to consumers as well as local, national and international economies. Conduct such as price-fixing, market-sharing and bid-rigging generally leads to heavy penalties (including substantial fines) for businesses and individuals. In some jurisdictions, cartel conduct is considered so damaging that criminal sanctions have been introduced that include jail sentences for individuals involved in cartels, e.g. US. Factors to consider when assessing the public interest of a particular investigation include the extent of potential consumer and market detriment.[51]

V.2 Extent of Potential Consumer Detriment

It is estimated that the worldwide economic cost of cartels exceeds many billions of US dollars every year and causes extensive harm to local, national and international economies. Agencies will most likely prioritise a cartel matter over other types of anti-competitive behaviour due to the known economic effect of cartel conduct. In prioritising one cartel investigation over another, agencies may take into account how widespread the economic impact may be and the volume of commerce that is affected and the duration of the conduct. The agency may allocate a lesser priority to those cases where the effect is not as great.

The harm inflicted by cartels on the economy and the general public may include:

- consumers being forced to pay higher prices for goods or service or alternatively, consumers being unable to afford the products at all
- businesses being forced to pay higher prices or having to pass this cost on to their customers
- government agencies paying higher prices for goods and services and passing these costs on to taxpayers
- businesses involved in cartels having less incentive to innovate or operate efficiently.[52]

[51] Supra Note 50
[52] *Ibid*

V.3 Priorities of Particular Markets or Sectors

Agencies may question how relevant a given industry or sector is to the priorities of the agency. Some agencies will undertake a detailed analysis of various industries when trying to detect cartels. This may be a result of intelligence indicating that particular industries are more likely to generate cartel behaviour, or alternatively, identification of secondary industries by cartel participants in other investigations or through a leniency application. Most agencies investigate the scope of cartel conduct in the context of the market(s) in which the cartel operates. Identifying a market, including identifying the sellers and buyers who potentially constrain the price and output decisions of the players in that market is an integral part of a cartel investigation.

It is important to establish how large the market is – specifically, whether it is substantial enough for the alleged cartel conduct to have a significant effect on businesses and consumers. The larger the market, the greater the detriment that is likely to occur and the more likely it is that the agency will prioritise that case over another concerning a smaller market. Agencies may also consider whether cartel behaviour is endemic in a particular industry and whether this is another case in a pattern of cases affecting that industry. This may mean that more needs to be done to educate and monitor a particular industry.[53]

V.4 Availability and Strength of Evidence

The strength of the available evidence will be a significant factor in an agency's decision-making process. While there may be a very strong suspicion that a cartel is occurring in a particular market, it is not worth committing resources to a matter that does not have strong evidence and therefore is not likely to be a successful case in a subsequent litigation or appeal.[54]

V.5 Availability of Resources for the Investigation and Adjudication of Cartel

Once the strength of the evidence has been determined, the next issue to be faced by an agency is the resources it has to investigate and adjudicate a cartel. These resources include staff, travel, experts and legal services. Some agencies may have limited budgets and can only undertake a few cases at a time or make decisions according to set ratios (e.g. one investigation per year).

[53] Supra Note 50
[54] *Ibid*

In some agencies, the staff undertaking cartel investigations may work across a number of areas that deal more broadly with competition matters, such as mergers and dominance issues. Agencies may weigh matters according to the financial and human resources required to pursue the case to resolution and this may somewhat depend on the type of evidence needed as well as the complexity of issues to be resolved.[55]

V.6 Cooperation from leniency applicants, informants or whistleblowers

The presence of a leniency applicant, informant and/or whistleblower may affect an agency's decisions regarding case selection and prioritisation. Typically, an investigation with a leniency applicant, informant and/or whistleblower features substantial levels of evidentiary material and cooperation. Given this tendency, there may be an assumption that matters featuring a leniency applicant, informant and/or whistleblower are somewhat 'easier'.[56]

V.7 Duration of Cartel Conduct

The average length of a cartel is six years, though it is not uncommon for cartels to exist for more than 20 years.[57] Given the economic damage caused to consumers and economies as a result of a cartel's existence, the duration of the cartel may be a factor that could lead to one cartel being investigated in preference over another.[58]

[55] Supra Note 50
[56] *Ibid*
[57] W. Wils (2001). 'Does the effective enforcement of Articles 81 and 82 EC require not only fines on undertakings but also individual penalties in particular imprisonment? Paper presented at the European Union competition law and policy workshop. See also C Veljanovski (2006), 'Penalties for price fixers: an analysis of fines imposed on 39 cartels by the EU Commission', European Commission Law Review (9), 2001, pp. 510-13.
[58] Supra Note 50

VI. FINES

VI.1 The Role of Fines

Competition experts agree that the most severe sanctions available under a competition law should be reserved for cartel operators. The most common form of sanctions against cartels is the imposition of fines on the members. Fines are an important instrument in the prevention of violations. First, fines may have a deterrent effect by creating a credible threat of being prosecuted and fined which weighs sufficiently in the balance of expected costs and benefits (fines increase the cost of joining the cartel) to deter companies from forming cartels. If fines are not significant, they become merely a cost of doing business for the cartel. In that case, the cartel operators can be confident of profiting significantly from their activity even if they are caught and sanctioned.

A secondary purpose of fines against cartels is to provide an incentive for members of a cartel to defect and to cooperate with an investigation in order to avoid punishment. Among the factors that a party to the cartel considers before coming up with a decision on whether or not to cooperate with the competition agency in response to a leniency programme is the level of the punishment. Cooperating with the agency has serious implications for the member as this complicates the interaction with other business partners after the case. The incentive to lure such cooperation has to be huge, and heavy fines may induce cooperation.

By acting as a deterring factor, imposition of fines also saves a lot of costs to society which could be used for other areas of development. The economic reason is that the enforcement measures to prevent violations are normally not without cost. The detection, prosecution and punishment of violations has a significant administrative cost, which includes both the cost borne by the public sector (cost of competition authorities, prosecutors and courts) and the cost borne by the businesses and individuals concerned (cost of lawyers and experts, management time). Such costs can be profitably employed elsewhere.

VI.2 Determining the Appropriate Fine

In drafting a proper fine policy, it is important to take note of the fact that an effective fining policy is the one that is a deterrent to the extent that no breaches are committed (and conversely no fines are collected), given that a balance is created where potential

violators are all frightened off, and no infringement takes place. The starting point is always to note that cartel members always take into account factors such as the probability of getting caught the level of punishment when caught and the benefit to be enjoyed under the cartel (that is the benefits of not getting caught). The probability of being caught obviously also depends on the competition authorities' enforcement priorities and their available resources. Specifically, for a cartel to be profitable, the chance of being caught when committing an infringement multiplied by the penalty after being caught must be larger than the advantage obtained from an unpunished offence[59].

The appropriate fine should be able to prevent cartels by altering the balance of expected benefits and expected costs of violations against the parties. Given that an infringement brings a certain advantage with it, it must be ensured that the chance of being caught and the penalty are high enough to act as a deterrent. When it is difficult to catch the offender for a certain infringement (and hence the probability of being caught is very low), a higher fine should be sought (so that the low probability multiplied by the fine would give a high value) if the fine is to be a deterrent. As a result, the potential offender would know that although the chance of being caught is small, a heavy punishment follows, with the result that committing the offence may not be worthwhile after all.

The implication from this is that, from an economic perspective, the most appropriate fine should not be arbitrarily chosen, but should be related to the damage that has been caused, such that it should not be too high or too low (this insight is relatively better known in environmental policy than in competition policy, where economists know that governments that book income from environmental taxation into their budget are actually not concerned with the environment, but rather with making their budget look better).[60] Determining whether the fine in a specific case is too high or too low forms the subject of economic analysis. Ideally the difference between the profit that is achieved *de facto* by cartel behaviour, and the profit that would have been earned without cartel behaviour should form the basic amount for the fine. By multiplying this

[59] Patrick Van Cayseele and Dr Peter D. Camesasca1 (2007). "The EC Commission's 2006 Fine Guidelines Reviewed from an Economic Perspective: Risking Over-Deterrence", Amsterdam Center for Law & Economics, Working Paper No. 2007-03
[60] *ibid*

by a factor that takes account of the fact that not all cartels get into trouble, an adequate deterring effect can be generated.

Fines also need not be too inordinate, as considerations also have to be taken on ability to pay. Although relating the fine to the profits that the companies concerned has been enjoying may sound proper, it is more likely that these profits would not have been retained but rather would have been paid out in taxes, dividends, salaries and wages to escape detection. Even if they stay below the level of inability to pay, the imposition of high fines is likely to be costly.

High fines may have undesirable side-effects. In the absence of perfect markets, high fines imposed on companies will have an incidence on all the stake-holders in the firm. Bondholders and other creditors will suffer a diminution in the value of their securities. Employees may suffer from cost-cutting campaigns induced by the need to pay the fine. Tax receipts will be reduced and finally, consumers may end up suffering. Indeed, if the firm competes in a product market characterised by imperfect competition (as will often be the case), the fine may be partly recovered from consumers in the form of higher prices[61].

While competition authorities have every reason to be harsh on cartels, they also need to consider these social implications. Given that the nature of calculations of fines may not be easy, there is need to determine fines for cartels on a case by case basis, taking into cognisance such factors as the level of profits enjoyed as a result of the cartel, the party's turnover and any other such factors that can be considered, and weighing them against the ability of the members to pay the fines, as well as what the implication such payment will have on the companies concerned.

VI.3 Cartel Fines in Different Jurisdictions

Wide variations in sanctions imposed by countries have been observed in their anti-cartel enforcement activities. In a few cases, very large fines – as high as many billion dollars – were reported. In US and Brazil, the authorities are empowered by the relevant Act to impose criminal sanctions too. The Antitrust Criminal Penalty

[61] Wouter P.J. Wils (2006). "Optimal Antitrust Fines: Theory and Practice" World Competition Vol 29, No 2, June 2006

Enhancement and Reform Act, 2004 increased the maximum criminal fine for companies violating the Sherman Act from US$10-100mn, making antitrust fines one of the most severe under US criminal laws. There have been instances in both the countries, where top executives of a corporation have received a prison sentence for being a part of a cartel activity. Convicted executives or individuals, because they are felons under the US Laws, may lose certain privileges of US citizenship, such as right to vote. In the US, in addition to large fines and possible imprisonment, cartel participants may be subjected to treble damages by private actions.

Section 4 of the Clayton Act provides that any person, whether an individual, business entity, or government, who has been injured in its "business or property" by reason of an antitrust violation may sue to recover treble damages, costs of that suit, and attorney's fees.[62] While it is more typical for private actions to be filed after the government wins (and in many cases simply after it files a complaint), there are also instances of cartel cases being prosecuted privately or by various States before the federal government gets involved, or even without the government ever getting involved. About one-third of all major private cartel suits are not follow-on suits.[63]

The Competition Act makes the participating enterprises liable to penalty. The law provides that the Commission shall impose upon each enterprise, which is a party to the cartel, a penalty equivalent to three times of the amount of profits made out of such agreements or ten per cent of the average turnover of the cartel for the last three preceding financial years, whichever is higher.[64] However, it remains unclear, according to the wording of the Competition Act, how the CCI would be calculating the three preceding financial years. Say, if a cartel is in operation from 1995-2000 and it gets detected in 2003 and prosecuted subsequently, then in this case what period would be considered to determine the penalty?

In the case of Brazil, a fine is imposed for the year immediately preceding the beginning of investigations. In the case of the European Union, under its 1998 Fining Guidelines, a fine is imposed based on the financial year immediately before the adoption of the decision imposing the fine.[65]

[62] 15 U.S.C. § 15.
[63] Supra note 22
[64] Section 27(b) of the Competition Act 2002 on "Orders by Commission after inquiry into agreements or abuse of dominant position"
[65] Article 15 (2) of Regulation No 17; now article 23 (2) of CCI's Regulation No 1/2003.

VII. CARTELS UNDER INDIAN COMPETITION LAW

VII.1 MRTP Act 1969 - Overview

We now look at the Indian experience in investigating and punishing cartels. This facilitates comparisons with other countries and provides a road map for future progress. The MRTP Act has its genesis in the Directive Principle of State Policy (Articles 38 and 39), embodied in the Constitution of India. It was enacted to:

- prevent concentration of economic power to the common detriment;
- provide for control of monopolies;
- prohibit monopolistic and restrictive trade practices, and
- prohibit unfair trade practices.

The MRTP Act empowered the Central Government to set up an authority, called the MRTPC, which has investigative, advisory and adjudicative functions, to oversee the implementation of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government, or upon the application made by the Director General of Investigation and Registration (DG (IR)) – which is the investigative wing of the MRTPC, or on *suo moto* basis.[66] The DGIR used to report directly to the Ministry of Corporate Affairs and not the MRTPC Commission. However, as per the Competition Act, the DG (IR) would report directly to the Commission.

Complaints regarding restrictive trade practices from affected parties have to be referred to the DG (IR) for conducting preliminary investigation as per section 11 and 36C of the MRTP Act. The DG (IR), after completion of the preliminary investigation and as a result of its findings, submits an application to the MRTPC for an enquiry. Restrictive trade practices are generally those practices that have an effect on prevention, distortion and restriction of competition. For example, a practice, which tends to obstruct the flow of capital or resources into the line of production, manipulation of prices and flow of supply in the market, which may have an effect of unjustified cost or restriction in choice for the consumers, is regarded as a Restrictive Trade Practice.

[66] Section 10 and 37 of the MRTP Act, 1969

One example of a RTP is a cartel. As held in *Union of India & Others vs. Hindustan Development Corporation,*[67] "a cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity". Under the MRTP Act, a cartel is categorised as an RTP, which has been defined as "a trade practice which has or may have the effect of preventing, distorting or restricting competition" (Section 2(o) of the MRTP Act).

Various categories of agreements enumerated under section 33(1) of the MRTP Act, including agreements, which restrict persons from whom certain goods can be purchased, have been recognised as *per se* restrictive. Cartels, fall under clause (d) of the section, which states that "any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers, shall be deemed for the purpose of this Act, to be an agreement relating to restrictive trade practices and shall be subjected to registration as under Section 35 of the MRTP Act". However, such agreements are not *per se* void or illegal. The MRTPC would still require undertaking an enquiry under Section 37 of the MRTP Act, as to whether the agreements are prejudicial to public interest or not. Until the time that the MRTPC declares the agreement as prejudicial to public interest, the parties may continue to conduct trade and business as usual.

Under the MRTP Act, the only power vested with the MRTPC with respect to restrictive trade practices such as cartels, is to issue a 'cease and desist order' or to permit the parties to a collusive agreement to modify the agreement so that it is no longer prejudicial to public interest. As mentioned above, parties until they are directed by the MRTPC could continue with the restrictive trade practice. At the most when a party is called and a restrictive trade practice is established, it may be directed to discontinue with the practice and only if it continues with the practice after the direction, would it be punishable for contravening an order made under Section 31 and 37 as provided in Section 50 of the MRTP Act. The MRTP Act grants the MRTPC the power to search and seize vital information necessary for proving a cartel. However, the act did not grant leniency provision, which the Competition Act now empowers the CCI with.

[67] 1994 CTJ 270 (SC) (MRTP)

Under the MRTP Act, even when the facts, as discovered during the inquiry, establish the existence of a restrictive trade practice, the onus is on the accused to show that the restriction is not against public interest or that the restriction is not unreasonable.

Looking at the cases of cartels, no matter how malicious the offences may be in the eyes of the public, no matter how serious the detriment caused may be, the MRTPC was without any effective weapon to grant justice to the aggrieved parties. The consequences are that the respondents, in case a complaint is lodged with respect to such breach of law or the MRTPC inquires *suo moto*, can still enjoy the fruits of their illegal acts, which may amount to a very large economic rent. Yet no penalty can be levied because the MRTPC has not been empowered to impose penalties or spell out an order of imprisonment to the offenders; what it can do is just pass a cease and desist order.

However, there have been cases in the past where the MRTPC as per section 12B have awarded compensation, but it failed to do so in cartel cases. For example:

1. ***Kiroloskar Oil Engines Ltd. vs. MRTPC*, JT2002 (10) SC53** – MRTPC ordered the appellant to pay compensation for indulging in Restrictive Trade Practice. But as the necessary ingredients for establishing indulgence of restrictive trade practice have not been found, the order could not be sustained.
2. ***Pennwalt (I) Ltd. & Another vs. MRTPC*, AIR1999Delhi23** – The respondent filed an application u/s 12B of the MRTP Act for compensation of Rs 110.48 lakhs for supplying defective machinery which led to unfair trade practice. The MRTPC filed a show cause notice on receipt of the application. The petitioner challenged the notice. The petition was rejected.
3. ***R.C. Sood & Co. (P) Ltd. Vs. MRTPC*, 1996 (38) DRJ118** – Petitioners by way of writ petition challenged the notice issued against the application of second respondent under section 12B of MRTP Act, claiming compensation for loses caused as a result of unfair trade practice. The petition was rejected and it was held that it is not necessary that MRTPC should inquire first or investigate into the allegations before issuing notice u/s 12B of the MRTP Act.

The following section deals with the analysis of some cartel cases under the MRTP Act and highlights the drawbacks.

VII.2 Select Cases dealt under the MRTP Act and the weaknesses that emerge

Out of the 90 cases[68], that were analysed we found 36 cases dealing with allegations of price fixing, 15 cases dealing with bid rigging, 19 cases dealing with collective boycott, 9 cases dealing with collective resale price maintenance and 11 cases dealing with market allocation. In several cases, a cease-desist order was passed by the MRTPC.

The select 90 cases have been classified broadly into pre-1991 (64 cases) and post-1991 (26 cases) – Annexure 1. The reasons why there is less number of cases post-1991 are several: inertia in the Commission due to vacancies in the Commission; poor track record; the Government's announcement in 1993 to draft a new competition law and the announcement that cartels can be punished; more competition in the market due to the liberalisation reforms etc. There was a new fervour in the market, which included the dilution of MRTPC's powers to a large extent, such as dropping of merger regulation. Furthermore, according to various experts the inadequate recording system employed then, as well as the absence of an established mechanism to monitor old cases for future reference, was another reason why the cases fell. This is a point, which should be noted during the design and establishment of the new competition regime in India.

A striking feature of these cases is that many are clustered within a few economic sectors or industries (see Box 10). Construction materials, such as cement, for example, seem to be fertile ground for cartelists. The reason for this high incidence is fairly obvious – cement, as well as most other construction materials, is a homogenous product. This homogeneity makes it easier for traders to agree on the terms of a cartel agreement, as well as to monitor the same.

[68] The cases presented in this study are illustrative and should be able to tell the stories effectively. However, the findings cannot be generalised as we were not able to get access to complete data on the relevant cases.

Box 10: Classification of Cases	
Manufacturing	**Services**
Chemical – 11 Cement - 2 Tyre - 5 Misc. (Manufacturing/Services) (Oil Mills, Power Cables, Foils, Ice Creams, Pictures, Batteries, Banks, Newspapers, etc) - 50	Trucking/Transportation – 22

In India as well as elsewhere, cartels are also found to be most common in markets for intermediate products – vitamins, cement, copper tubes, etc, that are processed and constitute input costs along several stages of the supply chain, with fairly sophisticated customers. Thus a copper tube cartel may result in a distributor being overcharged, which is then passed on in higher prices from the distributor to a fabricator, the fabricator to the boilermaker, then onto the builder, and finally the householder. There is a fully rationalised reason behind this. The passing-on of costs makes it difficult for even a most vigilant competition watchdog to follow and work out the price increase, price spread, profit margin, etc in such markets.

Any possible claimant would be required to go through expensive accounting and competition analysis to determine the extent of the overcharge, and to examine and defend counter-claims that they partially or fully passed on the overcharge to their customers. The users of the end products, of course, would not have a clue about why the price has gone so high. The lower the possibility of detection and punishment, the higher is the chance that cartelists rush to obtain the profits they made by entering into the cartel agreement. Besides, having 'fairly sophisticated customers' would, arguably enable cartelists to 'sham' the transactions with differentiations even though prices remain the same.

In the comparison made under this project with facts obtained from Brazil regarding those sectors most prone to cartelisation, similar results were found. From 1999 to 2006, the Brazilian competition authorities had 47 convictions, mostly for price fixing. Of the 47 cases, 4 are in the industrial sector (sheet steel, naval construction, pharmaceuticals and stones for civil construction), 8 are in the commercial sector (6 in

gas stations and 2 in domestic gas distribution) and 35 in services. Among the latter, 26 are in the health sector (associations of hospitals, doctors and others), travel agents, accountants, air transport, urban transport, cable television, newspapers and driver education. Services are considered by the competition watchdogs here as the first and easiest choice because professional associations tend to fix minimal prices, claiming to act on behalf of their members against the higher powers. Of course and as in any other jurisdictions, oligopolies in concentrated markets dealing with homogeneous products always claim a special dispensation by the authority as well. In addition, cartelisation was partly due to the fact that these sectors had a past of very high inflation and a tradition of (obviously mistaken and misleading) price control.[69]

A word of caution is in order even at the expense of sounding repetitive. It is axiomatic that mere simultaneous movement of prices, especially for homogeneous products like construction materials, is not by itself sufficient to prove an unlawful agreement. Such price activity could be equally consistent with active competition. In almost all countries there must be more evidence than just parallel pricing to support a cartel prosecution. This set of evidence is mentioned in the preceding part as "parallelism plus" factors. Indeed, in some countries investigations of possible price fixing in this respect have failed because such factors were lacking.

There have been instances where the DG(IR) and the MRTPC have tried to investigate cartels on suspicion of price rises or submission of collusive tenders in various industries such as tyre industry, sugar mills, yarn producers, plywood manufacturers, cement manufacturers, etc. However, they were not successful in proving the existence of a cartel as because the evidence collected did not go beyond price parallelism. Hence they were not able to provide direct or indirect evidence, such as an agreement or meeting of minds to prove the existence of a cartel.

In the US, the legality of tacit (as opposed to overt) agreements to restrict output and charge a higher than competitive price was raised long back in an ancient case in 1939, ***Interstate Circuit, Inc. vs. United States***. In the case, the court had to infer unlawful collusion since there was no direct (or what is called "smoking gun") evidence of collusion. In such instances, the burden of proof that a conspiracy did not exist rests on

[69] Supra note 31

the defendants. The court accepted the Interstate Circuit's opinion that collusion may be inferred from circumstantial evidence but warned against going too far. In a famous phrase, the US court, in this case, argued that "conscious parallelism has not yet read conspiracy out of the Sherman Act entirely". In short, parallel business behaviour by itself does not constitute a Sherman Act offence.

VII.2.1 Case 1 – Essential Factors to Constitute a Cartel[70]

Brief details: In *DG (IR) vs. Modi Alkali and Chemicals Ltd*[71], an anonymous complaint was received alleging that some of the leading undertakings in Northern India have formed a cartel for hiking the prices of their products. The prices of chlorine gas and hydrochloric acid had an increase of 277 percent and 200 percent within six and four months respectively in the year 1992. The same were contended to be a result of an agreement amongst the parties to create artificial scarcity, in order to raise prices of their products. Since the prices of raw materials namely sodium chloride and electricity had more or less remained the same, it was stated to be a fictitious crisis created to take advantage of the market and increase the prices of their products.

Investigation: The MRTPC directed the DG (IR) to carry out the preliminary investigation. The DG submitted its preliminary investigation report (PIR) which said that no case of cartel has been found and recommended that no action should be taken. However, the MRTPC after considering the PIR was of the view that the case needed enquiry and directed the issuance of a Notice of Enquiry. The respondents raised an objection on the ground that the notice of enquiry lacked a concise statement of material fact on which the notice was based, not meriting to cognisance based upon an anonymous complaint.

The DG (IR) contended that the present notice of enquiry had been issued under Section 10 (a) (iv) of the MRTP Act, which empowers the MRTPC to inquire into restrictive trade practice upon its own knowledge or on a complaint or information. Information can be derived from an invalid/irregular complaint or from any anonymous letter as held by the Calcutta High Court in the case of *ITC Limited vs. MRTP*

[70] Detailed information on market characteristics of the MRTP cases discussed in this section is not available, due to the inadequate recording system employed then, as well as the absence of an established mechanism to monitor old cases for future reference. This is a point, which should be noted during the design and establishment of the new competition regime in India.
[71] 2002, CTJ 459 (MRTP)

Commission & Ors. (1996) 46 Comp. Case. 619. Thus, it was held that the objection with regard to the anonymous complaint was not valid.

Order: The Commission then looked into the allegation of formation of a cartel. "Cartel" was not defined in the MRTP Act; however, the Commission referred to a preceding judicial pronouncements – "cartel is an association of producers who by an agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity". Three essential factors were identified to establish the existence of a cartel, namely (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy and (iii) intent to gain monopoly or restrict/eliminate competition.

Thus, keeping in mind the definition of cartels and the necessary elements, the Commission was of the view that, except for the use of the expression 'cartel', there was no material evidence to suggest parity of prices or meeting of minds. The Commission observed that the notice of enquiry and the subsequent investigation lacked relevant and necessary information with regard to the parties forming a cartel leading to distortion and restriction of competition in the market. With the essential factors not proved, the Commission agreed with the respondents that *prima facie* there was no case of a cartel.

Emerging Issues:

- Cartels were not defined in the MRTP Act, 1969, but the meaning of cartels could possibly be drawn only from Section 2(o) *i.e.* restrictive trade practice.
- Key factors required to establish the existence of a cartel were: (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy, and (iii) intent to gain monopoly or restrict/eliminate competition,
- Commission initiated the enquiry on the basis of an anonymous complaint

VII.2.2 Case 2 – Price Parallelism vs. Price Fixing

Brief details: In *Alkali & Chemical Corporation of India Ltd. And Bayer India Ltd*, the companies were engaged in the manufacture and sale of rubber chemicals and amongst themselves possessed a dominant share of the total market for these products. There were charges against them making identical increases in prices on five to six occasions

on or around the same date. However, there was no direct evidence available behind the increase in prices.

Investigation and Order: The MRTPC observed while making its judgment, that "in the absence of any direct evidence of cartel behaviour and the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in the proof of any plus factor to bolster the circumstances of price parallelism, we find it unsafe to conclude that the respondents indulged in any cartel for raising the prices".[72]

Emerging Issue:

- Price parallelism as a defence against cartelised price fixation. Factors required separating price parallelism from cartelised price fixation.

VII.2.3 Case 3 – Absence of Penalties

Brief details: In *Sirmur Truck Operator's case*[73]and *Truck Operators Union vs. Mr. N.C. Gupta & Mr. Sardar*[74] case, the nature of allegation was the same, i.e. the respondents had acted in concert while fixing the freight rates for rendering transport services and that they did not allow non-member truck operators to load and unload goods, unless they joined the union.

Investigation: In both the cases, the MRTPC instituted an enquiry on the grounds that practices indulged in by respondents fell under section 33(1)(d) and Section 2(o) of the MRTP Act[75]. For substantiating the allegations made against the respondents, in the Sirmur Truck Operators case, the DG (IR) submitted a lot of documents, such as the freight rates circulated by the respondent union and the letters exchanged between the respondents. Taking the freight rates as evidence, it was seen that there was no information on the freight list, that with the increase or reduction of the rates of diesel oil by the Government of India, there would be increase or decrease in freight rates fixed by the respondents.

[72] Kumar, S.S "Cartels and Price Fixation: Worst type of anti-competitive practices".
[73] (1995) 3 CTJ 332 (MRTPC)
[74] (1995) 3 CTJ 70 (MRTPC)
[75] Section 2(o) of the MRTP Act covers restrictive trade practice

Thus, there was no doubt that fixing the rates for the truck operators and asking the members to charge freight only on the rates fixed by the union was an instance of restrictive trade practice falling under clause (d) of Section 33(1), which states: "*Every agreement falling within one or more of the following categories shall be deemed, for the purpose of this Act, to be an agreement relating to restrictive trade practice and shall be subjected to registration, namely… (d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers"*.

In the Truck Operator's union case, the respondents did not co-operate with the investigation and the DG (IR) conducted an on-spot investigation to assess the correctness of the allegations. During the on-spot investigation, they met a member of the union, who did orally acknowledge that unless the complainant truck owners become members of the union, they were not permitted to operate.

Order: The MRTPC in the both the cases, concluded on the basis of the evidence, that preventing and restricting competitors from doing business was undoubtedly a restrictive trade practice falling under Section 2(o) of the MRTP Act. Accordingly, the Commission issued an order of 'cease and desist' against the respondents and directed them to stop the trade practice.

Emerging Issue:

- The MRTPC was not empowered to impose penalties.
- Increase in input cost as defence for price increase
- Non-cooperation on the part of the defendants could be a speed breaker in the investigation

VII.2.4 Case 4: Extra Territorial Jurisdiction

Brief details: In *American Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association of India (AMAI) and others*, ANSAC, a joint venture of six USA soda ash producers attempted to ship a consignment of soda ash to India. AMAI, whose members included the major Indian soda ash producers, complained to the MRTPC to take action against ANSAC for cartelised exports to India.

Investigation: The MRTPC instituted an enquiry and passed an *ad interim* injunction on ANSAC, restraining it from cartelised exports to India. In June 1997, the Commission rejected ANSAC's petition for vacating the injunction. Quoting from the ANSAC membership agreement, it held that ANSAC was *prima facie* a cartel which was carrying out part of its trade practices in India, giving the Commission jurisdiction under Section 14 of the MRTP Act, even though the cartel itself was formed outside India. ANSAC made an appeal to the Supreme Court of India, on the following grounds:

- Under the MRTP Act, the MRTPC had no power to stop import
- The MRTP Act did not confer extra-territorial jurisdiction to the MRTPC
- Action could be taken only if an anti-competitive agreement involving an Indian party could be proved and that too only after the goods had been imported into India. In this case, the shipment had not actually taken place.

Order: The Supreme Court did not go into the allegation of cartelisation, but instead held that the wording of the MRTP Act did not give the MRTPC any extra territorial jurisdiction. The MRTPC therefore could not take action against foreign cartels or the pricing of exports to India, nor could it restrict imports. Action could be taken only if an anti-competitive agreement involving an Indian party could be proved, and that too only after the goods had been imported into India.[76] The Supreme Court overturned the order of the MRTPC.

Emerging Issues:

- The MRTP Act did not empower the MRTPC with extra-territorial jurisdiction powers. It could handle only the cases that emerged in the Indian market but not that emerged outside India, despite their evident effects on the Indian market.
- Action against an anti-competitive agreement could only be taken if it involved an Indian party and that too only after the goods have been imported into India.

[76] *Haridas Exports vs All India Float Glass Manufacturers' Association*, (2002) 6 SCC 600. A discussion on the wider implications of this judgment and Indian competition policy in relation to international trade, in greater detail can be found in Bhattacharjea (2003).

VII.2.5 Case 5: Presence of Gateways

Brief details: In *DG (IR) vs. Sumitomo Corporation, Tokyo, Japan and others*[77], the MRTPC was called upon to decide on the charges of restrictive trade practices of manipulating prices of products within the meaning of Section 2(o)(ii)[78] of the MRTP Act. On the receipt of information by the commission regarding collusive tendering in the steel industry and quoting of identical prices, the commission appointed a consultant who reported that the Japanese companies along with their Indian agents have colluded and were quoting identical prices for input material required by the steel plant.

Investigation: In the preliminary investigation, it was revealed that the prices quoted by the Japanese companies and their Indian agents were identical for 8 items pursuant to a global tender floated by SAIL. However, there were some sort of negotiations between the relevant authorities and the Japanese companies, after which the latter revised their rates, which also were identical to the prices quoted by their apex body, i.e. the Rollers Exporters Association. The same was the case with regard to another global tender in the year 1984 invited by the Rourkella Steel Plant (RSP) to supply qualified rolls. On the basis of a complaint initiated by the RSP, the DG was of the view that the respondents were indulging in restrictive trade practice within the meaning of section 2(o)(ii) of the Act. Accordingly a Notice of Enquiry was initiated.
In response to the investigation, the defendants submitted their defence on the following grounds:

- absence of any factual allegations regarding the manipulation of prices imposing unjustified cost on consumers, the issuance of notice of enquiry was misconceived;
- participation of 35 companies from 13 countries, identical prices as quoted by the Japanese companies would in no way lead to manipulation of prices imposing unjustified costs;
- restriction of competition was to be seen with reference to context of SAIL, which had 90 percent of the market share in product and supplies;

[77] 2004 CTJ 26 (MRTP)
[78] Section 2(o)(ii) – Restrictive Trade Practice – "which tends to bring about manipulation of prices, or conditions of delivery or to affect the flow of supplies in the market relating to goods or services in such manner as to impose on the consumers unjustified cost or restrictions".

- ultimate decision for placement of orders to suppliers rested with SAIL, as well as RSP, hence, the uniformity in prices would have no significance;
- orders under the global tenders that were floated were for 18 rolls out of 228 pieces; and
- The Indian agents, also a party to the investigation, pleaded that they had no role to play in either fixation of prices of the products or in negotiations with the purchaser.

The MRTPC focused on the depositions made by the defendants, where it was confirmed that their apex body (Rollers Exporters Association) conducted the negotiations. The variations in sales commission to their respective agents and conditions of delivery had also existed but there were no differences in the price the purchaser had to pay. Thus, these facts clearly established a case of price fixing cartel by the defendants. However, the defendants contended that it had in no way been established that quotations of identical prices by them had been instrumental in preventing or impairing competition in any manner. In any case, the order for supply as placed by them was so small that it had virtually negligible effect on competition in the market and the same would bring the case in the ambit of provisions of Section 38 (1) (d) of the Act –

(1) For the purposes of any proceedings before the Commission under section 37, a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more of the following circumstances, that is to say – "(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such persons, controls a preponderant part of the market for such goods".

With reference to the definition of cartel, as mentioned above in DG (IR) vs. Modi Alkali and Chemicals Ltd, quoting of identical prices pursuant to a global tender, negotiation of prices by the parties other than those who had submitted the tenders,

having a close nexus in the trade dealings were a few factors strongly pointing to an action or activity undertaken by the respondents for manipulating the prices, which had adversely affected competition in the market. In addition to that, it was argued that the arrangements between the respondents and its allied parties in quoting identical prices had narrowed down the option of the purchasers to buy the goods, despite there being other 35 companies.

With regard to the allegation that SAIL had 90 per cent market power there was a need to make a distinction between voluntary decisions by players about not entering the market and those being pushed by the State Government. Thus, the allegations raised by the respondents, were not sustainable.

Keeping in mind the facts of the case, it was held that the respondents had indulged in cartelisation. However, the respondents argued that they were liable to be exempted in lieu of the gateways, to which the Commission also agreed. The Commission agreed that in terms of both the quantity and value of the rolls, it would have insignificant impact on the cost of rolled products.

Order: In lieu of the gateway available to the defendants, i.e. Section 38 (1)(d), the notice of enquiry was discharged. The allegation of cartelisation was only discharged on the ground of the availability of the gateway to the respondents.

Emerging issues:

- Due to the presence of certain gateways the companies could not be held guilty for being involved in a restrictive trade practice.
- Order for supply as placed by the respondents was so small that it had virtually negligible effect on competition in the market
- 0ne's own activity of cartelisation was justified on the basis that the accuser is itself a dominant player in the market

To summarise, the following emerging issues have been identified on the basis of the analysis of select cases shown above. These issues could be analysed from the perspective of the Competition Act to assess whether the new law equips the CCI to address these issues.

Definition

- Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels could be drawn from Section 2(o) on restrictive trade practice.

Factors to determine Cartel

- Key factors required to establish the existence of a cartel were (i) fixing of prices, (ii) agreement by way of concerted action suggesting conspiracy, and (iii) intent to gain monopoly or restrict/eliminate competition,

Defence

- Price parallelism as a defence against cartelised price fixation. Factors required to separate price parallelism from cartelised price fixation.
- Increase in input cost as defence for price increase
- Presence of gateways
- Order for supply was so small that it had virtually negligible effect on competition in the market
- Justification of one's own activity of cartelisation on the basis that the accuser was itself a dominant player in the market
- Acceptance of anonymous complaint to initiate an Enquiry

Powers of the Commission

- The MRTPC was not empowered to impose penalties
- MRTP Act did not empower the MRTPC with extra-territorial jurisdiction powers. Action against an anti-competitive agreement could only be taken if it involved an Indian party and that too only after the goods had been imported into India
- Non-cooperation on the part of the defendants could be a speed breaker in the investigation

VII.3 Competition Act 2002 – An Overview

In India, the MRTP Act was enacted in 1969. The focus of the MRTP Act was more on the control of monopolies and the prohibition of monopolistic and restrictive trade practices. In the current era of globalisation, the MRTP Act had become obsolete and there was a need to shift the focus from curbing monopolies to promoting competition.

The Central Government, therefore, constituted a high level committee known as the Raghavan Committee and after considering its report and suggestions from various stakeholders, enacted a new law called the Competition Act, 2002. The Central Government also constituted the Competition Commission of India. According to the Competition Act a cartel is formed if three prerequisites are fulfilled:[79]

- An agreement which includes arrangement or understanding;
- Agreement is amongst producers, sellers, distributors, traders or service providers, i.e. parties are engaged in identical or similar trade of goods or provision of service, and
- The agreement aims to limit, control or attempt to control the production, distribution, and sale or price of, or, trade in goods or provision of services.

The Competition Act covers cartels under Section 3, i.e. anti competitive agreements. According to the section, it is presumed that such agreements cause appreciable harm to competition. Thus the burden of proof in any cartel case is on the defendant to prove that the presumption is not causing appreciable adverse effect on competition. A specific goal of the Competition Act is the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. The CCI is required to control agreements among competing enterprises on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes which are likely to harm competition need to be addressed.

The Competition Act lists certain factors that are to be taken into consideration for determining whether an agreement or a practice has an appreciable adverse effect on competition, namely, 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 provisions of services; and promotion of technical, scientific and economic development by means of production or distribution of goods or provision of services.

[79] Section 2(c) of the Competition Act, 2002

CCI is empowered under Section 19 of the Act, to inquire into any alleged contravention of the provision either on *suo moto* basis or on receipt of information by any person, consumer or association or on a reference made to it by the Central or State Government. The Competition Act empowers the CCI with leniency provisions and also allows the Director General to undertake search and seizure by invoking sections 240 and 240 A of the Companies Act, 1956. In addition, the Competition Act extends its jurisdiction to cover any agreement referred to in section 3, which have been entered into outside India; and any party to such agreement, who is outside India. The CCI shall "have power to inquire into such agreement […] if such agreement […] has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India." This is known as the "effects doctrine" (Section 32).

The CCI has the power to grant interim relief (Section 33), impose penalty (Section 27(b)) and to grant any other appropriate relief. The CCI also has the power to levy penalty for contravention of its orders, making of false statements or omission to furnish material information, etc.

VII.4 The Competition Act, 2002 vs. the MRTP Act, 1969

Below we analyse the various issues that have emerged in the context of cartel cases analysed under the MRTP Act.

VII.4.1 Definition of Cartel

Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels could only possibly be drawn from the Section 2(o) *i.e.* restrictive trade practice. The Competition Act, 2002 explicitly defines Cartels under section 2(c) of the Act – "*Cartels includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services*".

VII.4.2 Identifying Cartel Formation

Certain practices need to be identified to establish the existence of a cartel under the Competition Act: (i) fixing of prices, (ii) agreement by way of concerted action

suggesting conspiracy, and (iii) intent to gain monopoly or restrict/eliminate competition.

Cartels are covered in Section 3 of the Act under anti-competitive agreements. The Competition Act frowns upon an agreement, which causes or is likely to cause an appreciable adverse effect on competition within India. Four types of agreements between enterprises involved in the same or similar manufacturing or trading of goods or services are presumed to have an appreciable adverse effect on competition, namely: agreements determining prices; agreements limiting or controlling quantities; agreements to share or divide markets; and agreements to rig bids. These agreements define the contours of a cartel activity.

Furthermore, the Act lists out certain factors as covered under Section 5.3.5 above, which the CCI could consider in determining whether an agreement has an appreciable adverse effect on competition.

VII.4.3 Defence against Cartelisation

Price parallelism as a defence against cartelised price fixation and factors required to separate price parallelism from cartelised price fixation. Based on experience from elsewhere, it is shown in the study that price parallelism is often used as an effective defence, posing a challenge for competition authorities. US and European courts have adopted a "*parallelism plus*" approach which requires showing the existence of "plus factors" beyond merely the firms' parallel behavior, in order to prove that an antitrust violation has occurred.

This has been adopted in some cases in Brazil as well. In all these jurisdictions, yet, there is an inclination to consider parallel behavior as a first clue pointing to the presence of collusion. Even though parallelism does not suffice to prove unlawful conduct, it may contribute to forming a suspicion of illegality.

Increase in input cost as defence for price increase

The Competition Act outlines various factors that determine the existence of a cartel. CCI needs to look into all the factors, before taking the input cost as a defence against cartelisation.

Presence of gateways

There is no Public Interest gateway present in the Competition Act, 2002.

Order for supply was so small that it had virtually negligible effect on competition in the market.

Cartel activity is 'presumed' to have an appreciable adverse effect on competition, the onus would be on the accused to justify that the practice did not have any significant impact on competition in the market. They would then have to consider the factors listed in the Act and other circumstantial evidence to assess this defence.

Justification of one's own activity of cartelisation on the basis that the accused is itself a dominant player in the market

In a buyer-supplier relationship, if, for example, the buyer-firm happens to be a dominant firm, the supplier-firms may have an incentive to enter into a cartel-type agreement to counter the dominant position of the buyer. However, in such cases, the CCI needs to impress upon the supplier firms that instead of entering into an agreement, they could approach the CCI, should the buyer firm abuse its dominant position. Establishment of an anti-competitive agreement to counter another potential anti-competitive practice should be discouraged. Two wrongs do not make a right.

Acceptance of anonymous complaint to initiate an Enquiry

Section 19 empowers the Commission to start an investigation on the basis of a reference from the Central Government or the State Government or a statutory authority or on its own knowledge or information. Thus the Competition Act also allows the Commission to accept anonymous information to form a basis for further investigation.

VII.4.4 Powers of the Commission

The MRTPC was not empowered to impose penalties.

Section 27 of the Competition Act empowers the CCI with powers to impose stringent orders and fines on detection of cartel activities. According to this section, CCI shall impose, a penalty equivalent to three times of the amount of profits made out of such

agreement by the cartel or ten per cent of the average turnover of the cartel for the last preceding three financial years, whichever is higher.

MRTP Act did not empower the MRTPC with extra-territorial jurisdiction powers. Action against an anti-competitive agreement could only be taken if it involved an Indian party and that too only after the goods have been imported into India.

The new law has extraterritorial reach and the provision is based on the *'effects doctrine'*. Section 32 states that the CCI has the power to inquire into any restrictive agreement which has an anti-competitive effect on Indian markets irrespective of where the involved parties are located. This clearly corresponds to the effects doctrine, which should undo the Supreme Court's disabling of the MRTP Commission in that respect.

Non-cooperation on the part of the Defendants in the investigation.

The Competition Act empowers the CCI to penalise a person for making false statement or for not cooperating in the investigation. This could provide sufficient disincentives for not cooperating.

VIII. CONCLUSION

It is clear from the preceding discussion that the CCI has been much better empowered to tackle cartel cases than its predecessor the MRTPC. This fact is well illustrated by the Competition Acts:

- explicit definition of cartel
- incorporation of a leniency programme
- powers to impose fines against cartel members
- explicit provision for exercising jurisdiction for actions taking place outside India (having an effect in India).

VIII.1 Recommendations

First, private notification or information is an important source imperative which trigger cartel cases. The CCI, therefore, should try to maximise this channel, and encourage the submission of information by injured parties**.** Towards this end, one can publish reader-friendly booklets and pamphlets explaining what cartels are, the harm that they cause and how to report them. A telephone hotline or an email address to which information can be made will be immensely helpful as well. The CCI also should try to publicise the important role of information in cartel cases that are successfully prosecuted. The identity of informants should be protected as confidential information to the fullest extent possible.

Second, in addition to relying on information or private notification, the CCI should try to focus its initial investigative efforts on sectors where cartel conduct is most likely to emerge on the basis of the tips they receive**.** This is going to be complementary to the effective implementation of a leniency programme that the CCI should adopt, as argued earlier at paragraph. The US DOJ, for instance, 'as a general rule, […] follows leads generated by disgruntled employees, unhappy customers, or witnesses from ongoing investigations. As such, it is very much a reactive agency with respect to the search for criminal antitrust violations."[80] The cases analysed above, as well as the theoretical discussion about the nature of cartels, shows that though cartels can happen in any sector, they are more likely to occur in some industries than in others. In most instances, the best sources of information about possible unlawful conduct in the

[80] McAnney J.W, "The Justice Department's Crusade against Price-Fixing: Initiative or Reaction?" Antitrust Bulletin (Fall 1991), pp.521-542

marketplace are market participants themselves – if a seller's cartel is suspected, then ask the buyers; if a buyer's cartel is suspected, ask the sellers.

Third, the news media are another useful source since cartel operators, especially unsophisticated ones, may make public statements that betray cartel activity. In other instances, known in the US, a series of simple reporting of various tender packages reveal useful patterns. Good sources of information regarding cartels in India, are the tenders being floated by the Railways, information from various government procurement agencies and Comptroller and Auditor General of India (CAG). Finally, taking into the account the long history of government intervention and planning in India, a fruitful avenue for cartel investigations could be sectors in which prices were until recently controlled by the government.

Fourth, the CCI should work out the details of implementing the leniency programme. Such a programme may not produce immediate results, as it would require the CCI to establish its credibility in successfully investigating and prosecuting cartels. CCI would face a major challenge in the latter context as the MRTPC has not established any precedent in successfully punishing or curbing cartels in India. Incidentally, this also presents an opportunity for the CCI. Lax enforcement of competition law (vis-à-vis cartel activity) has led to a mushrooming of cartels in India, which is often reported in the media from time to time. The CCI could use this opportunity to establish its credibility by investigating such alleged cartels. Some international best practices in formulating and implementing effective leniency programmes distilled by the International Competition Network could be useful in this regard.[81]

Thus a properly structured leniency programme should have the following elements:

- The first member of a cartel should receive complete immunity from prosecution and punishment. Leniency if provided to subsequent applicants should involve a wide gap between the first applicant and these applicants, in order to preserve the strong incentive to be the first.
- The programme should have maximum transparency so that would-be applicants can predict with certainty what the outcome of their application will be.

[81] Supra note 41

- The programme should apply both to situations in which the competition agency has no information about a cartel and those in which an investigation has already begun.
- CCI would need to maintain strict confidentiality regarding a leniency application and the identity of the applicant.[82]

Furthermore, a system of strong sanctions against cartels should also be detailed out, to provide a credible threat towards violators. The Competition Act provides for such tools to remedy the situation and they should be used.

Sixth, nowadays, there is an active international effort against cartels. The international competition community is working on means of achieving greater cooperation in fighting these secret, multinational agreements. A shared commitment to fighting international cartels has led to the establishment of cooperative relationships among antitrust enforcement agencies around the world. International organisations, such as UNCTAD and the OECD have long been active in studying and reporting on hard-core cartels.

Also, for the past seven years, representatives of the competition agencies of more than 25 countries have met annually to discuss anti-cartel enforcement techniques at the ICN. One result of this coordination in global antitrust enforcement has been an enhanced ability to detect, investigate, prosecute and punish cartel offences across the globe. For example, the Republic of Korea began investigating the graphite electrodes cartel after reading about American enforcement actions against this cartel. Likewise, Brazil initiated investigations into the lysine and vitamins cartels after US investigations were concluded (see Box10). Trading partners therefore benefit from active enforcement abroad – and these benefits are likely to be reinforced over time as formal and informal cooperation between competition authorities deepens.

[82] UNCTAD (2005)"A Synthesis of recent cartel investigations that are publicly available" Note by the UNCTAD secretariat

Box 11: Brazilian Investigations into the Lysine and Vitamins Cartels Triggered by Public Announcements from Abroad and Benefited from Informal Cooperation with US Agencies

In a submission to the 2002 OECD Global Forum on Competition, Brazil stated that, "despite the signature of the international agreement between Brazilian and North American antitrust authorities (in 1999), the most valuable source of international cooperation continues being informal. Particularly in three recent important cartel cases, this type of technical assistance proved to be essential".

"The first one is the Lysine International Cartel. Two months before the signature of the above mentioned agreement, in September 1999, in the International Cartel Workshop in Washington DC, the US Department of Justice presented in detail their work in the Lysine International Cartel Case. After the case went to trial, the available material became public, [which] allowed the disclosure of relevant information to Brazilian antitrust officials. Transcripts of the Lysine Cartel meetings sent to Brazilian authorities showed that Latin America and Brazil were included in the world market division set by the international cartel".

On the vitamins cartel, the Brazilian submission states:
"The second case, the Vitamins International Cartel Case, was also discovered by the US Department of Justice. the Brazilian Secretariat for Economic Monitoring (SEAE) decided to initiate its own investigations after press releases announced the prosecution of this cartel in the US. Notwithstanding, SEAE's lack of expertise in hard core cartel investigations hindered further developments in the case".

Concerning issues of confidentiality and informal cooperation with the US authorities, the submission states:
"…the fact that the case ha[d] not gone to trial in the United States unabled [prevented] the shar[ing] of documents because of confidentiality restraints. Hence, all the cooperation remained informal.

"Nevertheless, some important hints provided by North American authorities were essential for the analysis of Brazilian officials. One important [piece of] information received by SEAE was that the Vitamins Cartel operated very similarly to the Lysine Cartel…

"The second important hint was provided by an oral statement of a former director of a large vitamin producer. The director revealed that Latin American operations of the major vitamins companies were centralised in Brazil and helped Brazilian authorities to detect the whereabouts of former Latin American regional managers".

The submission goes on to describe how these two hints enabled the Brazilian authorities to assemble a case against the cartel members.

Source: Evenett, J. Simon (2003), "Can developing economies benefit from WTO negotiations on binding disciplines for hard core cartels?", UNCTAD/DITC/CLP/2003/3

The CCI should pro-actively participate in and make use of these cooperation initiatives. It may also try to establish bilateral cooperative arrangements with neighbouring countries and trading partners in competition law enforcement. While much of the information generated in the course of an investigation may be confidential and cannot be shared with a foreign agency, experience has shown that competition agencies can still engage in meaningful "informal" cooperation, which can include exchanging information on the status of a case or investigation, or on legal theories and investigative leads in a case.

There are benefits that CCI would be able to derive with international co-operation, on the following arguments:

- With collaboration of antitrust enforcement agencies, cartels run a greater risk of detection
- It becomes easier to collect evidence to use in prosecuting a cartel once it is detected.
- It is easier to apprehend culpable individuals. With the increasingly vigorous resolve of foreign governments to punish cartel activities, track and prosecute cartel offenders, the safe harbours for antitrust offenders are rapidly shrinking.[83]

[83] Barnett, T (2007). "Global Antitrust Enforcement", Georgetown Law Global Antitrust Enforcement Symposium

Seventh, competition agencies around the world agree that the success or failure of their on-the-spot investigations may in certain cases hinge crucially on the availability of investigators with expert information technology (IT) skills. What is more, every single investigator may not only be called upon to search computers, hand held and storage devices such as USB-sticks or memory cards, but is with increasing frequency confronted with password protected communication or storage systems, or even systems protected by encryption techniques. Hence computer-illiteracy can seriously impede the success of searches or inspections. It is considered of great importance that inspection teams comprise also specialist IT people who are able to search extensively company-internal networks and servers.[84]

Eight, industry or market studies may be conducted into particular industries, such as trucking, cement, tyre industry, shipping, etc in India where cartels are historically most prevalent. For example, cartels may be prompted by a decline in prices or by intense competition following the expansion of an incumbent or a large new entrant. Destabilisation of a cartel may be encouraged by entry or the threat of potential entry, and this may increase the incumbents' need to coordinate their activities, thereby making the collusive agreement more explicit and easier to prove. The likelihood of collusion can be inversely correlated with the number of firms and the degree of concentration in the market.

The above recommendations are with respect to specific cartel prosecution activities. Generally and most importantly, the CCI should strive to develop a "competition culture" – an understanding by the public of the benefits of competition and broad-based support for a strong competition policy. This requires communication with all parts of society – consumers, businesspeople, trade unions, educators, the legal community, government and regulatory officials, and judges – about the benefits of competitive markets to them and to their country's economy. Anti-cartel enforcement cannot be done in isolation; however, it is interdependent with competition law enforcement. Only through demonstrable success in enforcement will the public come to understand how it can benefit from competition. The above recommendations also

[84] ICN (2005), "Building Blocks for Effective Anti-Cartel Regimes", http://www.internationalcompetitionnetwork.org/media/library/conference_4th_bonn_2005/Effective_Anti-Cartel_Regimes_Building_Blocks.pdf

provide a platform to design the operational strategy for the CCI with relation to cartels, which is discussed below.

IX. OPERATIONAL GUIDELINES FOR CCI

IX.1 Dealing with Business

It is important for the CCI to educate business houses/associations on cartels. There have been instances where business houses or associations form a cartel without having an understanding of the fact that their action would come in the ambit of being a cartel. The practice becomes a norm without proper knowledge and prosecution of cartelisation. The CCI should prepare and publish reader-friendly booklets and pamphlets with case studies from around the world, explaining what cartels are, the harm that they cause and how to report them. This would help to curb cartel activities and business houses could be stopped from forming a cartel or running an existing cartel. This in turn would save a lot of the time and resources of the CCI.

Private notification or complaint is an important source of information to trigger cartel cases. Thus, CCI should develop a cordial relationship with the business houses, consumers and media and encourage them to give information about cartel activities in the industry. As the study has shown, there have been instances where trade/business associations have been engaged in cartel activity. The CCI needs to keep a check on the activities of the various trade/business associations.

IX.2 Capacity Building of CCI officials

It would be important to build in-house capacity on the understanding towards cartels. There is not much experience that could be gained from the past and hence the officials in CCI, who would be interacting with business houses, association etc, need to have a sound understanding of cartels. Thus they should undergo training programmes that would give them an exposure on cartels. In addition to this, CCI should also involve external advisers as experts for providing training programmes. External advisers should handhold CCI to undertake various activities including curbing of cartels in India. It is also important to build the capacity of CCI staff on issues relating to software, as explained above. It would be beneficial to hire IT experts who could then train the staff in-house.

IX.3 Studying Past Orders of the Supreme Court and the MRTPC

Several of MRTP Commission's decisions were challenged in the Supreme Court and in several of these cases the apex court turned down MRTP Commission's decisions. Such and other similar judicial orders have set a precedent. Defendants could use these case laws to defend their activities, when a particular case is taken up against them under the Competition Act. However, it is important to appreciate that the context under which these cases were decided has changed drastically and the past judgements need to be interpreted under the provisions of the Competition Act. CCI should study such precedent-setting orders in depth and prepare its strategy/arguments accordingly to deal with them should such a situation arise in the future. The alleged practices might be similar, but the legal and economic environment has changed substantially.

IX.4 Action against Existing Cartels

In recent time, various media houses have reported the maiden attempts of airlines to form a cartel. The newly formed Federation of Indian Airlines comprising of eight domestic airline companies, had in principle agreed that the full service carriers like Jet, Kingfisher, Indian Airlines would not price tickets lower than Rs. 2.40 a mile and the low cost airlines such as Air Deccan, Spice jet, etc would not price tickets lower than Rs. 2.00 a mile. The companies reached an agreement twice, but the cartelisation efforts broke down both times, with low cost airlines demanding a free run at the last minute.

In addition to this, there have been several reports of cartels in cement, steel, pharmaceuticals time and again. CCI can undertake in-depth study of such sectoral cartels and come out with their own analyses. The study would be undertaken for the purpose of in-house capacity building of the officials for better understanding of the workings of cartels.

IX. 5 Tie-ups with Media Houses and Consumer Organisations

Often cartels are reported in the media, which have a lot of useful information on the activities that take place in the market. CCI should build a relationship with media and consumer organisations, which could act as informers and provide the CCI with vital information on existence of cartels.

IX.6 Government Policies

As brought out in the report, there have been cases where government procurement policy or its implementation created incentives for formation of cartels. Hence, while investigating a case, the CCI should keep this factor in mind. It is important to create an environment that discourages formation of cartels rather than continue to detect and prosecute cartels without doing much about the root causes.

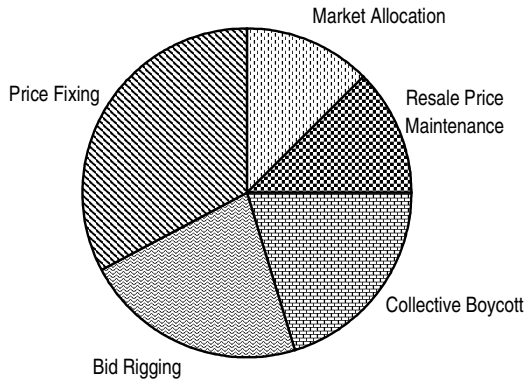
ANNEXURE I

Cartel Cases in India[85]

Cases before 1991 Amendment

If the cartel cases that were handled by the MRTPC before 1991 are analysed it will be found that majority of cases were related to price – fixing (21 cases), followed by cases on bid – rigging (14 cases), collective boycott (13 cases) and Resale Price Maintenance (8 cases) and Market Allocation (8 cases). According to the information that is available from the relevant sources, it is estimated that the MRTPC handled around 64 cases before 1991. In most of the cases where the cartelisation was established the MRTPC has passed cease and desist orders.

Pie Chart on types of cartel cases handled by MRTPC before 1991



The cases relating to price –fixing are as follows.

The majority of cases before 1991 are related to price –fixing in different industries in India including the woollen industry, the rubber industry, the tyre industry, the paper industry, the chemical industry and also the transport sector. Either prices were raised or fixed by the respective parties. In most of the cases the cartelisation was proved and the MRTPC had passed cease and desist orders.

[85] These cases have been compiled from the unpublished M. Phil Thesis of Oindrila De (2005), submitted to the Department of Economics, University of Delhi, alongwith MRTPC journals and various legal websites.

1. *Raymond Woollen Mills Ltd (J.K. Engineering Files Division)*, RTPE 27 of 1974, Order dated 25/2/1975 before MRTPC – The MRTPC filed a notice of inquiry to the respondent who was a manufacturer of steel, for indulging in restrictive trade practices by increasing prices of steel, practising discrimination in the matter of supplying, charging prices, giving discounts, etc., refusing to deal with certain distributors. The respondent filed an application praying that the notice of inquiry should be discharged and the MRTPC should extend time for filing the respondent's reply. The MRTPC dismissed the application as it was filed only to delay the inquiry into allegation of restrictive trade practice alleged against it.
2. *I A & I C (P) Ltd, Bombay and Sulphur Mills (P) Ltd, Bombay*, RTPE 6 of 1981, order dated 23/2/1984 - Respondents were manufacturers of Sulphur dust 85% and allegedly engaged in parallel pricing and acting in concert for fixing, maintaining and increasing price of sulphur dust 85%. Filed two statements in reply to a notice of enquiry (NOE) categorically stating that they will not indulge in RTP of fixing and rising prices in concert or indulging in cartel formation. After this, the MRTPC did not proceed with the enquiry whether the respondents were already engaged in a cartel or not; written statements were deemed to be as efficacious as a cease and desist order. Mere assurance from respondents who may be indulging in RTP was satisfactory enough to stop the enquiry since the ultimate result of enquiry is not very different anyway.
3. *Tirunerveli District Lorry Owners Association*, RTPE 14 of 1983, order dated 20/3/1984 - Similar situation as above (assurance given by respondents, hence no enquiry undertaken).
4. *Jay Engineering Works Ltd and others*, RTPE 17 of 1980, order dated 6/4/1983, Similar situation as above. (Assurance given by respondents, hence no enquiry undertaken).
5. *The general Code of Conduct for Members of the Automotive Tyre Industry of India*, RTPE 1 of 1971, order dated 19/4/1976 (Ref: First Annual Report of MRTPC, 1971-72) - Eight firms (Incheck Tyres Ltd, Dunlop India, Goodyear India, Firestone Tyre and Rubber Co. India Pvt Ltd, Premier Tyres Ltd, The India Tyre and Rubber Co. Pvt Ltd, Ceat Tyres of India Ltd, and Madras Rubber Factory Ltd.) engaged in a cartel with a formal or written agreement among them in the post 1967 period. The agreement was known as "The general

Code … …". The MRTPC instituted an enquiry in 1971 and commenced with it in December 1972 on grounds of price fixing in concert, discriminatory dealings, market sharing, fixing terms and conditions of sale other than price, mutually agreed distribution system, limiting, restricting and withholding supply, etc. MRTPC took up another enquiry against the 8 tyre companies based on a complaint lodged by the All India Motor Transport Congress. Allegations were price fixing concert, discriminatory dealings, restricting and withholding supplies and dumping accessories and other motor vehicle parts on dealers. A cease and desist order passed by the Commission in 1976 and in 1978 respectively. This led to formal breaking up of the alleged cartel.

6. *Firestone Tyre & Rubber Co. of India (P) Ltd (now changed to Bombay Tyres International Ltd) and Others*, RTPE 13 of 1978, order dated 24/3/1983 - MRTPC instituted an enquiry in 1978, but closed it in early 1980s on the ground that the respondents agreed not to indulge in the concerted price fixing in future and agreed to inform price increases to the Commission for consecutive 3-year period.
7. Madras Rubber Factory Ltd, Goodyear India Ltd, Dunlop India Ltd and Bombay Tyres International Ltd., RTPE 6 of 1978, order dated 2/2/1983 - Respondents filed an application under section 37(2) agreeing not to indulge in RTPs of concerted tying up sale of tyre flaps with either tubes or tyres or both and also agreed to inform the MRTPC about change in prices of tyre flaps in the replacement market within three months of change for next five years. Two cease and desist orders were passed against these tyre manufacturers in late 1970s. Yet the MRTPC did not punish them even though allegations of price fixing recurred again and again. MRTPC closed the enquiry on the ground that respondents 'assured' it of not indulging in such practices in future.
8. *The Alkali and Chemical Corporation of India Ltd, Calcutta and Bayer (I) Ltd, Bombay*, RTPE 21 of 1981, order dated 3/7/1984 - Respondents were engaged in manufacture and sale of rubber chemicals who commanded a dominant share (around 75% to 82%, as per DGIR) in the market. Respondents failed to justify the arbitrariness of the price increase despite the fact that two opportunities were given to them to do so. Respondents did not deny price parallelism, but denied the allegation that it was due to concerted effort. DGIR could not furnish other circumstantial evidences sought by the Commission. The DGIR alleged

that respondents did not furnish cost data even when asked to do so In this case, the Commission relied on a US judgment in deciding the case of price parallelism (346 U.S. 537, 1954, case of Theatre Enterprises) and sought for additional information. The Commission held that there is no price collusion since DGIR did not provide circumstantial evidences beyond price parallelism (crux: some additional factors or circumstances in the direction of concerted activity should be there to distinguish between price parallelism and tacit collusion). Neither the law nor the Commission and investigating agency had the expertise to deal with such cases. In this case, the Commission held that like price parallelism, price leadership too is a common feature of an oligopolistic market and cannot be considered as concerted effort.

9. *Major English Newspapers and Indian and Eastern Newspaper Society*, RTPE 46 of 1975, order dated 18/12/1975, RTPE 47 of 1975, order dated 6/2/1976, RTPE 48 of 1975, order dated 27/2/1976, RTPE 49 of 1975, order dated 19/3/1976 - In 1975, four cases came up alleging concerted effort among major English newspapers and Indian and Eastern Newspaper Society and its regional committee to fix, increase and maintain price. It was alleged that even if there was substantial reduction in pages, the price was not reduced, rather increased in the said period. Interestingly, in this case, the respondents in all four cases submitted a 'cease and desist' order and MRTPC passed the order accordingly, without going for a full-fledged inquiry into price parallelism.[86]

13. *Coates India Ltd and five others*, RTPE 7 of 1975, order dated 12/9/1975 - Same as in the newspapers case. Allegation of price parallelism, fixation and increase in prices in concert and concessions, discounts to dealers or customers.

14. *Ghai Enterprises Pvt Ltd and Quality Ice Creams*, RTPE 18 of 1983, order dated 25/4/1986 - MRTPC finally linked price parallelism with tacit agreement. The two leading manufacturers of ice cream had a market share of about 80% and MRTPC observed that identity of prices of a large number of varieties of ice cream was not coincidental but a mutually planned scheme. It was also noted that the two respondents have interconnection. Not only price increase but introduction of other incentives like discount schemes, new flavours were following one another. The Commission concluded that 'preponderance of

[86] There are in total four cases mentioned in point no. 9

probabilities' in the case leads to an inference of concerted effort and passed cease and desist order accordingly.

15. *Baroda Rayon Corporation Ltd*, Order dated 6/8/1976 - Cases where manufacturers in same line of production form an association or federation that is often instrumental to fix prices or terms of sale. These associations were involved in price fixing and in all these cases, the Commission passed a cease and desist order.
16. *Alkali Manufacturers Association*, RTPE 26 of 1984, order dated 29/3/1985 - Cases where manufacturers in same line of production form an association or federation that is often instrumental to fix prices or fix terms of sale. These associations were involved in price fixing and in all these cases, the Commission passed a cease and desist order.
17. *Indian Woollen Mills Federation and others*, RTPE 32 of 1976, order dated 25/4/1977 - Cases where manufacturers in same line of production form an association or federation that is often instrumental to fix prices or fix terms of sale. These associations were involved in price fixing and in all these cases, the Commission passed a cease and desist order.
18. *Food grains and kirana Merchants Association, Indian Rayon Corporation, Gujarat*, RTPE 18 of 1981, order dated 22/2/1983 - Cases where manufacturers in same line of production form an association or federation that is often instrumental to fix prices or fix terms of sale. These associations were involved in price fixing and in all these cases, the Commission passed a cease and desist order.
19. *Truck Operators and Transport Operators Association, Rampur and Other* - RTPE 11 of 1987, order dated 14/8/1987 - Cases where manufacturers in same line of production form an association or federation that is often instrumental to fix prices or fix terms of sale. These associations were involved in price fixing and in all these cases, the Commission passed a cease and desist order.
20. *RRTA vs Hind Lamps and others*, RTPE 13 of 1974, order dated 19/4/1984 - Enquiry whether agreement prejudicial to public interest or not. Allegation was that the electric bulb manufacturers entered into a formal agreement which was restrictive in nature. Five foreign electric bulb companies and an Indian company floated a new electric bulb company within India named as Hind Lamps Ltd, through two agreements among them. The Commission dropped the

enquiry on the ground that the agreement expired in 1972 and throughout the decade they did not hear any other complaint against the respondents other than the application filed by RRTA.

21. *The Nylon pact, Civil Miscellaneous writ petition 8060 of 1974*, order dated 16/4/1976 by the Allahabad High Court - Enquiry whether agreement prejudicial to public interest or not. The Nylon pact was among four nylon spinners and 18 weaver's association for the purpose of having an equitable distribution of nylon yarn at concessional prices under the supervision and approval of central government. The three-member bench differed in the matter that the agreement has the approval of central government but by majority judgment, commission decided against the nylon spinners on 21/10/1974.The writ petition was filed by one of the nylon spinners. The High Court agreed that the agreement had the requisite approval of the central government and cannot constitute the subject matter of an enquiry under section 37 of MRTP Act. On the issue of whether the Commission can enquire into an agreement that has already expired (the agreement expired on 31/8/1975), the Court concluded that the RTP which is intended to be enquired into and prevented from being repeated must exist in *praesenti*. So the writ petition was allowed nullifying the order of the MRTPC.

The cases relating to <u>bid rigging</u> are as follows. In most of the cases bid rigging was proved and the MRTPC had passed cease and desist orders. The industries where bid rigging was prevalent include the aluminium industry, asbestos industry, organic chemical industry and other industries. Detailed report on some of the cases could not be given due to lack of available information.

22. *Oriental Power Cables Ltd and Others*, RTPE 12 of 1975, Enquiry instituted against 10 respondents on the ground that they quoted identical or near about identical rates by arrangement and understanding among themselves. On receipt of NOE, respondents filed a writ petition at Bombay High Court complaining that they were being denied necessary particulars and they should be provided with better particulars by the MRTPC. After 7 years! (In 1982), the High Court ordered the MRTPC to furnish better particulars. Subsequently, DG (I&R) furnished better particulars. The respondents then

filed an application under 37(2) stating that they have never indulged in any cartel and would not indulge in such activity in future. They further stated that there is no relevance for investigating into an alleged cartel that formed almost a decade ago. The DG alleged that respondents have a habit of entering into a cartel and the same situation can happen in future, and that the matter should be thoroughly enquired. But the MRTPC did not find any relevant ground to continue with the enquiry and stated that if respondents indulge in such practices in future, DG can launch a fresh proceeding before the Commission.

23. *Sandvik Asia*, RTPE 44 of 1977, order dated 13/3/1979 - Economic theory recognises that 'oligopoly pricing' is a special case of 'collusive pricing' and conscious parallelism is much-sophisticated business behaviour to guard the firms from anti-trust law. The Indian judgments did not recognise that price parallelism is a form of non-cooperative collusion.
24. *South India Mill owners' Association vs Gwalior Rayon*, RTPE 83 of 1976, order dated 20/9/1979 - Economic theory recognises that 'oligopoly pricing' is a special case of 'collusive pricing' and conscious parallelism is much-sophisticated business behaviour to guard the firms from anti-trust law. The Indian judgments did not recognise that price parallelism is a form of non-cooperative collusion.
25. *RRTA vs India Foils and Indian Aluminium Co*., RTPE 16 of 1981, order dated 6/5/1983 - Economic theory recognises that 'oligopoly pricing' is a special case of 'collusive pricing' and conscious parallelism is much-sophisticated business behaviour to guard the firms from anti-trust law. The Indian judgments did not recognise that price parallelism is a form of non-cooperative collusion. Several cases came up before the MRTPC regarding price parallelism by manufacturers or parallel price quotations for tenders, but the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort. In dealing with price parallelism, the Commission emphasised on direct evidence of concert and other circumstantial evidence to strengthen the case.
26. *Grind well Norton Ltd and Carborandum Universal Ltd*, RTPE 23 of 1981, order dated 27/7/1983 - Several cases came up before the MRTPC regarding price parallelism by manufacturers or parallel price quotations for tenders, but

the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort. In dealing with price parallelism, the Commission emphasised on direct evidence of concert and other circumstantial evidence to strengthen the case.

27. *DGIR vs All Gujarat Distillery Association and Others*, I.A no. 109 of 1988, RTPE 315 of 1988, order dated 20/6/1988 - Several cases came up before the MRTPC regarding price parallelism by manufacturers or parallel price quotations for tenders, but the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort. In dealing with price parallelism, the Commission emphasised on direct evidence of concert and other circumstantial evidence to strengthen the case.
28. *RRTA vs Hyderabad Asbestos Cement Products and one other*, RTPE 17 of 1979, order dated 20/12/1982 - Several cases came up before the MRTPC regarding price parallelism by manufacturers or parallel price quotations for tenders, but the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort. In dealing with price parallelism, the Commission emphasised on direct evidence of concert and other circumstantial evidence to strengthen the case.
29. *DGIR vs Cement Manufacturers Association and Others*, Order dated 28/1/1991 - Several cases came up before the MRTPC regarding price parallelism by manufacturers or parallel price quotations for tenders, but the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort. In dealing with price parallelism, the Commission emphasised on direct evidence of concert and other circumstantial evidence to strengthen the case.
30. *National Organic Chemical Industries and Others*, Order dated 25/11/1978 - Hindustan Lever Ltd and TATA Oil Mills Co. Ltd, RTPE 4 of 1978, order dated 22/7/1982 - Allegation of price parallelism. The Commission pointed out two requirements for a trade practice to be a concerted one. First, the trade practice must either influence the market behaviour of undertakings concerned and remove in advance uncertainty as to the future competitive conduct of an undertaking or maintain or alter the commercial conduct in an uncompetitive manner. The MRTPC was satisfied with the facts presented by DGIR for proving the first requirement. But the Commission emphasised on the second

requirement: there should be a positive contact, however slender, between the parties either by meeting or decision or in any manner. The Commission stated "in an oligopolistic industry, a few units will be dominating the industry and each would be having an eye on the other to see what its behaviour will be. They will be interdependent without any overt acting together. The two respondents being the executive members of ISTMA and being dominant units in the industry is consistent with this possibility. No other contact for the above acted objections was alleged. DGIR applied for a review of the judgment, but this was rejected by the Commission.

32. *Bengal Tools Ltd*, RTPE 120 of 1984, order dated 25/4/1984 - In this case, collusive tendering was proved as concerted effort. Quotes given by the respondents were totally identical for various sizes of shear blades/knifes and slitting cutters. The cost data provided by respondents revealed stark differences in cost among the manufacturers though they quoted the same price. Respondents argued the act was not prejudicial to public interest. Howsoever, MRTPC passed a 'cease and desist order'.
33. *Excel Industries Ltd and Others*, RTPE 31 of 1985, order dated 23/3/1985 - Same result as Bengal Tools Ltd case.
34. *Shri Gopal Metal and Wood Works Ltd and Others*, Perfect Circle Victor and Others, RTPE 31 of 1976 - Same result as Bengal Tools Ltd case.
35. *Swastik Laminating Industries and Others*, RTPE 81 of 1984, order dated 31/1/1986 - Identical rates were quoted by various small-scale units against the tender floated by National Fertilizers Ltd, and prices quoted by these units were lower than others. Small-scale units contended that this benefited not only government, but also the units which depended for their survival on such large tenders. The Commission decided that the practice is not prejudicial to public interest mainly due to three reasons, (i) small-scale nature of the units, (ii) denial of any collusion by National Fertiliser Ltd and (iii) Fixed factor price, which was quoted by respondents, was just 25-30% of the total cost of the goods supplied.
36. *Chloride India Ltd and Others*, RTPE 46 of 1979, order dated12/5/1981 - Case relating to price leadership. Allegation revolved around quoting prices for storage batteries in concert because of the identity or near identity of prices quoted by the three respondents. The judgment stated "it was not

possible to make allegation of concert against the first respondent, being the bulk supplier of batteries, having a large share of the market, other respondents could not be blamed for treating him as a price leader and quoting prices either identical with or similar to the prices quoted by it. (The Commission seemed to express a viewpoint similar to that observed in a US Supreme Court order: the fact that competitors may see proper, in exercise of their own judgment, to follow the prices of another manufacturer, does not establish suppression of competition nor show any sinister domination).

The following cases are related to collective boycott. In most of the cases relating to collective boycott the MRTPC had passed cease and desist orders. According to the available information, the cotton merchant association, the ghee merchant association, the chemists and druggists' organisation, the transport sector were involved in collective boycott. In cases where the MRTPC could not get adequate evidence it stopped the enquiry.

37. *RRTA vs Hindustan Pilkington Glass Workers Ltd and Window Glass Ltd* - The manufacturers of wired, figured and profilite glass entered into an agreement with Surat Cotton spinning and weaving mills private ltd (proprietors of Navin glass products). The latter company was prevented from making or selling certain glass products in consideration of payment of agreed compensation of Rs.12.5 lakhs by each respondent and was further required to sell its products to both. Pilkington and Window Glass also arrived at a common marketing arrangement through Associated Partners and Wired Glass, a company promoted by them for the purpose. The Commission passed a 'cease and desist order' against the respondents and declared the agreement as void.
38. *RRTA vs Jay Engineering Works*, RTPE 17 of 1980, order dated 6/4/1983 - In this case and the following case, parties submitted before the Commission under section 37(2), without admitting it.
39. *RRTA vs Crompton Greaves Ltd*, Order dated 29/10/1976 - In this case, parties submitted before the Commission under section 37(2), without admitting it.
40. *Andhra Pradesh Paper Mills Ltd*, RTPE 1973, order dated 31/1/1976 - Enquiry closed on the ground that after Paper (Control of Production) Order,

1974 had come into existence, the ordinary white printing and writing paper was no longer in short supply.

41. *DGIR vs All India Organisation of Chemists and Druggists*, RTPE 259 of 1988, order dated 18/11/1991 - Respondents 1 to 4 (association of traders in pharmacy products) and respondent 5 (manufacturer of certain pharmaceutical products) entered into an agreement where certain obligations were imposed on respondent no. 5 by rest of them for appointing one stockist each geographical district where no stockists are in existence and if respondent no. 5 wishes to employ additional stockists in any area, it could only be done through mutual consent and discussion. Another allegation was that the agreement fixed the trade commission to be paid to the stockists. The Commission held that it was an agreement between a seller and a purchaser and passed a cease and desist order on the ground of restrictions on persons to whom goods have been sold and territorial restriction. However, the Commission refused to consider this as collective agreement.
42. *Bombay Cotton Waste Merchants Association*, RTPE 127 of 1984, order dated 20/3/1986 - Collective Boycott. Enquiry closed on the ground that the respondents submitted undertakings under section 37(2) stating not to indulge into such practices.
43. *Ghee Merchants Association*, RTPE 23 of 1976, order dated 14/2/1977 - The respondent is a registered association of persons doing business of selling ghee on wholesale basis, having place of business in Greater Bombay and carrying on the business relating to pure ghee bearing 'Agmark'. The association was accused of fixing the price for sale of ghee. The enquiry revealed the allegation to be true. MRTPC restrained the respondent from the RTP and prohibited them from fixing prices or terms of sales, cess, commission, storage charges, discount, godown rent, insurance, labour charges or any other charges.
44. *Truck Operators Union*, RTPE 32 of 1977, order dated 20/2/1978 - Enquiry was started suo motu by MRTPC. The respondents were alleged to be resorting to the following practices, (a) price control, (b) restriction on new members, (c) imposition of commission, in addition to the freight on the traders. After investigation, MRTPC passed an order restraining and prohibiting the respondent from prescribing uniform prices or other terms of

transportation, stopping any truck operator from entering the fruit and vegetable market and charging commission from traders in addition to the freight.

45. *Motor Merchants Association*, RTPE 1 of 1979, order dated 8/8/1979 - Relevant documents were not available at the MRPTC Commission office in New Delhi.
46. *General Merchants Association*, RTPE 19 of 1976, order dated 18/3/1977 - The respondent Association and its members were alleged to have entered into an agreement/understanding that no members of the Association should sell any articles at a price lower than that fixed by the Association and defaulting member is liable to pay a fine. MRTPC passed an order restraining and prohibiting the respondent from into any agreement, understanding for fixing price of any article to be sold by the Association or its members, non-members, or members of the general public.
47. *Association of Motion Picture Studios*, RTPE 17 of 1985, order dated 8/4/1991- Relevant documents were not available at the MRPTC Commission office in New Delhi.
48. *Retail and Dispensing Chemists Association*, Bombay, RTPE 10 of 1984 - Relevant documents were not available at the MRPTC Commission office in New Delhi.
49. *Motor Lorry Owners and Operators Union (A.P.) and three other lorry owners' association*, RTPE 97, 98 and 99 of 1989 and 402 of 1988, order dated 3/12/1990) - Allegation that four lorry owners at four places acting in concert in fixing freight rates, not allowing transport contractors to hire other lorries at existing market rates, and not allowing them to even place their own lorries and forcing the contractors to hire lorries from its members at higher rates. The Commission held that physical obstruction is not a RTP, it should be dealt under law. The Commission refused to believe that the respondents are forcing transport contractors to hire lorries from them. In the absence of clear-cut evidence, the Commission discharged the NOE.

The following cases are related to collective resale price maintenance. The organisations which were involved include Standard Mills Company, Phillips India

Limited, Amco Batteries, etc. The MRTPC had passed cease and desist orders in cases where collective resale price maintenance had been proved.

50. *RRTA vs Swadesi Mills Co. Ltd*, RTPE 19 of 1974, order dated 30/1/1976 - Respondents collectively known as 'Tata textile mills'. A standard agreement was entered into between respondents and a number of stockists. Clause 2 of the agreement declared, "the stockists shall at all times, sell cloths at prices not higher or lower than those prescribed by the Tata textile mills'. According to respondents this clause was drastically changed and circulated among the stockists where they were free to sell at any prices lower than a stipulated maximum price limit. Commission passed a consent order stating that the clause should be modified to replace, 'the prices recommended by Tata textile mills or any of them to the stockists shall be maximum prices and the stockists shall be free to charge prices lower than those prices'.
51. *Standard Mills Company Ltd and others*, Case book on MRTP cases by Rajendra, page 502 - Same judgment made in this case also, where textile mills of respondents were collectively known as Mafatlal group of mills.
52. *Phillips India Ltd and Others*, RTPE 18 of 1975, order dated 18/6/ - Collective resale price prohibited completely (cease and desist) in these cases.
53. *Phillips India Ltd*, RTPE 26 of 1975, order dated 25/7/1976- Collective resale price prohibited completely (cease and desist) in these cases.
54. *RRTA vs Crompton Greaves Ltd*, Order dated 29/10/1976 - Collective resale price prohibited completely (cease and desist) in these cases.
55. *Amco Batteries Ltd and others*, RTPE 25 of 1976, order dated 8/5/1978 - Collective resale price prohibited completely (cease and desist) in these cases.
56. *RRTA vs Electric Lamp Manufacturers (India) Pvt Ltd and Others*, RTPE 12 of 1974, order dated 17/9/1984 - Agreement among manufacturers or dealers of electric lamps and components. Main allegation was maintainance of resale price by the respondents. Respondents filed a writ petition before Bombay High Court objecting to the institution of enquiry contending that the particulars furnished to them were insufficient. On the order of Bombay High Court, RRTA furnished particulars demanded by them. The respondents filed an application under section 37(2) pleading that they have never indulged in any restrictive trade practices and assured the Commission that they will not

do so in future. The Commission closed the inquiry without investigating into the matter.

The following cases are related to market allocation mainly involving trucking cartels. In a number of the following cases allegations of price fixation were also proved in addition to market allocation.

57. In Re: Truck Operators Union, (RTP Enquiry No. 32 of 1977) – It was held that the constitution of the Union enabled the existing members to keep out new entrants from the market of transportation of fruits and vegetables on arbitrary grounds. It was alleged before the MRTPC that if any transporter had attempted to enter the market and offered to transport fruits and vegetables, he was restrained to do so by force. While ordering modification of the impugned clause of the constitution of the Union, a "cease and desist" order was passed against the Union.
58. In Re: Bharatpur Truck Operator's Union, (RTP Enquiry No. 10 of 1982) – It was alleged that non-members were restricted from lifting the goods from within the city of Bharatpur and its surrounding areas, in addition to concert in fixing, maintaining and increasing freight rates. A cease and desist order was passed.
59. In Re: Rohtak Public Goods Motor Union, (RTP Enquiry No. 25 of 1983) – A complaint was received from the President of Rohtak Mandi Foodgrain Dealer's Association against Rohtak Public Goods Motor Union alleging that they had not allowed non-union truck operators to carry goods. The allegation was proved and a cease and desist order was passed by the MRTPC.
60. In Re: Bhilwara District Trust Transport Union, (RTP No. 29 of 1986 and 109 of 1986) – Two enquiries were instituted against the Bhilwara District Trust Transport Union & others. Allegations of being involved in RTPs of market allocation and increase of freight rates were made and MRTPC issued an interim temporary injunction restraining the respondents from carrying on the restrictive trade practice.
61. In Re: India Truck Union, Mahwa, Rajasthan (RTP Enquiry No. 30 of 1983) – The allegations included preventing non-members from loading goods, forcing customer to hire trucks from members only, etc. The allegations were

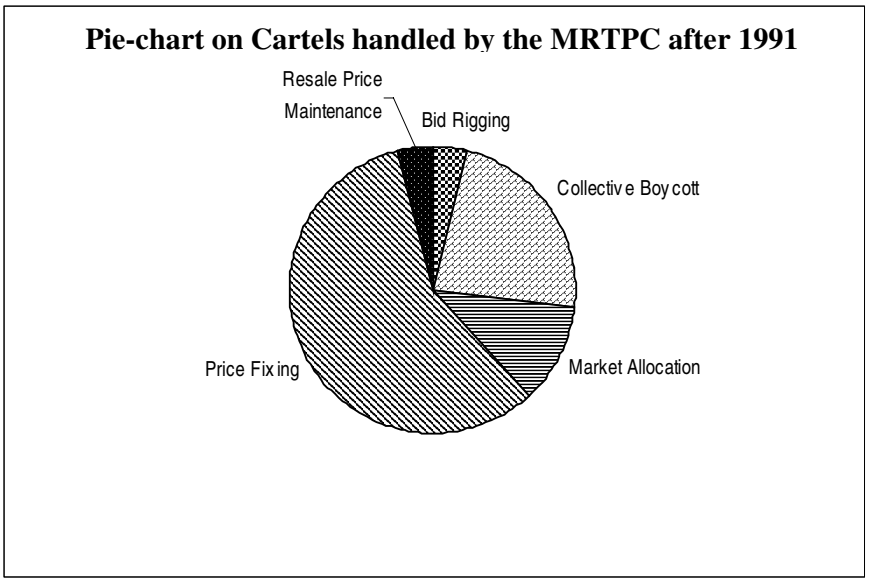
proved and the MRTPC passed cease and desist order against the respondent union.

62. In Re: Goods Trucks Operators Union, Faridabad and others (RTP Enquiry No. 1313 of 1987) – It was alleged that the members of the union were prevented from negotiating on freight rates freely and were involved in market allocation. A cease and desist order was issued by the MRTPC.
63. In Re: motor Lorry Owners and Operator's Union (RTP No. 402 of 1988, 97, 98 and 99 of 1989) – It was alleged that the four lorry associations had indulged in dislocating the public distribution system by not allowing the transport contractors of the Civil Supplies Corporation to hire other lorries at the existing market rates. Due to lack of evidence the MRTPC did not issue any restraining order.
64. In Re: Truck Operator's Union, Haryana (RTP Enquiry no. 98 of 1990) – The allegation was that the Union compelled non-member Truck Owner to become member of the Union failing which the Union would prevent manufacturers from using their trucks in Karnal district. The MRTPC issued a cease and desist order against the respondents.

Cases handled by MRTPC after 1991 amendment.

After 1991, the number of cases handled by the MRTPC had been lesser for reasons already mentioned above. Information was available in respect of 26 cases filed before MRTPC as compared to 56 cases filed before 1991. After 1991, most of the cases handled by the MRTPC were related to price fixing (15 cases), followed by collective boycott (6 cases), market allocation (3 cases), resale price maintenance (1 case) and bid rigging (1 case).

The majority of cases after 1991 had been related to the transport sector, where the truck organisations had been involved in price-fixation and market allocation. There are a number of cases where two or more forms of cartelisation had taken place together.



The following cases are related to price fixing. Price fixing was prevalent in the Indian chemical industry, bank associations and very significantly in the transport sector. The truck associations including Sirmur Truck Operator's Union, Taraori Mandi Goods Transport Co., Faridabad Complex Transporters & Truck Operators Union were involved in price-fixing and market allocating cartels. As the cases involve more than one form of cartel, they have been categorised under price-fixing cartel but a lot of them were also related to market allocation.

1. *American Natural Soda Ash Corporation (ANSAC) vs Alkali Manufacturers Association (AMAI) and others*, Order dated in 2002 (SC) - Supreme Court held that MRTPC has no extra-territorial jurisdiction.

2. *DGIR v. Reliance industries and others,* RTPE 123 of 1989, order dated 31/5/2002 - Relevant documents were not available at the MRPTC Commission office in New Delhi
3. *DGIR vs Modi Alkali and Chemicals Ltd and others*, RTPE 118 of 1994, order dated 1/3/2002 - It relates to an anonymous complaint received by the Commission that the respondents entered into cartel and increased prices of chlorine gas and hydrochoric acid by 277% and 200% within 6 and 4 months respectively in 1992. The Commission prima facie felt that the alleged formation of a cartel by the respondents warranted enquiry. A notice of enquiry was issued to the respondents. The respondents contested it. Parity of prices of respondents, agreement by way of concerted action suggesting conspiracy among them and intent to monopolise the market to eliminate competition could not be proved. Essential criteria of cartelization were thus found missing. Respondents were held right in their contention that there was no basis for the issuance of notice of enquiry to them on this ground. Accordingly the charge was dropped.
4. *U.O.I & Others vs Hindustan Development Corporation and Others*, Special leave petition 11897-11898 of 1992, order dated 15/4/1993 - A case tried in the Supreme Court. In this case three essential ingredients for cartel were identified: parity of prices; agreement by way of concerted action suggesting conspiracy; gain monopoly or restrict or eliminate competition. Cartel charge not established.
5. *DGIR vs Four Wheeler Nishan Owners Union and Others*, RTPE 94 of 1990, order dated 8/5/2001 - Respondents were restricting non-members from lifting goods of local trade and industry and were compelling non-members to hire vehicles from them at the prescribed freight rate which was maximum. The Commission passed a cease and desist order despite the gateways pleaded by respondents.
6. *DGIR vs Indian Banks' Association and its constituent members*, RTPE 106 of 1995, order dated 23/8/2001 - Respondents allegedly formed a cartel with a view to high bank service charges. DGIR in its preliminary report reveals that the accusation of arbitrary increase of service charges may not be established since there have been an increase in cost of operation, but there is no doubt that all the banks are fixing bank charges collectively which impairs competition

within the meaning of section 2(o)(ii) and section 33(1)(d) and (g). The RBI in its letter dated 8/9/1999 stated that though the present practice of fixing benchmark rates by IBA for services rendered by banks was consistent with a regime of administered interest rate, in the current scenario of deregulation, the above practice is not consistent with the principles of competition among banks. So RBI directed IBA not to fix or advise any benchmark fees/service charges thereafter. The Commission after observing RBI's direction did not find it relevant to investigate further into the matter.

7. *Association of State Road Transport Undertakings v. Kar Mobiles Ltd. & Another*, 2002 CTJ 433 (MRTP) - It relates to the allegation that the complainant discovered from the tenders submitted by the respondents that the prices of the tendered products quoted by them were identical suggesting carrying on the trade practice of cartelization by them. It was just by chance that the prices as quoted by them turned out to be identical. No material was brought on record to show that there was collusiveness on the respondents' part or any meeting of mind to act in concert against the complainant. Accordingly it was held that no case of cartelization or even manipulation of prices was made out against the respondents. Complaint was dismissed and notice of enquiry was discharged.
8. *Director General (I &R) v. Indian Banks' Association and its constituent members*, 2002 CTJ 159(MRTP) - DG (I & R) received a copy of complaint dated 24.9.94 from Calcutta Chamber of Trade, Union Ministry of Finance and complaint from Mr. MS Kamath and Mr Nagesh M. Kini, stating that the respondent association had formed a cartel to hike bank service charges steeply. As the RBI has already given directions in respect of contentions raised by the respondent, the complaint stands disposed of. Notice of enquiry is accordingly discharged.
9. *Alkali Manufacturers Association of India v. Sinochem International Chemicals Co. Ltd. & Another*, 1998 CTJ 253 (MRTPC) - Complaint was filed to the MRTPC alleging that the 1st respondent along with soda ash manufacturers in China formed a cartel and sold soda ash in the Indian market at prices ranging between $150 to $160 per mt. CFR against the normal CFR price of $209 -214 per mt of the product in question. An application was made for ad interim injunction against the respondents. After enquiry the injunction application was

considered and MRTPC prima facie held that the respondent has formed a cartel for exporting soda ash to India at prices lower than normal prices. An order was passed restraining the first respondent from getting into any cartel for export of soda ash to India or from exporting soda ash at below its normal and fair price.

10. *Director General (I &R) v. Saurashtra Chemicals Ltd. & Others*, 2001 CTJ 211 (MRTP) - A complaint was received from Insilco Ltd. alleging therein, cartelization by the three manufacturers of soda ash, in the country and price increase effected by them simultaneously, in the months of July and December, 1994 with very small differential in their respective prices. The complaint was investigated by the DG (I &R). Preliminary Investigation Report (PIR) was submitted to the MRTPC concluding that a case of RTP was made out. The preliminary issue with regard to the maintability of the present enquiry was decided in the affirmative and against the respondents.
11. *In Re: Sirmur Truck Operators Union (Regd) and Others*, (1995) 3 CTJ(MRTPC) - Allegations were made against the respondent union and its office-bearers that they resorted to RTP of acting in concert in fixing the freight rates and demanding donations from the non-members for loading or unloading goods in Sirmur. Enquiry was conducted by the MRTPC on its own knowledge or information. The charge of RTP was upheld. Freight lists prepared and circulated by the respondents established beyond any doubt that they indulged in the RTP covered by section 33(1)(d) of the Act. The respondents by preventing the non-member truck operators to load and unload goods within the territory of Sirmur, which inevitably distorted competition by reserving the area of Sirmur for the Union members, indulged in the RTP in terms of section 2 (o). As the practice was presumed to be prejudicial to public interest u/s 38, a cease and desist order was issued directing the respondents to stop the practice forthwith and not to repeat it in future.
12. *In Re: Truck Operators Union & others*, (1995)3 CTJ 70 (MRTPC) - Allegations were made that the respondents prevented other truck operators, not being members of the respondent truck operators' union, to load or unload goods at Nilokheri in Dist. Karnal. Even the owners of the trucks were given the same treatment. Complaint was filed together with an application seeking the issue of an injunction order with the MRTPC. Complaint was considered and referred to the Director General (I&R) for investigation. Investigation report

was received recommending enquiry into the alleged practices of the respondents. Enquiry instituted and injunction issued restraining the respondents from preventing the complainants from loading goods in their trucks. It was held, that the respondents indulged in the RTP, prejudicial to the public interest. A cease and desist order was passed prohibiting the respondents from engaging in the practice in future.

13. *Federation of Biscuit Manufacturers of India v. Gujarat Propack Ltd. & others*, (1994) 2 CTJ 201 - Allegations were made against the respondents by the consumers of restricting supplies of BOPP flim resulting in imposition of unjustified costs. Also allegations were made of formation of a price cartel. Replies were filed by the respondents contesting the allegations. The complaint and injunction application were dismissed by the MRTPC as they were considered devoid of substance and being too general and vague to warrant enquiry.
14. *Faridabad Complex Transporters & Truck Operators Union & Others: In re*, (1993) 1 CTJ 353 (MRTPC) - The MRTPC received information that the respondents were fixing or maintaining exorbitant freight rates for transport services provided by them leading to distortion of the competition. Respondents were also not allowing the trucks other than their own. The information was investigated by the DG (Research). Enquiry proceeded ex-parte against the respondents. Respondents were held to be indulging in RTP as alleged against them. A cease and desist order was issued.
15. *Alkali & Chemical Corporation of India Ltd. & Another,* (1993), (1993) 1 CTJ 7 (MRTPC) - The respondents were engaged in the manufacture and sale of rubber chemicals and alleged to be indulging in RTP of price parallelism and acting in concert in fixing, maintaining and increasing price of rubber chemicals. Enquiry was conducted by the MRTPC upon its own knowledge or information. It was held, that in the absence of any direct evidence of cartel and the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in proof of any plus factor to bolster the circumstances of price parallelism, it was unsafe to conclude that the respondents indulged in any cartel activity for raising prices. Further it was held, that in the context of information filed before the Commission it was

difficult to sustain the charge that the respondents manipulated prices in a manner which resulted in the imposition of unjustified cost on consumers.

The following cases are related to resale price maintenance. According to the available information very few cases on Resale Price Maintenance were handled by MRTPC. The MRTPC had asked the respondent to either modify the agreement or cease the alleged practice.

16. *Director General (I & R) v. Jayant Paper Mills Ltd.*, 2004 CTJ 120 (MRTP) - No fixed price was laid down by its products by the respondent and the dealers were given liberty to sell them at such price as they may deem proper. Even the basis at which the prices were to be fixed by the dealers was not spelt out. Accordingly, it was held that the practice adopted by the respondent fell within the purview of section 33 (1) (f). Respondent was directed either to modify its agreement or in the alternative to cease the practice forthwith and desist from following it in future.

The following cases are related to collective boycott. Such types of cases were prevalent mainly in the pharmaceutical industry with the chemists and druggists being involved in them, the film industry and also the textile industry. In most of the cases the allegations of collective boycott were proved and the MRTPC had passed cease and desist orders.

17. *In Re: Retail & Dispensing Chemists Association & Others,* 1999 CTJ 436 (MRTP) - On the basis of information furnished by an informant complainant against the respondents charging them with the adoption of or indulgence in the restrictive and unfair trade practices regarding the sale of pharmaceutical products of the informant/complainant, the Commission issued them a notice of enquiry. Held, the respondents indulged in the RTP of boycott as alleged. Benefit of gateways with respect to the said practice was not given as boycott would have deprived the public of the availability of an essential commodity. Holding the same as prejudicial to public interest, a cease and desist order was issued.
18. *Karak Bazar Sayaji Ganj Beopari Mandal v. The Chemists & Druggists Association & Others*, (1994) 2 CTJ 15 (MRTPC) - Charges were filed against the Chemists & Druggists Association, that it insisted in its members to obtain

NOC (No Objection Certificate) or LOC (Letter of Co-operation) before being appointed as stockist of any drug company failing which they would be boycotted as also the erring manufacturers. The other respondents were also charged with adopting the RTP. Enquiry was instituted. Respondent No. 1 already stood injuncted by Commission's order dated 12th December, 1985. MRTPC had to consider whether the respondents indulged in the RTP as alleged and whether those practices were prejudicial to public interest. Notice of enquiry against Respondent No. 2 to 4 was discharged. Practice of Respondent No. 1 Association was held to be ex-facie restrictive in its effect attracting section 33 (1) (a) as it restricts competition by placing on the manufacturer or stockist an unreasonable restriction of obtaining NOC or LOC before the appointment of stockists and involves boycott. MRTPC struck it down holding it to be prejudicial to public interest.

19. *Young Medicos Cultural Organization & Others*, IA No. 166 of 1985 in RTPE, No 131 of 1985. - Allegation in this case was that the wholesale and the retail chemists of Bombay and Thane boycotted, on the instigation of the respondents, the products of Glaxo Pharma Products (so as to wrest higher sales commission). It was found that there was indeed such a boycott and that though the boycott had come to an end there has been lingering apprehension that the recourse to such practice might persist for fulfilment of same or some more demands. An interim injunction was issued restraining the respondents from calling, instigating or encouraging any boycott during the pendency of the Enquiry.

20. *Vinod Chopra, Prop. Vinod Chopra Productions v. Film Makers Combine (FMC)*, 2001 CTJ 436 (MRTP) - It involved the issue of a circular dated 19.11.93 by the respondent asking all those associated with the film industry to suspend the complainant's membership, not to register any of his films for distribution and to stop working for him in the making of the films. By an exparte order dated 9.5.94 operation of the impugned circular was suspended by the Commission. Thereafter a notice of enquiry was issued for proceeding with the case on merits. It was held that the boycott call given by the respondent through its circular dated 19.11.93 undoubtedly constituted RTP within the meaning of sec. 33 (1) (a) (i) of the Act. The disputed circular having already

been withdrawn, only a direction to refrain from indulging in such a trade practice in future was issued.

21. *In Re: Bombay Cotton Waste Merchants Association & Others*, (1995) 3 CTJ 185. - On receiving information that the respondent association in a resolution adopted on 26th Feb., 1988, prohibited its members from buying cotton waste from the textile mills selling their cotton waste to persons other than its members, the MRTPC instituted enquiry against the association and twelve others. Despite receiving notice of enquiry, none of the respondents contested it. The impugned resolution of the association giving a call to its members to enforce boycott was held to be a RTP prejudicial to public interest. Respondents were directed to discontinue the practice and not to repeat the same in future.
22. *Johnson & Johnson Ltd. v. Maharashtra State Chemists & Druggists Associations & others.*, 2002 CTJ 265 (MRTP) - Allegation was made against the respondents for being involved in a RTP of giving a call for boycotting the products of the applicant/complainant and also interfering with the distribution and sale of those products. A notice of enquiry was issued by the Commission there being a prima facie case of RTP against the respondents. MRTPC also issued an injunction order whereby it restrained the respondents from enforcing any boycott against the products of the applicant/complainant by way of boycott or compelling the traders to boycott the applicant/complainant's products or interfere in any manner with the distribution and sale of the products of the applicant/complainant.

The following cases are related to <u>market allocation</u>. The transport sector involving truck associations in India had been mostly involved in market allocation. The same organisations were also involved in price-fixation as well. The cases relating to price fixation and market allocation after 1991 are mainly related to this sector and in the major number of cases the allegations was proved and the MRTPC had passed cease and desist orders.

23. *Mewar Chamber of Commerce & Industry & Others v. Bhilwara dist. Truck Transport Union & Others*, (1995) 3 CTJ 7 (MRTPC) - Allegations that the respondent (truck-operators' union) collected by force fines or levies from non-member traders under the guise of donations and fixed freight rates in concert to be charged by the member truckers from the users or consumers. Enquiry was

instituted. An ad-interim temporary injunction was issued restraining the respondents from carrying on the RTP till the disposal of the enquiry. After completion of the enquiry, it was held that the respondent and its office-bearers were involved in the alleged RTP and the practice was held prejudicial to public interest. A cease and desist order was passed directing the respondents not to indulge in these practices in future and stop collecting fines or levies or fixing the freight rates which distorted or restricted competition between the members of the Union and others.

24. *Taraori Mandi Goods Transport Co., in re.*, (1994) 2 CTJ 129 (MRTPC) - There was allegation that the respondents did not allow the other truck operators and persons, not being members of the respondent association, to load or unload goods within the area they operated in. Even the owners of the trucks were subjected to similar restrictions. A complaint along with injunction application was filed with the MRTPC. After enquiry the DG concluded that respondents prevented the complainants from loading goods in their trucks. Respondents contested the enquiry. It was held that excluding the rivals from the competition is a RTP which is ex-facie prejudicial to the public interest. A cease and desist order was issued prohibiting the respondents from engaging in the impugned practice in future.
25. *Bhiwadi Manufacturers Association v. Truck Operators Association.*, 1 CTJ 126 (MRTPC) - Bhiwadi Manufacturers Association is an association of manufacturers who are engaged in diverse trading and commercial activities. The Association complained to the MRTPC that the local Truck Operators Association had resorted to various RTPs of preventing the non-members from carrying on the trading activity of loading and unloading of goods, fixing freight rates, demanding 'dharmada' and making the rules binding on the persons hiring trucks. The complainant Association wanted the MRTPC to pass an injunction on truck operators' association and restrain it from indulging in the alleged RTP. All the respondents did not file ant reply to the injunction application. So far as the enquiry proceedings are concerned, the Commission proceeded ex-parte. It observed that the rules of the Respondent Association clearly established that the respondents had indulged in the RTP as defined under section 2 (o) and section 33 (1) (j) read with section 33 (2) of the Act. The respondents were directed to cease and desist from indulging in those practices.

The following case is related to bid rigging. Very few cases related to bid rigging were found after 1991. As the inference is subjected to the information that was available, it is difficult to conclude that bid rigging had decreased in India but if compared to the other forms of cartelisation there had been lesser number of cases on bid rigging.

26. *UOI v. Hindustan Development Corp. & Others*, (1994) 2 CTJ 270 - It involved issue of a Limited tender notice by Railway Board for procuring cast steel bogies. Quotations were received. Three big manufacturers quoted identical price of Rs 77,666 per bogie as against other tenderer quoting between Rs 83,000 and Rs 84,500 per bogie. The Tender Committee arrived at a rate of Rs 76,000 per bogie. Two of the big manufacturers offered to reduce their price substantially, if called for negotiation. Convinced that the three big manufacturers had formed a cartel, a counter-offer of price of Rs 65,000 per bogie was made as against Rs 76,000 to others as some of them were sick units. Feeling aggrieved by the counter offer, the three manufacturers filed a writ petition in the High Court. The High Court, at an interlocutory stage pending the disposal of the writ petitions, passed an order directing the ministry to accept the allocation of bogies recommended by the Tender committee and to pay a price of Rs 67,000 per bogie till the final disposal of the writ petitions. As against that order a petition for special leave to appeal was moved by the Railways before the Supreme Court. The Supreme Court held that (i) there was not enough material to conclude that the big manufacturers had formed a cartel, (ii) a mere offering of a lower price by itself, though appeared to be predatory, could not be a factor for inferring the formation of a cartel unless an agreement amounting to conspiracy was also proved, and iii) dual pricing under certain circumstances may be reasonable and the stand of the railways to adopt dual pricing was bonafide and not malafide.

ANNEXURE II

Good Practices Relating to Search and Seizure[87]

The following list reflects key practices common to many of the competition authorities for undertaking searches, raids, and inspections. This list does not purport to present all of the possible practices, nor does it necessarily recommend these practices over others, as such a choice will depend on the circumstances particular to any given situation. The list is meant to provide a concise summary of common and widely reported practices in the conduct of dawn raids.

Pre-search intelligence and preparation

It is good practice:

1. to undertake reconnaissance of the search venue prior to the search day in order to understand the physical layout of the premises, potential obstacles to obtaining entry to the premises (e.g. electronic entry locks, travel time, traffic conditions).
2. if there are indications of a security risk, to conduct some type of personnel profile of persons expected to occupy the premises (e.g. criminal records checks for violent past offences, firearm registry checks) to minimize safety issues during the search, and assist in determining whether it is advisable in the circumstances to engage the police.
3. to precede searches with briefings for team members including, if time permits, distribution of a written briefing or 'operational order" (including search team assignments, contact numbers, a description of the premises, strategy for entry, persons likely to be at the premises and their relationship to the investigation, alleged violations of the law, description of the types of records sought, key search terms including names and dates and other relevant descriptors, and the practice to be employed to deal with potentially privileged documents).
4. to prepare a "search kit" ready-packed with stationery, seals (e.g. for use on doors and cabinets), and other necessities for all team members.
5. to consider, before the search is carried out, what the authority's press line should be during the search (in the event that the fact that a search has taken place becomes public during or after the search).

[87] "Anti-cartel enforcement manual", International Competition Network - Cartel Working Group, http://www.internationalcompetitionnetwork.org/

6. where permitted, to ensure the search authorization covers moveable objects such as briefcases, handbags, electronic diaries, and portable computers.
7. where appropriate, to communicate with relevant foreign competition authorities to determine whether coordination of searches is possible and to avoid conflict with other agencies' investigations (when known).

Search Teams

It is good practice:

1. to appoint a Team Leader who will be responsible for the overall conduct of the search at each search premise, including serving as the liaison with the target's representatives (including legal advisors).
2. for the officers assigned to the case to participate in the search, and for the team to be augmented with other case officers and officers seconded from the police, as appropriate.
3. to assign an IT Forensics Specialist to each team unless it is clear that no electronic data will be searched.
4. to ensure that the issue of language pro file is adequately addressed (both of the occupants and the language of documents being sought).
5. when resources permit, and having regard to the nature of the premises to be searched, to include both male and female personnel on search teams (particularly when a private residence is to be searched).
6. to ensure the appropriate resources are available on a stand-by basis to aid the search team if necessary (e.g. legal counsel, supplementary search officers, officer to draft additional search authorizations if necessary).
7. in the instance of simultaneous raids, to plan for a central "control room" or "command post" to coordinate the sharing of emerging information and strategies among the search teams and ensure overall consistency of approach.

Entry

It is good practice:

1. to conduct searches with the element of surprise and ensure a rapid entry to the premises being searched .
2. to preserve the element of surprise during entry by not disclosing to a receptionist or other intermediary at the premises the precise purpose of the search team's

presence until the search authorization has been served upon, or the reason for entry otherwise communicated, directly with the senior official at the premises.

3. to make entry simultaneously with search teams on other premises and equip each Team Leader with a mobile phone and the numbers of all other relevant team leaders to enable continuous coordination .
4. to be courteous and diplomatic.

Search in progress

It is good practice:

1 . for the Team Leader, upon entering the premises, to identify the appropriate target representative, present identification, furnish a copy of the search authorization, explain the nature of the search, and caution against obstruction .
2. if acceding to a request to delay searching to allow a reasonable time for the targets legal representatives to arrive at the premises, to first ensure the premises have been adequately secured so the delay does not prejudice the outcome of the search .
3. to ensure that the search team has the power and has been trained to respond to unauthorized removal or destruction of records.
4. for the Team Leader to look for opportunities to bring any applicable leniency program to the attention of the target company and to individuals at the premises alleged to be involved in the cartel conduct.
5. to ensure that documents seized during a search are duly coded by means of affixing an identifier to each document seized and recording a description of the document on a separate list.
6. to make accurate notes of the events and occurrences as they occur at the search premises, including through the use of photos and videos, and to designate (if appropriate) who will be principal note-taker.
7. to ensure, if interviews are conducted during the search, that a strategy is in place as to who will conduct the interviews and that complete notes are made of the interview.

Post Search

It is good practice:

1. to return all seized documents to the authority's offices as soon as possible upon completion of the search and to ensure all seized materials are secured in a facility with restricted and monitored access.
2. where applicable, to consolidate all notes as soon as possible after the search to create a complete record of the search .

ANNEXURE III

Cartel Investigation Steps & Checklists[88]

Cartel Investigation Steps

Step 1 – Search and Seizure

1. The Competition Commission may exercise its *suo motu* authority to tap a cartel.
2. The Director General may exercise powers of investigation to search and seize evidence so required to bust a cartel.

Step 2 – Receipt of information

Issuance of direction by the Competition Commission on receipt of information [when prima facie case exists] to the Director General for investigating the complaint and submit report to the commission.

Step 3 - Procedural Investigation

The Director General or the person so authorised to investigate need to do the following:

1. Summon the accused entity/person
2. Enforcing the attendance of the person so summoned or any person
3. Examine such person on oath
4. Requiring the discovery and production of documents
5. Issuing interrogatories for discovery of facts and requiring return of interrogatories
6. Receiving evidence on affidavits
7. Issuing commissions for the examination of witnesses or documents

[88] Supra Note 6

Step 4 – Submitting Report

1. Informant is to be heard if Director General's report does not disclose positive response to information. Further informant is to be given opportunity to rebut the findings of the Director General.

2. When Director General submits a positive report i.e. existence of the reported act then the Commission shall decide as to, whether there is a need to further inquire the matter? If yes, then Commission shall inquire the matter and pass order accordingly. If no, the Commission may pass orders according to circumstances.

Checklist for a cartel investigation

It is always useful to begin an investigation of a cartel by asking three questions:

(1) **What do you suspect?**

Theorize about what cartel agreement might have existed. Does the theory make sense? Keep in mind the three problems of cartels:

(A) What competitors must participate in order for a cartel to be effective?

(B) What type of agreement is the easiest to reach in this industry, price, output, territories and customers?

(C) What type of agreement could be monitored or enforced?

(2) **How would the cartel have worked?**

Consider what steps would have been necessary for such an agreement to exist:

How would it have been formed?

How would they have included everybody in the cartel?

How would they have reached the terms of the agreement?

How would they have policed the agreement?

Use any information available from easily available sources to develop a theory. Try to identify key time periods, such as the periods immediately before and after a price increase.

(3) **What evidence might exist?**

Imagine what evidence would have been created at each step of the process, and look for it.

Notes taken during meetings?

Reports of meetings?

Travel or meeting records?

Executives' business diaries, calendars, or notebooks?

Telephone or fax records?

Notes of telephone calls?

Instructions to subordinates about implementing the agreement?

Records of monitoring other firms' prices or sales for the purpose of enforcing an agreement?

ANNEXURE IV

Selected Worldwide Jurisdictions with Leniency Programme[89]

Jurisdiction	Administrative or criminal penalties?	Is there a leniency regime?	Is there automatic immunity for the first undertaking to apply?	What is the level of discretionary reduction for undertakings?	Is individual leniency available?
Australia.	Administrative	Yes, amended in September 2005.	Yes, if conditions fulfilled.	A reduction in penalties up to 100% may be negotiated with later applicants.	Yes.
Brazil.	Both	Yes, extended in 2007 to permit plea-bargaining agreements	Yes, if conditions fulfilled.	33.3% to 66.6%.	Criminal immunity: any fine imposed is reduced in line with the undertaking.
Canada	Both	Yes, revised in October 2007.	Yes, if conditions fulfilled.	Up to 100% (guidelines awaited).	Yes.
Japan	Administrative	Yes, introduced in January 2006.	Yes, if conditions fulfilled.	Second applicant: 50%. Third applicant: 30%.	Yes.
New Zealand	Administrative	Yes, introduced in November 2004.	Yes, if conditions fulfilled.	Level is negotiated with the Commerce Commission, and in practice reduction may be up to 50%.	Yes.

[89] David, H and Rachel, C (2007/08), "Overview of leniency", Berwin Leighton Paisner LLP, available at www.practicallaw.com/8-379-0892

Jurisdiction	Administrative or criminal penalties?	Is there a leniency regime?	Is there automatic immunity for the first undertaking to apply?	What is the level of discretionary reduction for undertakings?	Is individual leniency available?
Norway	Both.	Yes, introduced in May 2004.	Yes, if conditions fulfilled.	Second applicant: 30% to 50%. Third applicant: 20% to 30%. All subsequent applicants: up to 20%.	No.
South Africa	Administrative	Yes, introduced in April 2004. Proposed amendments published October 2007.	Yes, if conditions fulfilled.	No, but fines may be reduced by way of a settlement agreement or consent order.	No.
South Korea	Administrative	Yes, revised in 2005. Amendments due to come into force late 2007.	Yes, if conditions fulfilled.	Second applicant: 30%. All subsequent applicants: 15%. Under revised programme (from late 2007): second applicant: 50%.	N/A
Switzerland	Administrative	Yes.	Yes, if conditions fulfilled.	Up to 80%, if conditions fulfilled.	No.
US	Both	Yes, amended in 1993/1994.	Yes, if conditions fulfilled.	Up to 100%.	Yes

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CARTEL INVESTIGATION IN THE U.S.A

Stratis G. Camatsos and Albert A. Foer*

I. Introduction

A cartel is an arrangement among supposedly legal corporations or national monopolies in the same industrial or resource development field organized to control distribution, to set prices, to reduce competition, and sometimes to share technical expertise. [1] When the agreement is among competitors, the conduct is classified as horizontal. [2] The reason for a cartel to exist is, ultimately, to increase the joint-profits of its members to a level as close as possible to that of a monopolist. [3] Hard-core cartels may agree to raise their list prices, to lower total production, or both; they may also reinforce this basic decision by fixing market shares for each member, allocating specific customers, imposing uniform selling conditions, and other illegal activities. [4] Effective cartels cause unrecoverable losses in production and consumption, and transfer income from customers to the stakeholders of cartel members. [5]

The period after 1865 set the stage for the adoption of the Sherman Act in 1890. Public antagonism towards corporate trusts and pooling arrangements, which permitted competitors to form combinations, to set prices, and divide markets, grew during this period. [6] The first cartel case that the Supreme Court considered under the Act was in 1897. [7] The cartel was created by eighteen railroads, which provided rail service west of the Mississippi River. Their association set freight schedules and rates for all railroads. [8] The Supreme Court held that the necessary effect of the agreement is to restrain trade or commerce, no matter what the intent was on the part of those who signed it. [9]

Section 1 of the 1890 Sherman Act [10] provides that "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade…is hereby declared illegal. Every person who shall make any contract or engage in any combination or conspiracy

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[1] *See* http://legal-dictionary.thefreedictionary.com/cartel

[2] Sullivan, E. Thomas and Hovenkamp, Herbert. Antitrust Law, Policy and Procedure: Cases, Materials, Problems. Lexis Nexis: New Jersey, 5th ed., 2003, 187.

[3] Connor, John M. (1996). "Global Cartels Redux: The Amino Acid Lysine Antitrust Litigation." In John E. Kwoka, Jr. & Lawrence J. White (Eds.). *The Antitrust Revolution: Economics, Competition, and Policy*, New York: Oxford University Press, 4th ed., 2004, p. 256.

[4] Id.

[5] Id. at 257.

[6] Sullivan and Hovenkamp, note 2 supra, at 26.

[7] *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)

[8] Id. The Department of Justice (DOJ) charged that the cartel was a restraint of trade in violation of section 1 of the Sherman Act. The Court interpreted section 1 literally as condemning "every" restrain without exception as unlawful.

[9] Id.

[10] 15 U.S.C. § 1-7

hereby declared to be illegal shall be deemed guilty of a felony." [11] An explicit agreement to fix prices is a "conspiracy in restraint of trade," irrespective of the agreement's actual impact on market prices or output. [12] This section attacks trusts by proscribing combinations in restraint of trade - what we call cartelization - agreement(s) among competitors formed with the intent or that have the necessary tendency to restrict the output of the cartel members. [13]

Section 2 of the Sherman Act condemns not only monopolization and attempts to monopolize, but also "every person who shall…combine or conspire with any other person or persons, to monopolize…" There seems to be little separate case law on the offense of conspiracy to monopolize, because any imaginable multi-party "conspiracy" to monopolize would also constitute a combination in restraint of trade under section 1, where the burden of proof is generally lighter. [14]

Under section 1 of the Sherman Act, if the alleged illegal conduct is likely to have no beneficial effect and if it significantly impairs competition, it is classified as "per se" illegal. From an evidentiary standpoint, the inquiry is over once the Court has determined that the conduct is, by its nature, anticompetitive. The per se analysis is a conclusive presumption of illegality. However, early in the Sherman Act's history, the Supreme Court recognized that if the Act's language was interpreted literally, then all contracts could be considered illegal, so the Supreme Court held that only "unreasonable restraints" are illegal. [15] While certain acts, such as horizontal price-fixing, allocation of markets, and group boycotts are so clearly anticompetitive that they are considered per se illegal, other behavior is treated under a "rule of reason" analysis - an interpretation under which agreements are illegal if they unreasonably restrain or suppress competition. The former violations are customarily treated as criminal matters, the latter as civil ones. More than 90% of all cartels are indicted criminally.

Antitrust laws extend to every type of industry, and can apply at every level of market structure. Collusion has been seen in industries concerning vitamins, chemicals, bread, graphite electrodes, automotive paint suppliers, construction, synthetic rubber, and concrete to name but a few. Most of the cartels that were detected involved price-fixing. Other types of cartels detected were bid rigging [16] and market allocation. [17] Estimates vary but even the most optimistic estimates suggest that less than one-third of the operating cartels are detected and prosecuted.

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[11] 15 U.S.C. § 2

[12] Connor, John M. "Global Cartels Redux", at 257.

[13] Clark, Nolan Ezra. "Antitrust Comes Full Circle: The Return to the Cartelization Standard", 38 Vand. L. Rev. 1125, 1131.

[14] The other relevant provisions that are applicable antitrust laws are section 2, 3, 7, and 8 of the Clayton Act and section 5 of the Federal Trade Commission Act.

[15] See *Standard Oil Co. v. United States,* 221 U.S. 1 (1911)

[16] Bid rigging is agreement in which one party of a group of bidders will be designated to win the bid. For example, NYC food distribution companies were found to be rigging bids of frozen food contracts awarded by the New York City Board of Education (NYCBOE) and were fined $126 million in 2001.

[17] In the Lysine and Citric acid case, executives from Archer Daniels Midland were found guilty for their roles in a conspiracy to allocate sales in the lysine market worldwide and to fix prices.

This paper begins by describing investigatory procedures in civil and criminal proceedings in the U.S. It next describes how cartels are detected and how the Department of Justice (DOJ) leniency program operates. Finally, it provides three case studies of cartel prosecution (the lysine cartel, the vitamins cartel, and the NASDAQ market-makers cartel), showing the relationship between private and public antitrust enforcement actions.

II. Investigation Procedure

The Antitrust Division of the Department of Justice (DOJ), together with the United States Attorney's office, is delegated the authority to enforce the criminal provisions of the federal antitrust laws. Both the DOJ and the Federal Trade Commission can enforce the federal antitrust laws through civil means. We will focus on the DOJ which brings almost all cartel cases in the federal courts. The FTC operates primarily through an administrative process. [18]

a. Civil Action

In investigating a civil charge, the DOJ may discover and examine records of a business under investigation by issuing a civil investigative demand (CID) before a formal complaint has been filed. [19] The enforcement of a CID is analogous to that of a subpoena *duces tecum* [20] issued by a grand jury. Its scope is similar to that permitted under the Federal Rules of Civil Procedure. It is a procedural device that allows the DOJ to obtain information needed to pursue possible antitrust violations.[21] A CID enforcement suit must be brought in the federal district court where the target company is found or transacts business. [22]

After the civil suit has been filed, the Department can use the Federal Rules of Civil Procedure to acquire discoverable material. The civil action can be initiated for either injunctive relief under section 4 of the Sherman Act and section 15 of the Clayton Act, or damages under section 4A of the Clayton Act if the U.S. government itself was injured by the violation. [23] Injunctions sought by government enforcement action generally focus on restraining anticompetitive conduct or behavior. If the Department files a civil suit to recover damages, it is entitled to claim the same as that allowable to private parties when injured by reason of a price-fixing scheme.[24]

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[18] *See Alza Corp. v. Mylan Labs, Inc.*, 310 F. Supp. 2d 610 (D. Vt. 2004)
[19] Sullivan and Hovenkamp, at 65.
[20] A command to a witness to produce documents.
[21] Rosenthal, Edward H., "Government Use of the Civil Investigative Demand to Obtain Materials Discovered in Private Antitrust Litigation", *Columbia Law Review*, Vol. 79, No. 4 (May, 1979), pp. 804-815.
[22] Id. at 66.
[23] Id.: If the Department files a civil suit to recover damages, it is entitled to claim the same as that allowable to private parties when injured by reason of a price-fixing scheme.
[24] Id.

Under section 4B of the Clayton Act, the statue of limitation for a civil antitrust action for damage is four years from the time the claim for relief accrues. Since suits for injunctive relief are equitable in nature, no statue of limitation governs the commencement of that suit.[25]

b. Criminal Procedure

Although the DOJ has various initial investigative tools which it uses, [26] if the conduct investigated by the DOJ appears to involve price-fixing or bid-rigging, then it will recommend a federal grand jury investigation to further investigate allegations of criminal antitrust violations.

The grand jury is a group of 16-23 individuals who listen to a hearing of the case from the point of view of the government. There is no presence of counsel for the accused or witnesses. There were approximately 56 sitting grand juries, around the U.S., investigating suspected international cartel activity as of the end of 2005.

The grand jury investigation will begin by the DOJ issuing subpoenas for documents in the name of the grand jury. This will most likely be the first time the defendant will hear about inquiries by the DOJ.

Having received the subpoenaed documents, the government will start the process of oral testimony and call witnesses before the grand jury. The documents obtained may be used in examining these witnesses.

On the completion of the hearings, the DOJ will prepare a draft indictment and a detailed fact memorandum that will be sent to the Assistant Attorney General for Antitrust. Defense counsel, who was not present at the grand jury hearing, may offer additional facts or arguments. The Assistant Attorney General will decide whether or not to indict certain individuals, or organizations, often after lengthy plea bargaining.

At the criminal trial, in a U.S. District Court, the government is required to prove beyond a reasonable doubt that the defendants have committed the acts charged in the indictment. There is also an appeal procedure available for defendants. However, the Court of Appeals does not sit for the purpose of reviewing the evidence in a jury case, as long as there was some evidence at trial that supports the verdict. Further appeal to the U.S. Supreme Court is theoretically possible but the Supreme Court rarely chooses to hear criminal antitrust appeals.

c. Enforcement Tools and Penalties

[25] Id.

[26] Through: 1) the voluntary cooperation of the target, 2) by exploiting the investigative powers of the Federal Trade Commission, 3) by initiating a suit with a "skeleton" complaint in order to invoke the discovery provisions of the Federal Rules of Civil Procedure, 4) civil investigative demand (CID)

Investigative procedures would not be as effective without enforcement tools to accompany them. The resources dedicated to detection and prosecution have become much more widespread and effective in recent years.

Antitrust enforcers, within the U.S. and internationally, are sharing information and learning investigative techniques from each other. The European Commission's use in cartel investigations of surprise early morning investigations, known as "dawn raids", has contributed to the increased use of search warrants in antitrust investigations in the U.S. Search warrants have been successful in obtaining records at the homes of persons participating in cartel activity. [27] Unlike a subpoena, a search warrant typically does not provide the recipient with advance notice. It gives the law enforcement officers the benefit of surprise and consequently creates a much more volatile situation. In addition to search warrants issued by a court, several administrative agencies have the power to inspect the records of government contractors or participants in government programs

A new tool that prosecutors in the U.S. are increasingly using is requiring corporations to waive attorney-client and work product protections as a condition for more lenient treatment. [28] The DOJ's leniency program is discussed elsewhere in this paper.

The Antitrust Procedures and Penalties Act of 1974 had a maximum fine of $1 million for corporations and $100,000 for others. In 1984, the Criminal Fine Enforcement Act increased penalties for antitrust violations and other federal crimes to $250,000 for individuals. The Sentencing Reform Act of 1984 established sentencing guidelines for federal judges and allowed for fines of up to twice the gross pecuniary gain of the defendant or twice the loss of the victim. The increased sentences will bring antitrust prison sentences in line with those for other white-collar crimes and ensure that corporate fines accurately reflect the enormous harm inflicted by cartels on the economy. [29]

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[27] A search warrant is an order issued by a judge, authorizing a law enforcement officer to search for and seize any property that constitutes evidence of the commission of a crime, property used as the means of committing a crime, contraband, etc. A subpoena is an order directing a person to appear and to testify at a given time and place. A subpoena duces tecum requires you to bring certain documents and things with you. Subpoenas may be issued by a court, by a grand jury, by a lawyer representing a party in a civil or criminal case, or by government agencies.

[28] Larry D. Thompson, Deputy Attorney General U.S. Dept. of Justice, *Principles of Federal Prosecution of Business Organizations*, Section VI, January 20, 2003, *available at* http://www.usdoj.gov.dag/eftf/corporate_guidelines.htm#back_3. He states that "one factor the prosecutor may weigh in assessing the adequacy of a corporation's cooperation is the completeness of its disclosure including a waiver of the attorney-client and work product protections, both with respect to its internal investigation and with respect to communications between specific officers, directors and employees and counsel."

[29] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *An Update of the Antitrust Division's Criminal Enforcement Program,* November 16, 2005, *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm. See Connor, John and Helmers, C. Gustav. "Statistics On Modern Private International Cartels, 1990-2005", The American Antitrust Institute AAI Working Paper No. 07-01, *available at* http://www.antitrustinstitute.org/recent2/567.pdf. In 2005, aggregate cartel sales and overcharges totaled about $1.2 trillion and $300 billion, respectively.

The DOJ has other wide-ranging investigative tools. The DOJ can make use of informants, consensual monitoring/wiretap authority, and hidden microphones and video cameras. The DOJ adopted a policy in 2001 of placing indicted fugitives on a "Red Notice" list maintained by INTERPOL. This is essentially an international "wanted" notice that, in many INTERPOL member nations, serves as a request that the subject be arrested, with a view toward extradition. Multiple fugitive defendants have already been apprehended through a Division INTERPOL red notice, [30] and the DOJ will also seek to extradite international fugitives to the U.S. to stand trial for antitrust crimes and related offenses. [31]

The Federal Bureau of Investigation, a separate division of the DOJ, played a major role in breaking up the Lysine cartel. After the *Lysine* cartel investigation, the FBI leadership declared that antitrust crimes were one of the top priorities of its white-collar crime program and then backed it up by dedicating unprecedented resources to investigating antitrust crimes. Today, FBI agents are assigned to all of the Division's ongoing international cartel investigations. [32]

Additionally, when no incriminating documents are uncovered by investigators- a frequent event as increased deterrence will cause cartels to become more sophisticated- individual admissions are needed to prove existence of cartels. The ability to compel testimony under oath and under penalty of perjury is an invaluable tool. Another incentive to plead guilty is the DOJ's ability to arrange for the restoration of rights to travel across U.S. borders, a right normally lost by felons. This explains success in convicting foreign executives guilty of cartel offenses. Thus, the DOJ trains investigative personnel in interviewing to obtain sworn witness statements. [33]

III. Identifying Cartels

A DOJ investigation is typically generated by either a private complaint, a revelation in the media, or by an informant seeking protection under the leniency program.

Antitrust prosecutions today receive far more media coverage than in the past. News coverage of antitrust crimes has become almost sensational. [34] The increased news coverage and its resultant damage to a company's reputation and perhaps to its decrease in stock value as well, seem to have led to other companies coming forward to disclose conspiracies. In addition to cooperating with the DOJ, a number of companies have issued press releases announcing their cooperation.

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[30] Id.
[31] Id.
[32] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *From Hollywood to Hong Kong-Criminal Antitrust Enforcement is Coming to a City Near You*, November 9, 2001, *available at* http://www.usdoj.gov/atr/public/speeches/9891.htm
[33] [33] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *Ten Strategies for Winning the Fight Against Hardcore Cartels*, October 18, 2005, *available at* http://usdoj.gov/atr/public/speeches/212270.htm.
[34] Scott D. Hammond, *From Hollywood to Hong Kong-Criminal Antitrust Enforcement is Coming to a City Near You*, note supra 31.

In addition to large fines and possible imprisonment, cartel participants may be subject to treble damage actions in the U.S by private actions. Section 4 of the Clayton Act provides that any person, whether an individual, business entity, or government, who has been injured in its "business or property" by reason of an antitrust violation may sue to recover treble damages, costs of that suit, and attorney's fees. [35] While it is more typical for private actions to be filed after the government wins (and in many cases simply after it files a complaint), there are also instances of cartel cases being prosecuted privately or by various States before the federal government gets involved, or even without the government ever getting involved. About one-third of all major private cartel suits are not follow-on suits.

Once a governmental investigation begins, the DOJ has certain "red flags" that it will look for to decide whether the industry being investigated is involved in an illegal cartel. It will look to see if there are sharp price increases (particularly after low prices) or stable prices in a slumping industry; parallel prices; concentrated sellers (10 or less) or an industry association; high barriers to entry [36]; joint sales agencies or inter-company sales (information sharing); homogenous products/commodities [37]; relatively sophisticated intermediate goods and services (chemicals, pharmaceuticals, plastics); relatively predictable and stable market (moderate growth) and market participants; social or cultural cohesiveness. Cartels will increase capacity because it seeks to protect itself, and as a result large customers and small customers will be vulnerable.

IV. Leniency Program

The U.S. DOJ's Conditional Leniency Policy was originally adopted in 1978. It was revised and became dramatically more effective in 1993. [38] From 1993 to 2004 the DOJ would automatically grant 100% fine discounts and immunize all corporate officers for the first qualifying leniency applicants; second applicants could receive substantial discounts of 70% to 80%. In the late 1990s, the DOJ was receiving about 25 amnesty applications per tear. Efforts undertaken by the U.S. DOJ to publicize that policy significantly contributed to the increased prosecution of corporations and responsible managers. The incentives for companies engaged in an illegal cartel to come forward and blow the whistle are now a major factor threatening existing conspiracies. The rewards for amnesty applicants to cooperate with the government and private parties increased in 2004. They now include damages in civil cases being de-trebled, and joint and several liability eliminated. These provisions are subject to a sunset provision which will require their review by 2009.

Admission to the Leniency Program requires that applicants meet basic criteria, such as taking "prompt and effective action to terminate its part in the activity," "reporting the

[35] 15 U.S.C. § 15.

[36] In the *Vitamins* cartel, entry was slow and impeded by sunk costs and excess capacity.

[37] In the vitamins industry, it is clear that for a given grade of bulk vitamin there is little or no differentiation across producers. Vitamins are widely viewed as "commodities," that is, products so homogeneous that delivered price net of discounts is the only factor driving buyers' decisions.

[38] Department of Justice Corporate Leniency Policy (August 10, 1993), *available at http://www.usdoj.gov/atr/public/guidelines/lencorp.htm*

wrongdoing with candor and completeness and providing full, continuing and complete cooperation to the Division throughout the investigation." Additionally, it provides for automatic leniency if there is no pre-existing investigation [39], and leniency may still be available even if cooperation begins after an investigation is underway. [40] If a corporation qualifies for automatic amnesty, all officers, directors, and employees who cooperate are protected from criminal prosecution. To simply state it, if an investigation is not currently underway, the program generally allows the first corporation that comes forward to cooperate, along with its officers, directors, and employees, to avoid prosecution.

As mentioned above, the Corporate Leniency Program sets out condition for leniency for directors, officers and employees who come forward as part of a corporate confession. In addition, there is a specific Individual Leniency program, which allows for leniency for individuals who approach the DOJ on their own behalf and not as part of the corporation. [41] Under the policy, the DOJ will agree not to prosecute individuals if they come forward before an investigation has begun if the following 3 conditions are met: i) when the individual comes to the DOJ, it has no prior information about the alleged activity, ii) the individual reports the illegal activity completely and honestly, and continues to cooperate with the DOJ throughout and investigation, and iii) the individual did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

There is another part to the Program that is titled Amnesty Plus. It sometimes occurs that a company operating in multiple lines of business finds that the cartel habit works in more than one line. Suppose a new investigation results after a company approaches the DOJ to negotiate a plea agreement in a current investigation and then seeks to obtain even more lenient treatment by offering to disclose the existence of a second, unrelated conspiracy. Under these circumstances, the company will receive amnesty, pays zero dollars in fines for its participation in the second offense, and none of its officers, directors, and employees who cooperate will be prosecuted criminally in connection with that offense. [42]

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[39] Conditions are: (i) DOJ is not already aware of cartel from another source; (ii) the corporation, upon its discovery of the illegal activity being reported, took prompt and effective action to terminate its part in the activity; (iii) the corporation reports the wrongdoing with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (iv) the confession of wrongdoing is truly a corporate act; (v) where possible, the corporation makes restitution to injured parties; (vi)the corporation did not coerce another party to participate in the illegal activity and clearly was not the leader in, or the originator of, the activity.

[40] If (i) corporation is first to come forward and qualify for leniency; (ii) DOJ does not yet have evidence that is likely to result in a sustainable conviction, (iii) company upon discovery of conduct "took prompt and effective action to terminate its part in the activity"; (iv) report with candor and completeness and provides full, continuing and complete cooperation to the Division throughout the investigation; (v) confession truly a corporate act; (vi) Division determines that granting leniency would not be unfair to others. *See* Srivastava, Anita. "A Primer on US Criminal Antitrust", July 2001, *available at* http://www.antitrustinstitute.org/primer.cfm

[41] *See* http://www.usdoj.gov/atr/public/guidelines/lenind.htm.

[42] Scott D. Hammond, Deputy Assistant Attorney General for Criminal Enforcement, Antitrust Division, U.S. Department of Justice, *An Update of the Antitrust Division's Criminal Enforcement Program,* November 16, 2005, *available at* http://www.usdoj.gov/atr/public/speeches/213247.htm

The corporate leniency program has been very successful. Under the old policy, the DOJ obtained roughly one amnesty application per year. Under the new policy, the application rate has jumped to roughly two per month. [43] Amnesty awards have been a part of several high-profile cases, including the Vitamins investigation for which the amnesty applicant received a fine reduction of almost $200 million. Where single actors are involved in multiple violations, the opportunity to gain amnesty and leniency in one action by cooperating to disrupt another cartel further adds to the appeal of the program. Of the 56 grand juries in 2005 investigating international cartels, almost half began after evidence was uncovered in an investigation of a separate industry. [44]

According to the Antitrust Division's chief criminal prosecutor, the following prerequisites appear to be essential cornerstones that must be in place before a jurisdiction can successfully implement a leniency program. The first is that the jurisdiction's antitrust laws must provide the threat of severe sanctions for those who participate in hardcore cartel activity and fail to self-report. The threat of criminal sanctions and individual jail sentences along with follow-up private actions for treble damages provides the foundation for an effective leniency program. Cartel activity will not be adequately deterred nor reported if the potential penalties are perceived by firms and their executives as outweighed by the potential rewards. [45] Second, organizations must perceive a high risk of detection by antitrust authorities if they do not self-report. If the firms perceive the risk of being caught by antitrust authorities as very small, then stiff maximum penalties will not be sufficient to deter cartel activity. Antitrust authorities must cultivate an environment in which business executives perceive a significant risk of detection by antitrust authorities if they either enter into, or continue to engage in, cartel activity. [46] The risk that other members of the cartel will go to the government first creates tension within a cartel and may lead to a race to the DOJ. Third, there must be transparency and predictability to the greatest extent possible throughout a jurisdiction's cartel enforcement program, so that companies can predict with a high degree of certainty how they will be treated if they seek leniency and what the consequences will be if they do not. [47]

V. The Amino Acid Lysine Antitrust Litigation, 918 F. Supp. 1190

Complaint

There were five defendants companies that were involved in the illegal cartel; Archer-Daniels-Midland (ADM), Ajinomoto, Kyowa Hakko Kogyo, Sewon and Cheil

[43] Id.
[44] Balto, David and Carrol, George, "Top 10 Developments in Criminal Antitrust Enforcement in 2005", Robins, Kaplan, Miller & Ciresi L.L.P., May 2006, at 2.
[45] Hammond, *An Update of the Antitrust Division's Criminal Enforcement Program.*
[46] Id.
[47] Id.

Jedang. The Department of Justice was the plaintiff in the federal suits, but there were also many later private civil suits filed by buyers of lysine who were injured by the conspiracy's overcharges.

All of the five companies that were thought to be part of the conspiracy manufactured or imported lysine, which is an essential amino acid, a building block for proteins that speed the development of muscle tissue, in humans and animals, and can be produced as a by-product of bacterial fermentation. [48] The companies were suspected by the Department of Justice of violating section 1 of the Sherman Act by arranging price fixing agreements, a per se antitrust violation.

Evidence from cartel participants confirmed that the conspirators anticipated that the rewards from price fixing would far outweigh the costs of operating the cartel. [49] In 1992, a top ADM official expressed the expectation that their agreement would generate $200 million in joint profits in a global market for lysine that varied from $500 to $700 million in annual sales. [50] ADM earned just about $200 million in profits from the cartel over three years with its one-third share of sales in the worldwide lysine market. [51] Additionally, total labor costs for all corporate conspirators did not exceed $1 million for the entire duration of the cartel, which reveals that the costs of forming and maintaining a collusive contract is not high compared to the benefits the conspirators can receive. [52]

Investigation and Evidence Gathered and Used

By the end of 1992, a high ADM official became an inside source of information for the FBI and he supplied evidence of illegal meetings taking place from 1992 to 1995. In the fall of 1992, Mark Whitacre - the former head of the Archer Daniels Midland bio-products division, which made lysine - informed an agent of the Federal Bureau of Investigation that Archer Daniels Midland was working with competitors to rig the markets for a number of the commodities it sold. He informed the agent, Brian Shepard, that he had personal knowledge of the schemes because he was participating in the price fixing in the lysine market With this information, more than seventy FBI agents simultaneously raided the world headquarters of ADM, and interviewed a number of ADM officers in their homes. The FBI served subpoenas authorized by a federal grand jury sitting in Chicago, and the agents collected documents related to ADM's lysine, citric acid, and corn-sweeteners businesses. The FBI involvement in this case, although somewhat unusual, demonstrates the government's intention to apply tough - "blue-collar" investigative techniques to what had been formerly been treated as a gentle, "white collar" activity. [54] Within a day, investigators also raided the offices of the other four companies that were involved in the conspiracy. These subpoenaed documents, together with hundreds of secret tape recordings

[48] It is therefore an important supplement in animal feeds. Connor, "Global Cartels Redux", at 258.
[49] Connor, at 261.
[50] Id.
[51] Id.
[52] Id. at 262.
[53] For the whole series of events of how and why Whiteacre informed the FBI, see *U.S. v. Andreas*, 216 F.3d 645 C.A.7 (Ill.), 2000 .
[54] Id., at 254.

and films of the conspirator's meetings and conversations, built a strong case that five companies had been illegally colluding on lysine prices around the world for at least three years. [55]

The investigation and trial received unprecedented exposure in the media for a number of reasons, including the identity of the defendants (ADM was widely believed to be one of the politically best-connected companies in the country), the use of a government informant inside ADM, and the existence of video and audio tapes secretly recorded by the FBI clearly showing the conspirators in the act of fixing prices and carving up the world markets for lysine. [56]

The way the DOJ collected the evidence was also unprecedented -- the co-opting of one of the company's top executives as a cooperating witness, the covert audio taping of telephone conversations and video taping of meetings in bugged conference rooms, and the simultaneous execution of search warrants by dozens of FBI agents at the offices of the corporate subjects around the U.S.

Outcome

The FBI raids were widely reported in the mass media and unleashed many legal actions. Three major antitrust actions were the result of an undercover investigation by the U.S. DOJ that had begun in 1992 with the cooperation of the ADM lysine division president. In 1992, the DOJ sought and obtained convictions for criminal price-fixing by the five corporate lysine sellers. [57] Thirdly, the DOJ prosecuted four lysine executives in a highly publicized jury trial held in Chicago in the 1998; three of the four were found to be guilty and heavily sentenced. [58]

Within a year of the FBI raids, in 1996, about four hundred plaintiffs were certified as a single federal class, and the case called *Amino Acid Lysine Antitrust Litigation* was assigned to a judge in the U.S. District Court in Northern Illinois. The three largest defendants

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[55] Id. at 252. The American Antitrust Institute produced a film, *Fair Fight in the Marketplace*, that includes a section on this cartel, which may be viewed at www.fairfightfilm.org. The film includes a snippet of the FBI informant's video of the conspiracy at work. The full FBI video has been available from the DOJ on request and is frequently show in law schools. At least two best-selling books were written about this case: Eichenwald, Kurt, The Informant. Broadway Books: New York, 2000.; Lieber, James, Rats in the Grain. Four Walls Eight Windows: New York, 2000. The most extensive economic treatment is Connor, John, Global Price Fixing: Our Customers Are the Enemy. Kluwer Academic Publishers: Boston, 2001.

[56] Scott D. Hammond, >*From Hollywood to Hong-Kong-Criminal Antitrust Enforcement is Coming to a City Near You"*.

[57] Connor, "Global Cartels Redux", at 252-253.

[58] See the transcript and exhibits of *U.S. v Michael D. Andreas et al.* Andreas received a thirty-six month sentence, the maximum allowed by the Sherman Act. Terrance S. Wilson received 24 months of incarceration. Both of them were fined $350,000 each. Defendant Mark E. Whitacre, the informant, having turned out to have been an embezzler and a liar, was sentenced to serve 30 months and no fine was imposed on him.

offered the class $45 million to settle the damages allegedly caused by their price fixing and later that year, final approval of the settlement occurred.[59]

VI. In re Vitamins Antitrust Litigation (many related cases)

This is perhaps the best-documented global cartels case, which lasted from 1990-1999. The litigation also returned to victims an unprecedented total amount for any related series of antitrust cases in history, although arguably the total of damages and penalties worldwide were still less than the excessive profits gained through cartelization.[60]

Complaint

The first suit in the case was filed in Alabama state court in 1997, on behalf of a class of indirect purchasers with a named plaintiff who had purchased vitamin products for use in his farming operations. [61] The complaint alleged a conspiracy among the three major vitamins manufacturers, Hoffman La Roche, Rhone-Poulenc S.A, and BASF AG. Apart from the allegations that the defendants were fixing prices, it was also alleged that the defendants participated in meetings and discussions of prices, to have exchanged completely significant information, and to have monitored compliance. [62]

The first private complaint, in federal court, which was filed in March 1998, on behalf of a class of direct purchasers [63] alleged that as early as 1990 and continuing into 1998, the Defendants conspired to fix prices, allocate markets, and engage in other collusive conduct with respect to certain vitamins, vitamin premixes and other bulk vitamin products. A subsequent filing in December 1998 on behalf of direct purchasers provided even more detail about an international cartel whose participants met regularly inside and outside the United States to fix prices and allocate customers.[64]

To understand why there were so many different private cases, one must understand that the Supreme Court had held in 1976 that under the federal antitrust laws, only direct purchasers could have standing to bring an antitrust action for damages resulting from alleged overcharges. [65] Due to controversy immediately following this case, various states began passing "*Illinois Brick* repealer laws" permitting indirect purchasers to recover under state antitrust laws; in other states, courts interpreted existing statutes to permit recovery by

[59] Connor, at 253. The other two defendants settled for almost $5million about a year later.
[60] Connor, John M, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," Draft 2/14/06, available at www.antitrustinstitute.org
[61] *Robertson v. F. Hoffman-LaRoche, Ltd.*, Complaint 7, CV-97-200a (Cir. Ct., Cullman City., Ala. Filed Dec. 5, 1997)
[62] First, Harry, "The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law," 68 Antitrust L.J., 711, 713.
[63] *Donaldson & Hosenbein, Inc. v. Hoffmann-LaRoche,* Case No. 1: 980V0062 (D.D.C. filed Mar. 28, 1998)
[64] *Animal Science Prods., Inc. v. Hoffmann-LaRoche, Inc.,* ¶ 48a, Case No. 1:98CV02947.
[65] *Illinois Brick Co. v. Illinois,* 431 U.S. 720 (1977)

indirect purchasers. [66] These repealers are not preempted by federal antitrust laws. [67] Thus, there is at least the theoretical potential for duplicative litigation and/or multiple liability in the state and the federal courts. Indirect purchasers can only bring their complaints in state courts while direct purchasers can be bring federal, or state, complaints. Vitamins were sold to direct purchasers who re-sold them to indirect purchasers. Both categories of purchasers could and did allege damages against the cartel.

Investigation

In 1997, a client of David Boies III, a son of a high profile attorney specializing in antitrust class action litigation, told him about what appeared to be secret price-fixing meetings in the vitamins industry. He began his own investigation and learned that vitamins manufacturers sell most of their output in dry powder form, eventually to be used for human and animal nutritional purposes in a wide variety of products. [68] In the initial stages of this distribution process, most vitamins are blended into "premixes," which are combination of vitamins. Although the major vitamins manufacturers sell premix, there are also some independent blenders who buy straight vitamins from the manufacturers and sell them in blends. [69] Boies began talking to these independent blenders and found out that these companies also suspected some collusion was occurring with the vitamins manufacturers. [70] As time passed, his firm found more evidence, and by December 1997 decided they had gathered enough to file suit. The interesting statement made by Boies was that his firm uncovered and ultimately proved the collusion "without the benefit of government involvement." [71]

During the same period, however, the Justice Department was also working on an investigation of price fixing in the vitamins industry. U.S. investigations first got wind of the vitamins cartel and Roche's role in it in late 1996 from sources at ADM who were then cooperating with the DOJ in its investigation of the citric acid cartel. The FBI interviewed the head of Roche's Vitamins division in March 1997. [72]

Evidence

More evidence of the illegal activity began to appear in 1997, after the initial investigations. A partner in Boies' law firm, Boies & Schiller, claims to have discovered evidence of price fixing. He began hearing many complaints from Roche customers. Customers who purchased from Roche would not be able to get price quotes from BASF or

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[66] Davis, Ronald W., *Indirect Purchaser Litigation:* Arc America's *Chickens Come Home to Roost on the* Illinois Brick *Wall*, 65 Antitrust L.J. at 391-93.
[67] *California v. ARC America Corp.*, 490 U.S. 93, 102-105 (1989).
[68] First, Harry, 711, 712.
[69] Id.
[70] Id. Their concerns were based not only on the high prices the vitamins manufacturers were bidding to these blenders, but also on the blenders' inability at various times to get competing bids for the vitamins they needed.
[71] Id. at 230.
[72] Connor, John M, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," at 25-26.

other suppliers. Buyers of vitamin C were threatened with unspecified retaliation should they try to resell purchased products. [73]

In late 1997 and early 1998, lawyers working for Roche heard about allegations that some managers in the company were fixing vitamin prices. [74] This discovery seemed to be corroborating evidence because a top Roche official issued a directive specifically ordering that the conspiracy stop. [75]

This additional information led Boies & Schiller to file a civil price-fixing suit in 1998. The allegations made in the suit, and perhaps other allegations, were forwarded to the DOJ and a grand jury was established.

Then, in 1999, after the choline chloride cartel was revealed, the DOJ negotiated with Rhone-Poulenc, a French pharmaceutical manufacturer, negotiated with the DOJ to admit them into the leniency-program. This explains why this apparently important participant in the conspiracy was not charged. The Rhone-Poulenc managers agreed to attend a conspiracy meeting and tape record it. [76] The evidence that the company revealed must have been highly incriminating because within two months, Roche and BASF pled guilty and received very high fines. [77] The government noted that information provided by Rhone-Poulenc, "together with information being provided by other, led directly to the charges" and to the decision of the defendants "not to contest the charges and to cooperate with our investigation." [78]

Likely Impact of the Vitamin Cartel

During the duration of the 16 vitamin cartels, vitamin prices increased by 60% to 100%. [79] In terms of direct overcharges on buyers, the total amount worldwide was about $7 billion. Buyers in North America, the European Union, and Asia incurred roughly 90% of the global cartel overcharges. [80] The sales of these global cartels occurred in virtually every country in the world, but were concentrated in North America (20%), the European Economic Area (29%), and Asia (55%). [81] For all of the cartels together the overcharges amounted to more than 40% of affected world commerce. [82]

Outcome

[73] Id at 29.
[74] Id.
[75] Id.
[76] Id at 30.
[77] Id, at 43. Hoffmann-La Roche agreed to pay $500 million in fines, almost five times the previous record antitrust fine. BASF paid $225 million.
[78] First, Harry, 711, at 716.
[79] Connor, John M, "The Great Global Vitamins Conspiracy: Sanctions and Deterrence," at 4.
[80] Id.
[81] Id.
[82] Id.

Almost all of the private vitamins cases settled. The only vitamins case that went to trial was the choline chloride conspiracy, where the jury decided that the cartel had overcharged purchasers because the defendants conspired to fix the price of choline chloride. [83] In 1999, six of the main vitamins companies agreed to a settlement in the private class-action litigation brought in federal court on behalf of direct purchasers of vitamins and vitamin premix. [84] Later in 2000, the Justice Department announced guilty plea agreements from two Swiss nationals and two German nationals, three of whom were high officers in BASF's Fine Chemicals Division and one of whom was in a similar position at Roche. In the same year, two more German pharmaceutical manufacturers were added to the list, Merck and Degussa-Huels Ag, along with two U.S. firms, Nepera, Inc., and Reilly Industries. These guilty pleas involved the vitamin C and vitamin B3. Fourteen chemical companies were convicted by the U.S. for price-fixing in the vitamins market. U.S. fines for these fourteen companies and fifteen of the officers were $915 million. Two firms received amnesties from the DOJ under the leniency program. Additionally, sixteen senior executives of the vitamins manufacturers were criminally indicted, of which fifteen received personal sentences.[85]

VII. In Re: NASDAQ Market-Makers Antitrust Litigation, 184 F.R.D. 506 (S.D.N.Y. 1999)

Complaint

The plaintiffs in this private class action against a cartel are a class of over 1 million individual and institutional investors who purchased or sold shares of certain securities on the NASDAQ through one or more Defendants or their commonly owned affiliates. [86] The defendants were 37 market-makers of the National Association of Securities Dealers Automated Quotation System exchange.

The complaint alleged violations of the Sherman Act arising out of price-fixing of spreads and stocks traded on the NASDAQ exchange. [87] The Defendants planned to file a motion arguing antitrust preemption, based on comprehensive regulation by the National Association of Securities Dealers, NASD, and by the Securities Exchange Commission,

[83] *In Re: Vitamins Antitrust Litigation, Misc No. 99-197 (TFH) MDL No. 1285, (Animal Science Products, Inc., et al. v. Chinook Group, Ltd., et al)*

[84] The settlement was for $1.05 billion, the largest private antitrust price-fixing settlement in history. Details can be found in Barboza, David, "$1.1 Billion to Settle Suit on Vitamins, N.Y. Times, Nov. 4, 1999, at C1.

[85] Id. at 48-49. (These cases were in different courts, for example, United States v. Bronnimann, No. 399-CR-316R (N.D. Tex filed Aug. 3, 1999)). In real (2005) dollars, U.S. fines were $677 million. Two firms received amnesties that might otherwise have added $550 million in fines and seven firms went unpunished. Because of discounts on fines, the vitamins conspirators paid only 19% of the maximum possible fines of $4.8 billion. In addition, 16 senior executives of the vitamins manufacturers were criminally indicted of which 15 received personal sentences that averaged $110,000 in fines and 8 months in prison.

[86] *In Re: NASDAQ Market-Makers Antitrust Litigation,* 184 F.R.D. 506 (S.D.N.Y. 1999) at 470.

[87] The collusion was based on the absence of odd-eighth quotations on many high-profile NASDAQ securities within a sample of 100 securities.

which regulates the NASD. [88] Plaintiffs' counsel met with the SEC's senor staff. At the end of the meeting, the SEC decided that the draft complaint would not be preempted, and the SEC would not support the defendants' anticipated motion. [89] Thus, the private plaintiffs successfully blocked that motion, [90] after it had been filed. After extensive briefing of the law, facts, and economic arguments for the motion, the plaintiffs prevailed against the defendants. [91]

The impact of this cartel was quite significant. In 1993, NASDAQ trading volume totaled more than 66.5 billion shares, with an average of 263 million shares traded each trading day. For that year, more than $1.35 trillion in trades were executed through NASDAQ. The NASDAQ model fundamentally relied on competition between marketmakers to offer the best buy-side quotation and the best sell-side quotation. [92] It was alleged that the price-fixing spread was a major source of market-maker profits and that the large numbers of market makers competing for business on actively traded NASDAQ Class securities should have resulted in a narrower spread than those on the exchanges. The spreads were, however, on average, approximately twice as large as spreads for comparable securities traded on the stock exchanges. [93] Defendants and their co-conspirators raised, fixed and maintained the spreads for Class Securities on NASDAQ to supra-competitive levels through, among other, the mechanism of collectively refusing to quote their bids and asks for Class Securities in so-called odd-eighths instead of widening the spread to even-eighths. Accordingly, $.25 per share became the minimum spread, whereas the typical spread would have been half that amount. [94]

Investigation

This case began with private plaintiffs investigating possible collusion on NASDAQ following publications of a 1993 Forbes article. [95] Neither the SEC nor DOJ opened formal investigations until 1994, after the class actions were filed. The preliminary investigation at the DOJ was assigned to a junior-level attorney, who accepted the industry's argument that collusion could not have occurred among so many market-makers and intended to terminate the investigation. [96] The investigations began to take shape though, after the 1994 publication, by two finance professors, entitled "Why Do NASDAQ Market-Makers Avoid Odd-Eighth Quotes?" [97] This article suggested that there was an absence of odd-eight quotations of many high profile NASDAQ securities and inferred "tacit" collusion from the

[88] Kaplan, Arthur, "Antitrust as a Public-Private Partnership: A Case Study of the NASDAQ Litigation", 52 Case W. Res. L. Rev. 111, 116 (2001).
[89] Id. at 118.
[90] They drafted a Consolidated Complaint expressly averring that defendants' spread-fixing was unauthorized by the NASD and the Securities Exchange Commission. Private plaintiffs then spoke with the SEC, which already had been contacted by the defendants.
[91] *In re NASDAQ Market-Makers Antitrust Litigation*, 894 F. Supp. 703, 710 (S.D.N.Y. 1995)
[92] Id. at 112.
[93] *NASDAQ*, at 707.
[94] Id.
[95] Gretchen, Morgenson, *Fun and Games on NASDAQ*, FORBES, Aug.16, 1993, at 74.
[96] Kaplan, Arthur, at 116.
[97] William Christie & Paul Schultz, "Why Do NASDAQ Market Makers Avoid Odd-Eighth Quotes?", 49 J. FIN. 1813, 1840 (1994).

absence of plausible legitimate explanations. [98] The securities industry attempted to silence the co-authors of the article by threatening libel action [99] and by publicly criticizing their work, but widespread skepticism about collusion was not put to rest.

Evidence

In developing the cases filed by the private plaintiffs, private counsel conferred with economists and witnesses. Private counsel also arranged for maverick market-makers to break even-eight spreads that the market-makers were following, and monitored the resulting conversations, which reflected the enforcement of market-maker collusion. [100] Private counsel also obtained a document preservation order that prevented the ordinary periodic erasure and recycling of audiotapes. [101] Without these early preservation orders, crucial evidence would have been lost to private plaintiffs and the government. [102] These many hours of preserved audiotapes eventually provided important, direct evidence of collusion.

Throughout late 1994, 1995 and into 1996, the private plaintiffs and economists continued to encourage and assist the government investigation, although at times, defendants and their economists nearly convinced the DOJ that no conspiracy existed.[103] Plaintiffs and their economists [104] repeatedly met with the DOJ. [105] They provided the DOJ with direct evidence developed through their own investigation, including witness interviews. The plaintiffs' economists developed extensive additional economic evidence, which they shared with the DOJ's economists. [106]

Outcome

Eventually, the industry having agreed to a settlement with the government, the DOJ (in the usual process of settlement) filed its own complaint and concurrent consent decree. The Antitrust Division's consent decree, forbade all forms of price-fixing, but also required antitrust compliance programs, appointment of antitrust compliance officers, annual complaint certifications and the taping and monitoring of a specified sample of market-maker telephone conversations. [107]

[98] Kaplan, at 114.
[99] The industry also attempted to stop the usage of the word "collusion".
[100] Kaplan, at 116.
[101] Id.
[102] Id. at 117.
[103] Id at 119.
[104] Principally Professor Paul Schultz and Michael Barclay
[105] Kaplan at 119.
[106] Id.
[107] Id. at 120.

The settlements that followed the government complaints and private class actions were subsequently approved by the court. [108] The court also approved an innovative plan of distribution. [109]

The settlements in the aggregate totaled approximately $1.027 billion. This amount approximated the total of the plaintiffs' individual damages. The attorneys' fees were modest in percentage terms, which came out to be 13% of total recovery. Private antitrust class actions are usually brought by attorneys who put forward the expenses of the litigation and receive fees and expenses only if the class prevails. The amounts must be approved by the court. This settlement was agreed to be paid all in cash despite the defendants' advocacy that they be paid in the form of coupons.

VIII. Conclusion

We have provided an overview of the U.S. mechanisms for enforcing the antitrust laws against cartels, including the statutory framework, the key procedures, the inducements to blow the whistle on a cartel, and the criminal penalties and other remedies that are available. In three case studies, we have also shown that there is an intricate relationship between public and private enforcement in the U.S. In a very general way, the government uses its resources to ferret out evidence of illegality and the private bar, motivated by the prospect of treble damages and attorneys fees and funded through contingent fee arrangements dependent upon success, provides a mechanism for obtaining substantial damage awards (often in cases that are settled rather than tried) for harmed private parties. The combination of criminal sanctions (jail and fines) and multiple civil remedial actions provide a significant deterrent to joining a cartel and this is supplemented by clear benefits to the first member of an existing cartel who comes forward with evidence. Cartel-fighting, which can be considered one of the most successful of American exports,[110] continues to be the highest priority of the American antitrust enterprise.

[108] See *NASDAQ*, 187 F.R.D. at 473.
[109] Id at 492.
[110] See Wyatt Wells, Antitrust & the Formation of the Postwar World (New York: Columbia University Press, 2002).

CARTEL INVESTIGATION IN INDIA

I. INTRODUCTION & UNDERSTANDING OF CARTELS

In the beginning of the 1990s, there were about 30 countries with a competition law, however at present there are over 100 countries in the stage of enactment of competition law. Competition laws across the world differ in various aspects, however there is one feature that unites them i.e. condemning cartel agreements.

Across the globe, there is a common understanding among various stakeholders, that the seller or trader should sell goods, that the various utilities should provide the consumers services at competitive prices and quality, that the courier company should deliver the consignment undamaged to the customer, that the manufacturer should distribute durable reliable products. However, these various rules have been broken time and again in India, despite the existence of laws, policies and regulations.

To make the matter even more complicated and difficult, with the advent of globalization, economic transactions have moved on from the phase of ink-paper and gone digital, gone beyond the physical boundaries of a nation state, when various stakeholders in the market can produce, sell, buy goods from stakeholders of different nationalities, the common consumer is subjected to higher degree if abuse, and the protection of their interest, is no longer the sole responsibility of a national law.

With the advent of liberalisation and globalisation, companies are equipped and are more powerful to form cartels, which could seriously hamper the economic growth of any country. Globalisation also led to market reforms, liberalisation of prices, deregulation and privatization of sectors that were under state control. However, these reforms are not adequate in fighting anti-competitive practices such as cartels. Governments across the globe have realised that there is a need to implement competition law as a tools to tackle the problem of cartels.

Consumer's benefit from competition through lower prices, better products and services. However, when competitors agree to forego competition for collusion, consumers lose those benefits. The competitive process only works when competitors set prices independently. Secret cartel agreements are a direct assault on the principles of competition and are universally recognized as the most harmful of all types of anticompetitive conduct.

Wherever, cartels operate nations experience social and economic disruption since the local industries or small business houses cannot compete with big combinations that have lower costs and collusive strategies. In this given situation, entire community could be devastated by the failure or non-functioning of local businesses due to the formation of cartels.

One of the problems faced in India, is that there are certain policies and practices of the State Governments that lead to anti-competitive practices at local level. One such policy is of giving preference by the state governments to local units in their procurement policy. Under such a policy price or purchase preference is given to a small sector units, with the objective

to protect and support such a small sector units. In the process, the state government gives preference to certain units over the others and distorts the competition between units producing the same kind of product. However, the problems arise when such small sector units form a cartel and the state government lands up paying higher price for a product.

Another sector in India, where cartelisation was present due to faulty government policy is the distribution and marketing of liquor. In certain states, liquor groups spread over large geographical areas are auctioned, competition is restricted to a small number of players, who have the muscle power and the money to run the business. Thus over a period of time, it leads to cartelisation which in turns leads to loss of government revenue. However, the Government of Rajasthan has taken certain steps to tackle the problem. In its excise policy of 2005-06, the government introduced a government owned agency, called the Rajasthan State Beverages Corporation Limited (RSBCL). RSBCL would deal exclusively with all the liquor items and would imbibe the role of middlemen of purchasing and supplying liquor. In addition to that, the government also introduced separate licenses for the wholesaler and the retailer and undertook the system of allotment by way of a lottery system. Thus the new system aims at devolution of liquor selling rights to a large number of vendors to break the nexus of a dozen liquor contractors, who informally form a cartel while bidding for selling rights.[1]

However, the determination whether cartels unreasonably restrain the trade depends on the nature of agreement and on the surrounding circumstances that give rise to an inference that the parties are involved in some pernicious activity. There has to be an agreement to purchase or sell the goods only at price or on terms or conditions agreed upon between the sellers or purchasers. Thus there has to be an agreement either in respect of prices or in regard to terms and conditions on which the goods are to be sold. Existence of an agreement (oral or written) is one of the essential conditions is to be fulfilled to establish a cartel.

"There is worldwide recognition and consensus that Cartels harm consumers and damage economies. Japan has estimated that recent cartels raised prices on average by 16.5 percent. In Sweden and Finland, competition authorities observed price declines of 20-25 percent following enforcement actions against asphalt cartels. The football replica kits case in the United Kingdom has resulted in long-term price reduction to the extent of 30 percent following the OFT's enforcement action. In Israel, the competition authority observed that prices declined by approximately 40-60 percent after it uncovered a bid-rigging cartel among envelope producers. Estimates in the United States suggest that some hard-core cartels can result in price increases of up to 60 or 70 percent. Based on a review of a large number of cartels, it is estimated that the average overcharge is somewhere in the 20–30 percent range, with higher overcharges for international cartels than for domestic cartels. [2]

In India too, cartels have been alleged in various sectors, namely cement (Refer to Box 1), steel, tyres, trucking (Refer to Box 2), family planning device (Copper T) etc. India is also

[1] Dayal, P and Agarwal, M (2006), "State Government Policies and Competition", Towards a functional competition policy for India, Ed. Mr. Pradeep S Mehta, CUTS International.

[2] Bhatia, G.R. "Combating Cartels in the markets: Issues & Challenges", Competition Commission of India (CCI)

believed to be a victim of overseas cartel in soda ash, bulk vitamins, petrol etc. In the bulk vitamin case, it was estimated that the cartel overcharged consumers in developing nations by around US$1.34bn. (Refer to Box 3) All these tend to raise the price or reduce the choice of consumers. The business houses are affected most by cartels as the cost of procuring inputs is enhanced or choice is restricted making them uncompetitive, unviable or are satisfied with fewer profits." [3]

II. TOOLS FOR DISCOVERING CARTELS

II.1 Whistleblowing

Competition authorities face a hurdle in gathering evidence, as the cartel activities are operated in close rooms and board rooms, this is where a whistleblower is important to reveal provide relevant information about the meetings, contacts, participants and the range of practices covered under the cartel.

Competition authorities across the globe are persuading whistleblowers in approaching them to give information about companies coming together and forming a cartel. However, there are certain conditions attached, such as that the whistleblower must not be the ringleader of the cartel and that he would be cooperating with competition authority for undertaking the investigation against such companies. Once the conditions are fulfilled to the satisfaction of the competition authorities, complete immunity is available from any penalty that might have been imposed, if the competition authorities discovered the relevant cartel before.[4]

II.2 Dawn Raids & Leniency Provisions

Companies forming a cartel are aware of the unlawfulness of their action and thus they often come together in jurisdictions where they are likely to be overlooked by the competition authorities. They use code-names; undertake verbal discussions with nothing being recorded on paper to avoid detection.

It follows that competition authorities may find it very difficult to compile evidence that would satisfy a court to the required standard of proof that there has been illegal behaviour. Without doubt the adoption of dawn raids and leniency programmes by competition authorities across the globe have been immensely important and successful in this respect

It is important that the competition authorities should be given investigative powers such as unannounced dawn raids, which are effective in gathering direct evidence such as agreements, participants, recording tapes, etc to satisfy the standard of proof as required by law.

In today's world, with advancement in technology, information relating to cartels can be stored electronically. Thus it is required the information to be retrieved, for which the competition authorities must have staff, or access to individuals, with the necessary skills to

[3] Supra Note 3
[4] Whilsh. R, (2006)" Control of Cartels and Other Anti-competitive Agreements", Professor of Law, King's College London

achieve this. This is why, in some jurisdictions, powers exist to listen to telephone conversations; to maintain surveillance, for example, of office premises in order to monitor who is attending meetings there; and even to require people to attend meetings of a cartel and to report back to the competition authority of what had taken place[5].

To this effect, the Indian Competition Act, 2002 has been empowered with a leniency provision. According to Section 46, the CCI has the power to impose lesser penalties. However, there is a catch that the leniency is granted only if the whistle blower approaches the authorities before the prosecution procedure starts. The same can be seen in the case of Brazil Competition Authority, which also grants immunity or leniency if the approach has been made before the authorities discover any evidence themselves.

The party desirous to take shelter under the leniency provision has to proceed carefully as conditions precedents to avail of the concessions are: -

- That full and true disclosure is made before initiation of investigation/enquiry
- The disclosure is vital in bursting the cartel
- That the benefit of lesser penalty is limited to the party who made the disclosure first; and
- The benefit can be rescinded if there is non-compliance of conditions subject to which lesser penalty was imposed.

Thus an enterprise can have the benefit of lesser penalty, if it follows the above-mentioned conditions carefully. However, the reduction in penalty is discretionary, is only available before the starting of the investigation. However, under the US Anti-trust Act, leniency is provided before and after the starting of the investigation. To qualify for post-investigation leniency, a corporation, in essence must, be the first one to come forward, corporate fully and make restitution to injured parties, where possible.[6]

II.3 Fines

The Indian Competition Act, 2002 also makes the participating enterprises liable to penalty. The penalty provisions are extremely stiff in respect of anti-competitive agreements, which are in the nature of a 'cartel', and it leaves no discretion with the Commission. The law provides that the Commission shall impose upon each enterprise, which is a party to the cartel, a penalty equivalent to three times of the amount of profits made out of such agreements or ten per cent of the average turnover of the cartel for the last three preceding financial years, whichever is higher.[7]

[5] On the powers to this effect in UK law, see Whish *Competition Law* (5th edition, 2003, Oxford University Press), pp. 392-393.
[6] Supra No. 3
[7] Supra No. 3

III. Cartels under Indian Competition Law

III.1 MRTP ACT 1969 - OVERVIEW

The Monopolistic and Restrictive Trade Practices Act 1969 (MRTP Act), has its genesis in the Directives Principle of State Policy, embodied in the Constitution of India. It was enacted:

- Prevention of concentration of economic power to the common detriment,
- To provide for control of monopolies,
- To the prohibition of monopolistic and restrictive trade practices ex. cartels, and
- To the prohibition of unfair trade practices.

The MRTP Act underwent various amendments during the course of its journey. Important amendments among them were the ones that were undertaken during 1984 and 1991. In 1984, the Unfair Trade Practices, enquiries were added and in 1991, the chapter dealing with Mergers and Acquisitions was deleted.

The MRTP Act has empowered the Central Government to set up a commission, the Monopolistic and Restrictive Trade Practice Commission (MRTPC), which has investigative, advisory and adjudicative functions, to oversee the implementation of the MRTP Act. The MRTPC could investigate into any restrictive trade practice, on a complaint from any trade or consumer associations or upon a reference made by the Central or State Government, or upon the application made by the Director General of Investigation and Registration (DG (IR)) – which is the investigative wing of the MRTPC, or on suo moto basis.[8]

Complaints regarding restrictive trade practices from an association are required to be referred to the DGIR for conducting preliminary investigation as per section 11 and 36C of the MRTP Act. DGIR after completion of the preliminary investigation and as a result of its findings submits at application to the MRTPC for an enquiry.

Restrictive trade practices, are the generally those practices that have an effect on prevention, distortion and restriction of competition. For example, a practice, which tends to obstruct the flow of capital or resources into the line of production, manipulation of prices and flow of supply in the market, which may have an effect of unjustified cost or restriction in choice for the consumers, is regarded as a Restrictive Trade Practice.

One example of a RTP is a cartel. As held in ***Union of India & Others .v. Hindustan Development Corporation***,[9] " Cartel is an association of producers who by agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity". Under the MRTP Act, cartel is categorized as an RTP, which has been defined as, " a trade practice which has or may have the effect of preventing, distorting or restricting competition", Section 2(o) of the MRTP Act.

[8] Section 10 and 37 of the MRTP Act, 1969
[9] 1994 CTJ 270 (SC) (MRTP)

Various categories of agreement enumerated under section 33(1) of the MRTP Act, including agreement, which restrict persons from whom certain goods can be purchased, have been recognized as per se restrictive. Cartels, fall under clause (d) of the section, which states that " any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers, shall be deemed for the purpose of this Act, to be an agreement relating to restrictive trade practices and shall be subjected to registration as under Section 35 of the MRTP Act. However, such agreements are not per se void or illegal. The MRTPC would still require to make an enquiry as under Section 37 of the MRTP Act, as to whether the agreements are prejudicial to public interest or not. Until the time that the MRTPC declares the agreement as prejudicial to public interest, the parties may continue to conduct trade and business as usual.

Under the MRTP Act, the only power vested with the MRTPC with respect to restrictive trade practices such as cartels, is to issue a 'cease and desist order' or to permit the parties to a collusive agreement to modify the agreement so that it is no longer prejudicial to public interest. As already mentioned above, party until it is instructed by the MRTPC, can continue with the restrictive trade practice. At the most when a party is called and a restrictive trade practice is established, it may be directed to discontinue with the practice and only if it continues with the practice after the direction, would it be punishable for contravening an order made under Section 31 and 37 as provided in Section 50 of the MRTP Act.

Inquiry before the MRTPC under section 37(1) is not par with a trail in the court. In case of a trail, the respective parties know the facts on which the parties are relying a claim or defence. On the basis of the facts produced in the court, one party would be asserting the facts and the other would be denying the same. This conflict would raise issues for determination and the judge in the court of law would judicially examine and frame the issues between the parties involved in the trial. In comparison, an inquiry into an alleged restrictive trade practice inquiry, there are no statements of facts that a party could rely on while pleading its claim. It follows that at the stage where the inquiry has begun, no instances of facts findings can be given to the accused. An allegation of restrictive trade practice is only an allegation that a party is practicing certain trade restrictions in its own interest. However, even when the facts as discovered during the inquiry, do establish the existence of a restrictive trade practice, then it is obligation of the person so accused to show that the restriction is not against public interest or that the restriction is not unreasonable, as per section 38 of the MRTP Act.

Looking at the cases of cartels, no matter how malicious the offences may be in the eye of public interest, no matter how serious the detriment caused may be, the MRTPC is without any weapon to grant justice to the aggrieved consumers. The consequences are that the respondent, in case a complaint is lodged with respect to such breach of law or the MRTPC inquires suo moto, can still enjoy the fruits of their illegal acts, which may amount to innumerous amount of economic rents and yet to penalty can be levied because the MRTPC has not been powered to impose penalties or spell an order of imprisonment to the offenders, what it could do is just pass an cease and desist order.

Due to the defects in the MRTP Act, the MRTPC in its history of 30 odd years rarely booked any cartel cases in the domestic markets. No penalty has ever been recorded and no loss suffered by the consumers, has been able to be retrieved so far.

The following section deals with the analysis of some cartel cases as dealt by the MRTP Act and highlights the drawbacks.

III.2 Select cases dealt under the MRTP Act, 1969 and the weaknesses that emerges

In order to appreciate and look at the practices by Cartels in India we need to refer to cases brought under the Monopolies and Restrictive Trade Practices Act, 1969. It is pertinent to note here that cases relating to all the industries were not brought before the MRTP Commission but those cases brought before the Commission definitely throw light on possible pernicious activity of Cartels in other industry types.

We had undertaken analysis of roughly 63 cases that were decided by the MRTP and given below is a chart of some selected sectors that were mostly affected by cartels or anti-restrictive practices. Next to each sector there is a number, which is given, that shows the number of cases from that particular sector, in order to understand which sector is more prone to cartelisation in India -

Manufacturing	**Services**
Chemical - 4 Cement - 4 Tyre - 3 Misc. (Oil Mills, Power Cables, Foils, Ice Creams, Pictures, Batteries, Banks)	Trucking - 5 Newspaper – 2

Case I: ***DG (IR) vs. Modi Alkali and Chemicals Ltd***[10]

Charge

It was alleged on the basis of an anonymous complaint that the respondents have entered into a cartel for hiking the prices of their products. The prices of chlorine gas and hydrochloric acid had an increase of 277% and 200% within six and four months respectively. The same was a result of an agreement amongst the parties to create artificial scarcity, in order to raise the prices of their products.

Investigation

[10] 2002, CTJ 459 (MRTP)

Keeping in the mind the above complaint, the MRTPC started the investigation and directed the issuance of Notice of Enquiry. However, the respondents raised an objection, on the grounds that the notice of Enquiry lacks a concise statement of material fact on which the notice is based, not meriting to cognizance based upon an anonymous complaint. The DG contended that the present Notice of Enquiry has been issued under Section 10 (a) (iv) of the Act, which empowers the Commission to inquire into restrictive trade practice upon its own knowledge or on a complaint or information. Information can be derived from an invalid/irregular complaint or from any anonymous letter as held by their Lordships of Hon'ble Calcutta High Court in the case of ***ITC Limited vs. MRTP Commission & Ors. (1996) 46 Comp. Cas. 619.*** Thus it was held that objection in regard to anonymous complaint is not valid.

The Commission then looked into the allegation of formation of a Cartel. Cartel was not defined in the MRTP Act, however, in the light of judicial pronouncements – "cartel is an association of producers who by an agreement among themselves attempt to control production, sale and prices of the product to obtain a monopoly in any particular industry or commodity". It was further observed "a mere offer of a lower price by itself does not manifest the requisite intent to gain monopoly and in the absence of a specified agreement by way of a concerted action suggesting conspiracy, the formation of a cartel among the producers who offered such lower price cannot readily be inferred". The three essential ingredients, namely – identify of prices, agreement by way of concerted action suggesting conspiracy, and to gain monopoly or restrict or eliminate competition can be taken out from the above – mentioned definition.

Order

Thus keeping in mind the definition of cartels and the necessary ingredient, the Commission was of the view that except the use of expression 'cartel' there is no material evidence to suggest parity of prices or meeting of minds. The Commission was of the view, that the Notice of Enquiry and the subsequent investigation lacks relevant and necessary information in regard to the parties forming a cartel leading to distortion and restriction of competition in the market. Having the essential ingredient not being proved, the Commission agreed with the respondents that prima facie there was no case of a cartel. Thus the charges under section 2 (o) (iv) are being dropped.

Weakness – Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels was only possible to be drawn from the Section 2(o) i.e. restrictive trade practice.

Case II: ***American Natural Soda Ash Corporation (ANSAC) vs. Alkali Manufacturers Association (AMAI) and others***

Charge

In this case**,** the Supreme Court held that MRTP Commission has no jurisdiction to try cases outside of India. The AMAI filed a complaint as well as an application to grant of temporary injunction before the MRTPC alleging that ANSAC, comprising of six producers of natural

soda ash, have come together to form an export cartel by way of an membership agreement amongst themselves entered into in USA. The six producers as per the agreement agreed that all export sales by them or any of their subsidiaries would go through ANSAC, which was formed as an association.

Investigation

The MRTPC instituted an enquiry and passed an ad interim injunction on ANSAC, restraining it from cartelised exports to India. In June 1997, the Commission rejected ANSAC's petition for vacating the injunction. Quoting from the ANSAC membership agreement, it held that ANSAC was prima facie a cartel which was carrying out part of its trade practices in India, giving the Commission jurisdiction under Section 14 of the MRTP Act, even though the cartel itself was formed outside India. The Commission confirmed its earlier injunction, on the grounds that ANSAC was prima facie a cartel. ANSAC then appealed to the Supreme Court of India, on the following grounds –

- Under the MRTP Act, there is no power to stop import,
- The MRTPC could take action when a restrictive trade practice is carried out in India in respect of imported goods. In this case, the goods were not imported into India and hence the matter was beyond the jurisdiction of the MRTPC.
- The MRTP Act did not confer extra-territorial jurisdiction to the MRTPC

Order

The Supreme Court did not go into the allegation of cartelization, but instead held that the wording of the MRTP Act did not give it any extra- territorial jurisdiction. The MRTPC could therefore not take action against foreign cartels or the pricing of exports to India, nor could it restrict imports. The Supreme Court overturned the order of the MRTPC.

Weakness – The MRTP Act did not empower the MRTPC with the extra-territorial jurisdiction powers. It could only handle cases that emerged in the Indian market but not the cases that emerged outside India, however having the effect in the Indian market.

Case III: ***Alkali & Chemical Corporation of India Ltd. And Bayer India Ltd***

Charge

The companies were engaged in the manufacture and sale of rubber chemicals and amongst them constituted a dominant share of the total market in the product. There were charges of them making identical increases in prices on five to six occasions on or around the same date.

Investigation and Order

However, there was no direct evidence available behind the increase in prices. The MRTPC observed while making its judgment, that "in the absence of any direct evidence of cartel and

the circumstantial evidence not going beyond price parallelism, without there being even a shred of evidence in the proof of any plus factor to bolster the circumstances of price parallelism, we find it unsafe to conclude that the respondents indulged in any cartel for raising the prices".[11]

There have been instances where the DGIR and the MRTPC have tried to investigate cartels on suspicion of price rises or submission of collusive tenders, in various industries such as Tyre industry, sugar mills, yarn producers, plywood manufacturers, cement manufacturers, etc. However, they were not successful to prove the existence of cartel as because the evidence collected did not go beyond price parallelism and hence they were not able to provide direct or indirect evidence such as an agreement or meeting of minds to prove the existence of a cartel. The Supreme Court held the same view in ***Haridas Exports v. All India Float Glass Manufacturers Association 2002 CTJ 353 (SC) (MRTP),*** that the mere formation of a cartel by itself will not give rise to an action. Something more must have to be proved to demonstrate the detrimental effect thereof.

The formation of a cartel amounts to anti-competitive act and which is against the public interest is rarely proved by direct evidence. Most of the time, it has to be proved by circumstantial evidence by setting up a chain of events leading to a common understanding or plan. The underlying task is to find out at the minimum, what constitutes that 'meeting of minds' which must be directly or circumstantially established to prove that there exists a cartel.[12]

Weakness: The MRTPC did not have the tools or the powers to efficiently investigate in order to recover direct evidence to prove the existence of a cartel activity.

Case IV: ***Sirmur Truck Operators case***,[13]

Charge

The MRTP Commission received a complaint from Paonta Transport Co-operative Society Ltd., Himachal Pradesh against the respondents, alleging that they had acted in concert while fixing the freight rates for rendering transport services and that they did not allow non-member trucks operators to load and unload goods in Sirmur unless they paid donations on demand.

Investigation

The MRTPC instituted an enquiry on the basis that the practices indulged by the respondent fell under the section 33(1)(d) and Section 2(o) of the MRTP Act. For substantiating the allegations made against the respondents, the Director General submitted a lost of several documents, such as the freight rates circulated by the respondent union, the letters exchanged between the respondents.

[11] Kumar, S.S "Cartels and Price Fixation: Worst type of anti-competitive practices".
[12] Ibid.
[13] (1995) 3 CTJ 332 (MRTPC)

Taking the freight rates as evidence, it was seen that there was no information on the freight list that with the increase or reduction of the rates of diesel oil by the Government of India, there would be increase or decrease in freight rates fixed by the respondents. Thus there was no doubt that fixing the rates for the truck operators and asking the members to charge freight only on the rates fixed by the union is one of the instances of restrictive trade practice falling under clause (d) of Section 33(1), which states –

"Every agreement falling within one or more of the following categories shall be deemed, for the purpose of this Act, to be an agreement relating to restrictive trade practice and shall be subjected to registration, namely

(d) any agreement to purchase or sell goods or to tender for the sale or purchase of goods only at prices or on terms or conditions agreed upon between the sellers or purchasers".

In addition to the above evidence, the Director General also submitted a copy of an FIR (First Information Report) alleging that the respondents were unlawfully preventing the truck operators from operating within their territory. While it is a matter of fact that an FIR cannot be itself deemed to be a substantive piece of evidence. However, it does assume relevance in so far as to show that FIR was filed against the respondent for similar activities. It does lay some credence to the evidence and allegation made by the Director General to show that the respondent have been so interfering and preventing others from doing business in Sirmur.

Order

The MRTPC concluded based on the evidence that preventing and restricting competitors from doing business is undoubtedly restrictive trade practice falling under Section 2(o) of the MRTP Act. Thus the MRTPC issued an order of 'cease and desist' against the respondents and directed them to stop the trade practice.

Case V: *Truck Operators Union vs. Mr. N.C. Gupta & Mr. Sardar*[14],

Charge

It was alleged that the respondents were preventing the non-members truck owners including the complainants from loading their goods (paddy and rice) on the grounds that they are not the members of the respondent union. Their further complaint was that they are not allowing even the other transporters to lift the goods and insisted the complainants to become the members of the respondent union, if they wanted to operate their vehicles.

Investigation

The DG (I&R), upon receiving the complaint, was directed to undertake the investigation and submit the PIR. The DG (I&R) served a letter, which the respondents did not respond too and hence they conducted on-spot investigation to assess the correctness of the

[14] (1995) 3 CTJ 70 (MRTP)

allegations. During the on – spot investigation, they met a member of the union, who did orally acknowledge that unless the complainant truck owners become members of the union, they would be not be permitted to operate unless they become a part of the respondent union. The Commission acknowledged the PIR and issued a Notice of Enquiry under section 10 (a) (iv) and 37 of the MRTP Act. The Director General in support of the case, presented certain documents and witnesses, who affirmed the complaint. The one of the witness was the driver of the complainant driving trucks and transporting goods.

Order

The Commission was of the view that, from the evidence that was produced, that the respondents have indulged in a restrictive trade practice. Having held so, a 'cease and desist' order is passed against the respondents prohibiting the respondents from engaging in the impugned trade practices in near future.

Weakness: In both the above cases (IV+ V), the MRTPC were only empowered to pass 'cease-desist orders' in successful detection of cartelization. It did not have powers to impose more stringent orders along with fines.

Case VI: ***DG (I&R) vs. Sumitomo Corporation, Tokyo, Japan and others,***[15]

Complaint

It was charged that the Japanese companies along with their Indian agents have colluded and are quoting identical prices in response to a tender floated by the Steel Authority of India (SAIL).

Investigation

In the preliminary investigation, it was revealed that the prices quoted by the Japanese companies and their Indian agents quoted the identical prices in respect of 8 items pursuant to a global tender No. P/IMP/Rolls 66/2203, floated by SAIL. However, there were some sort of negotiations between the relevant authorities and the Japanese companies revised their quotes, which also were identical and they were quoted by their apex body i.e. Rollers Expert Association. The same was the case in with regard to another global tender in the year 1984 being P/IMP/Rolls/565/9470010, invited by the Rourkella Steel Plant (RSP) to supply qualified rolls. On the basis of a complaint initiated by the RSP, the DG was of the view that the respondents were indulging in restrictive trade practice within the meaning of section 2(o)(ii) of the Act. Accordingly the Notice of Inquiry was initiated.

In lieu of the investigation, the defendants submitted their defense on the following grounds –

[15] 2004 CTJ 26 (MRTP)

- In the absence of any factual allegations regarding the manipulation of prices imposing unjustified cost on consumers, the issue of notice of enquiry is misconceived.
- In view of participation of 35 companies from 13 countries identical prices as quoted by the Japanese companies would in no way lead to manipulation of prices imposing unjustified costs.
- Restriction of competition is to be seen with reference to context of SAIL, which has 90% of the market share in product and supplies.
- The ultimate decision for placement of orders on the suppliers rested with SAIL, as well as RSP, thus the uniformity in prices would have no significance.
- The orders under the global tenders that were floated were for 18 rolls out of 228 pieces.
- The Indian agents also a party to the investigation, pleaded that they had no role to play in either fixation of prices of the products or with the negotiations with the purchaser.

The Commission concentrated on the depositions made by the defendants, where it was confirmed that their apex body (Rollers Expert Association) conducted the negotiations. The variations in commission to their respective agents and conditions of delivery have also been argued to make no difference to the price the purchaser has to pay. Thus these facts clearly established a case of price fixing cartel by the respondents. However, the respondents contended that it has in no way been established that quotations of identical prices by the defendants have been instrumental in preventing or impairing competition in any manner. In any case, the order for supply as placed by the respondents was so small that it had virtually negligible effect on the competition in the market and the same would bring the case of the respondents in the ambit of provisions of Section 38 (1) (d) of the Act –

(1) For the purposes of any proceedings before the Commission under section 37, a restrictive trade practice shall be deemed to be prejudicial to the public interest unless the Commission is satisfied of any one or more of the following circumstances, that is to say – "(d) that the restriction is reasonably necessary to enable the persons party to the agreement to negotiate fair terms for the supply of goods to, or the acquisition of goods from, any one person party thereto who controls a preponderant part of the trade or business of acquiring or supplying such goods, or for the supply of goods to any person not party to the agreement and not carrying on such a trade or business who, either alone or in combination with any other such persons, controls a preponderant part of the market for such goods".

With reference to the definition of cartel, as mentioned above in ***DG (IR) vs. Modi Alkali and Chemicals Ltd,*** quoting of identical prices pursuant to a global tender, negotiation of prices by the parties other than those who have submitted the tenders, having a close nexus in the trade dealings are a few factors strongly pointing to an action or activity undertaken by the respondents for manipulating the prices, adversely affecting the competition in the market. In addition to that, it was argued that the arrangements between the respondents and its allied parties in quoting identical prices, have narrowed down the option of the purchasers to buy the goods, despite there being other 35 companies.

Taking the allegation of SAIL having 90% market power in the market, there is a need to make a distinction between restricting the players voluntarily and the restricted number of

players available in the market. The latter is due to market conditions. Thus the allegations raised by the respondents, are not sustainable.

As held in the case of ***Union of India v. Society of India Gasoline Marketers,*** it would aptly apply:

"Since in a price fixing conspiracy the conduct is illegal per se, further inquiry on the intent or the anti-competitive effect is not required. The mere existence of a price fixing agreement establishes the defendant's illegal purpose since the aim and result of every price fixing agreement, if effective, is the elimination of one form of competition".

Thus keeping in mind the facts of the present case, it was held that the respondents have indulged in cartelisation. However, the respondents argued that they are liable to be exempted in lieu of the gateways, to which the Commission also agreed. The Commission agreed that in terms of both the quantity and value of the rolls, it would have insignificant impact on the cost of rolled products.

Order

In lieu of the gateway available to the defendants, the NOE is discharged. The allegation of cartelisation is only being discharged on the grounds of the availability of the gateway to the respondents.

Weakness: The presence of such gateways, acted as a deterrent in successfully charging the companies of a restrictive trade practice act. It weakened the MRTP Act and gave the companies the gateways to escape punishment.

III.3 Competition Act 2002 – Overview

In India, the Monopolies & Restrictive Trade Practices Act (MRTP Act) was enacted in 1969. The focus of the MRTP Act was more on the control of monopolies and the prohibition of monopolistic and restrictive trade practices. In the era of globalisation, the MRTP Act had become obsolete and there was a need to shift the focus from curbing monopolies to promoting competition.

The Central Government, therefore constituted a high level committee known as the Raghavan Committee and after considering its report and suggestions from various stakeholders, enacted a new law called the Competition Act, 2002 (Competition Act). The Central Government also constituted the Competition Commission of India (CCI).

The CCI is a quasi-judicial body having the powers to acquire, hold and dispose of property, both movable, immovable, to contract and can sue and be sued. (Section 7). The CCI may look into any alleged violations under the Act, either on its own motion, or on receipt of a complaint from any person, consumer or trade associations (Section 19) or on reference made by the Central Government, State Governments or any statutory authority (Section 21).

The aim of the Competition Act is to create an environment encouraging competition. However, the Competition Act does not condemn the existence of a monopoly in the relevant market as compared to its predecessor, the MRTP Act, 1969. This can be inferred from Section 3[16], which states that only such agreements will be void if they are causing 'appreciable adverse effect' on the relevant market. The species of agreements which would be considered to have an "appreciable adverse effect" would be those agreements which directly or indirectly determine purchase or sale prices, limit or control production, supply, markets, technical development, investment or provision of services, share the market by allocation of inter alia geographical area of market, nature of goods or number of customers or which directly or indirectly result in bid rigging or collusive bidding.

An apt example of the types of agreements which, if they cause an "appreciable adverse effect", are "tie-in arrangements" (where a purchaser is through the agreement forced to purchase other goods in addition to the goods desired) and "refusal to deal" agreements (which operate to restrict the persons or class of persons involved in the sale and purchase of the concerned goods).

Further, competitors know that such an agreement is unlawful and it compels them to keep such agreement secretive and resultantly it is invariably not reduced to writing and it is often found to be in the form of arrangement or oral understanding. Moreover, the best evidence against 'Cartel' is usually in possession of the charged parties, which are not likely to easily part with and make available to the investigator or enquiring authority. These compulsions seem to have persuaded the lawmakers to prescribe that 'Cartel' has appreciable adverse effect on competition."[17]

The Competition Act as compared to the MRTP Act extends its jurisdiction to cover any agreement referred to Section 3, which has been entered into or outside India and any party to such agreement, who is outside India. The CCI shall "have the powers to inquire into such agreement […] if such agreement […] has or is likely to have, an appreciable effect on competition in the relevant market in India". (Section 32).

A perusal of the MRTP Act would show that there was neither definition nor even a mention of certain offending trade practices, which were restrictive in character. Some illustrations of these are:

- Cartels
- Price Fixing
- Bid Rigging

[16] Sec 3(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India

[17] Supra No. 2

According to Competition Act, 2002 a cartel is formed if below mentioned three prerequisites are fulfilled:[18]

- An agreement which includes arrangement or understanding;
- Agreement is amongst producers, sellers, distributors, traders or service providers, i.e. parties are engaged in identical or similar trade of goods or provision of service, and
- Agreement aims to limit, control or attempt to control the production, distribution, and sale or price of, or, trade in goods or provision of services.

The Competition Act recognizes some of the abovementioned restrictive trade practices. The drafters of the Competition Act have tried to remedy the flaws of the MRTP Act, and to promote competition in a structurally correct manner. A specific goal of Competition Act is and needs to be the prevention of economic agents from distorting the competitive process either through agreements with other companies or through unilateral actions designed to exclude actual or potential competitors. It needs to control agreements among competing enterprises on prices or other important aspects of their competitive interaction. Likewise, agreements between firms at different levels of the manufacturing or distribution processes, which are likely to harm competition, need to be addressed. The foremost constituent of any competition law is obviously the objective to foster competition and its obverse is the need to deal effectively against practices and conduct that subvert competition. The Act reckons these propositions.

However, the implementation of the Competition Act, 2002 ran into problems on account of the composition of the CCI, the competition authority entrusted with the responsibility of implementing the Act. A writ petition filed in the Supreme Court challenged that the CCI envisaged by the Act is more of a judicial body having ad judicatory powers and that in the background of the doctrine of separation of powers recognised by the Indian Constitution, the Chairman of the Commission had necessarily to be a retired judge.

Pursuant to this, the Government has proposed to amend the Competition Act, 2002. The Competition Amendment Bill, 2006 is expected to tabled in the forthcoming 'budget session' of the Parliament.

III.4 Competition Act, 2002 Vs. MRTP Act, 1969

The Competition Act, 2002 is better equipped to handle restrictive trade practices such as cartels, as explained below –

Case I (Weakness) – Cartels were not defined in the MRTP Act, 1969, but the understanding of cartels was only possible to be drawn from the Section 2(o) i.e. restrictive trade practice.

The Competition Act, 2002 explicitly define Cartels under section 2(c) of the Act –

[18] Section 2(c) of the Competition Act, 2002

"Cartels includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves limit, control or attempt to control the production, distribution, sale or price of, or trade in goods or provision of services".

In addition to that, cartels are also covered under anti-competitive agreements, which are prohibited agreements under Section 3 of the Act. The Section lays down that, " any agreement entered into between enterprises or associations of enterprises or persons or association of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprise or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which –

- Directly or indirectly determines purchase or sale prices,
- Limits or control production, supply, markets, technical development, investment or provision of services,
- Shares the market or source of production or provision of services by way of allocation of geographical area of market, type of goods or services, or number of customers in the market, and
- Directly or indirectly results in bid-rigging[19] or collusive bidding, shall be presumed to have an appreciable adverse effect on competition."

Case II (Weakness) – The MRTP Act did not empower the MRTPC with the extra-territorial jurisdiction powers. It could only handle cases that emerged in the Indian market but not the cases that emerged outside India, however having the effect in the Indian market.

Section 32 of the Competition Act, 2002 empowers the CCI to investigate and take action against acts that must have been formed outside India but have an effect on competition in India. The Section lays down that, "The Commission shall, notwithstanding that –

- An agreement referred to in Section 3 has been entered into outside India, or
- Any party to such agreement is outside India, or
- Any enterprise abusing the dominant position is outside India, or
- A combination has taken place outside India, or
- Any party to combination is outside India,
- Any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination, has or is likely to have, an appreciable adverse effect on competition in the relevant market in India."

[19] Bid rigging means any agreement between enterprises or persons engaged in identical or similar production or trading of goods or services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process of bidding.

Case III (Weakness):The MRTPC did not have the tools or the powers to efficiently investigate in order to recover direct evidence to prove the existence of a cartel activity.

The Competition Act, 2002 has been given proper tools and powers to efficiently investigate cartel cases. First, the Act defines Cartels under Section 2(o). Thus there is a better understanding and much more importance is given to curbing such anti-competitive practices. Secondly, the Act constitutes a Commission called the Competition Commission if India under section 7. The Act empowers the Commission to investigate into cases related to cartels, on a suo moto basis or on a complaint received from any person or consumer association or on a reference made to it by the Central or State Government or any statutory authority. Thirdly, as mentioned above, Section 32 gives extra-territorial jurisdiction to the CCI to investigate into acts taking place outside India but having an effect on competition in India. Fourthly, Section 18 empowers the Commission for the purpose of discharging its duties such as investigation into cartel cases, to enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country.

Further to strengthen the investigative powers and to follow best international practices the Competition Act empowers the CCI with a leniency provision. According to Section 46, the CCI has the power to impose lesser penalty, "if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated Section 3, has made a full and true disclosure in respect of the violation and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit". However, in order to seek the benefit of the leniency provision, the disclosure must be made before the start of the investigation. In addition to that, the leniency provision is only available to the producer, seller, distributor, trader or service provider who first makes such full disclosure.

Cases IV+ V (Weakness): The MRTPC was only empowered to pass 'cease-desist orders' in successful detection of cartelization. It did not have powers to impose more stringent orders along with fines.

Section 27 of the Competition Act, empowers the CCI with powers to impose stringent orders and fines on successful detection of cartel activities. According to the section the CCI may pass all or any of the following orders-

- Direct any enterprise or associations of persons, as the case may be, to discontinue or not to re-enter such agreement,
- Commission shall impose upon each producer, seller, distributor, trader or service provider included in the cartel, a penalty equivalent to three times of the amount of profits made out of such agreement by the cartel or ten per cent of the average turnover of the cartel for the last preceding three financial years, whichever is higher,
- Direct that the agreement shall stand modified to the extent and in the manner as may be specified by the commission, and
- Direct such enterprises concerned to abide by such orders as the Commission may pass and comply with the directions, including payment of costs.

Case VI (Weakness): The presence of such gateways, acted as a deterrent in successfully charging the companies of a restrictive trade practice act. It weakened the MRTP Act and gave the companies the gateways to escape punishment.

There are no such gateways present in the Competition Act, 2002.

IV. Conclusion

The availability of definition of cartel, incorporation of a leniency program, the powers to impose fines against cartel member, the explicit provision to exercise jurisdiction in respect of actions taken place outside India, however with an effect in India, with the provisions to enter into co-operation agreement with the overseas competition agencies, etc the CCI has been much better empowered to tackle cartel cases than its predecessor.

However, there is lot of improvement to be done in the CCI investigative methodology, infrastructural support has to be provided to the investigators, protection to the whistleblower has to be assured, etc. In order to achieve this, there are lessons to be learnt from competition authorities in developed countries that are better quipped to prevent or crack hard-core cartels. Success requires the following: proactive role on the part of the competition authority; high level of fines; criminal liability (for individuals); protection for whistleblowers; leniency program for the firms willing to cooperate in the proceedings; and co-operation among countries (and probably an international watchdog) in case of global cartels.

One important amendment as proposed in the Competition Bill 2006, is in relation to leniency provision. As per the Competition Act producer, seller, distributor, trader or service provider who comes first to the authorities and discloses vital information regarding the cartel, would be able to get the benefit of leniency provision. However, the Competition Amendment Bill proposes that the Commission would allow reduced penalty (not just the first) that provides vital information before the start of the investigation. The proposed amendment, removes the incentive to report first about the cartel activity. Thus there is a need to revisit the leniency provision scheme and do away with the proposed amendment.

Box 1: MRTP Cases Against Cement Cos For Arbitrary Pricing

11 August 2006

Lok Sabha

The Monopolies and Restricted Trade Practices (MRTP) Commission has registered cases against some cement companies.

The DG (I&R) filed an application under section 10(a)(iii) of the MRTP Act against Cement Manufacturers, Bombay and 44 others cement manufacturers. It was alleged that the Respondents had fixed the prices of cement arbitrarily and in an unjustified manner. It was further alleged that there was little variation in the prices of several cement manufacturers in the same region inspite of the fact that the cost of production was not identical. The matter is listed on 28.11.2006 for cross-examination of respondent's witnesses.

The DG(I&R) had filed an application under section 10 of the MRTP Act, 1969 against Associated Cement Companies Limited, Bombay. It was alleged that the Respondents increased the prices from time to time without any increase in the cost of production and this had led to an unreasonable increase in the profit of the Respondent. The matter is listed for final arguments on 21.8.2006.

A complaint filed by M/s Gayatri Agencies against Cement Manufacturers Association, Chennai under section 10(a)(i) alleging, interalia, that the Respondent did not give free hand to the applicant in the matter of prices, sale and distribution of cement by imposing various restrictions. The matter was referred to D.G. (I&R) for investigation. The D.G. (I&R) filed Preliminary Investigation Report stating that the respondents are indulging in Restrictive Trade Practices under sections 33(1)(d) and Section 2 (o) of the MRTP Act. The matter is listed on 21.8.2006 for consideration.

Shri Servejit Mokha & Another have filed a complaint against Cement Manufacturers Association and 10 others under section 10(a) (i) and 36 B(a) alleging, interalia, that the said cement manufacturers had formed a cartel and had increased the prices. Notice of Enquiry against 11 Respondents was issued. The Hon'ble High Court of Delhi on 10.5.2005 has stayed the proceedings before the Commission. The matter is adjourned to 13.10.2006 for further consideration.

D.G.(I&R) filed an application under section 10 (a)(iii), read with section 37 of the MRTP Act, 1969 against Gujarat Ambuja Cements Limited and two others alleging that the respondents in collusion have created an

artificial scarcity of cement resulting in increase in prices, which constitutes a Restrictive Trade Practice as defined under section 2(o) read with section 33(1)(d) of the MRTP Act, 1969. The matter is listed before the Commission on 31.8.2006 for consideration.

The MRTP Commission has directed the D.G.(I&R) to investigate into the sudden and steep increases in prices of cement reported in the print media during May-2006. It was reported that the prices of cement rose from Rs. 140 to Rs. 220-240/- per bag with in a period of two months. It was also reported that the cement manufacturers have entered into a cartel. The Preliminary Investigation Report is awaited.

Shri Prem Chand Gupta, Minister of Company Affairs in reply to the question raised by Shri Bhubneshwar Prasad Mehta in Lok Sabha today, gave this information.

Source: http://www.indlawnews.com/1d1fdaa54779c92320fde0c478b09cf4

Box 2: Truck Operators' Cartels: A Snapshot

- In case of Baddi, Himachal Pradesh, the Baddi Nalagarh Truck Operator Cooperative Transport Society, has monopolised the movement of goods from the state. Controlled by the local MLA, the truck union charges 30 percent higher on the Baddi-Delhi route and 15-20 percent on the Baddi-Mumbai route. Trucks coming in with supplies go back empty, because they are not allowed to pick up freight, which only adds to the cost.
- In the case of Orissa, the Angul Truck-owners Association, a Government registered body operating at the National Aluminium Co. Ltd.'s factory charges as much as 200 percent more for transportation of ingots under the obliging eyes of the authorities. Such official cartels are known to exist in other parts of Orissa also like in Sukinda Mines, Paradeep Port and Balasore.
- In Punjab's Derabassi, truck unions have drafted their own tariffs, increasing costs of production for local units, thus rendering them uncompetitive. A cartel of around 500 truck operators has been troubling the area, since Derabassi's inception as an industrial town in 1987. In Sirhind, near Mandi Gobindgarh, such unions stalled industrial growth, resulting in industry to flourish in nearby Khanna and Amloh.
- A similar situation now exists in Bikaner, Rajasthan where the truck operators' union is creating problems in the smooth movement of minerals from the area. Due to obstruction in the supply, the ceramic tile industry, which uses these minerals as raw material are facing hardships, and even closure.

Source: Various newspaper clippings published across India

Box 3: The Vitamins Cartel

Duration and Effect: The vitamins cartel to fix prices and allocate market shares for the sale of certain vitamins operated from 1990-1999. Annual global sales over the conspiracy period averaged US$1.34bn. (Yu, 2003) The price increase generated by this cartel has been estimated to be 35 percent. In the US alone this cartel may have produced US$500mn in overcharges. (OECD, 2003)

Impact on Developing Countries: The aforementioned high overcharge definitely impacted developing countries in view of the fact that developing countries imported around US$6.6bn worth of vitamins in the course of the conspiracy. (Yu, 2003)

***Sanctions*:** US, Canada, EC, Australia, and South Korea have each investigated and prosecuted the cartel for its effect on their domestic markets. The US and Canadian authorities have fined the cartel approximately US$1bn and the EC 85mn, respectively. (OECD, 2000) The Korea Fair Trade Commission (KFTC) imposed corrective measures and a civil penalty to the amount of 3.9 billion Korean *Won*. Brazil. Japan and Mexico are reported to be investigating.

Source: Chowdhury. J (2006), "Private International Cartels – An Overview", Briefing Paper, CUTS C-CIER

ANNEXURE - I

CARTEL CASES IN INDIA

S. No.	Case	Reference	Description
Cases before 1991 Amendment: Price Fixing and Collusive Tendering or Bid Rigging [Section 33(1)(d), (j(b))]			
1.	Raymond Woollen Mills Ltd (J.K. Engineering Files Division)	RTPE 27 of 1974, Order dated 25/2/1975 before MRTPC	
2.	I A & I C (P) Ltd, Bombay and Sulphur Mills (P) Ltd, Bombay	RTPE 6 of 1981, order dated 23/2/1984	Two respondents were manufacturers of Sulphur dust 85% and allegedly engaged in parallel pricing and acting in concert for fixing, maintaining and increasing price of sulphur dust 85% Filed two statements in reply to a notice of enquiry (NOE) categorically stating that they will not indulge in RTP of fixing and raising prices in concert or indulging in cartel formation. After this, the MRTPC did not proceed with the enquiry whether the respondents were already engaged in a cartel or not; written statements were deemed to be as efficacious as a cease and desist order Mere assurance from respondents who may be indulging in RTP was satisfactory enough to stop the enquiry since the ultimate result of enquiry is not very different anyway
3.	Tirunerveli District Lorry Owners Association	RTPE 14 of 1983, order dated 20/3/1984	Similar situation (assurance given by respondents, hence no enquiry undertaken)
4.	Jay Engineering Works Ltd and others	RTPE 17 of 1980, order dated 6/4/1983	Similar situation (assurance given by respondents, hence no enquiry undertaken)

S. No.	Case	Reference	Description
5.	Oriental Power Cables Ltd and Others	RTPE 12 of 1975	Enquiry instituted against 10 respondents on the ground that they quoted identical or near about identical rates by arrangement and understanding among themselves. On receipt of NOE, respondents filed a writ petition at Bombay High Court complaining that they were being denied necessary particulars and they should be provided with better particulars by the MRTPC After 7 years! (In 1982), the High Court ordered the MRTPC to furnish better particulars. Subsequently, DG (I&R) furnished better particulars. The respondents then filed an application under 37(2) stating that they have never indulged in any cartel and would not indulge in such activity in future. They further stated that there is no relevance for investigating into an alleged cartel that formed almost a decade ago. DG alleged that respondents have a habit of entering into a cartel and same situation can happen in future, and that the matter should be thoroughly enquired. But the MRTPC did not find any relevant to continue with the enquiry and stated that if respondents indulge in such practices in future, DG can launch a fresh proceeding before the Commission
6.	The general Code of Conduct for Members of the Automotive Tyre Industry of India	RTPE 1 of 1971, order dated 19/4/1976 (Ref: First Annual Report of MRTPC, 1971-72)	Eight firms (Incheck Tyres Ltd, Dunlop India, Goodyear India, Firestone Tyre and Rubber Co. India Pvt Ltd, Premier Tyres Ltd, The India Tyre and Rubber Co. Pvt Ltd, Ceat Tyres of India Ltd, and Madras Rubber Factory Ltd.) engaged in a cartel with a formal or written agreement among them in the post 1967 period The agreement was known as “The general Code … …” The MRTPC instituted an enquiry in 1971

S. No.	Case	Reference	Description
			and commenced with it in December 1972 on grounds of price fixing concert, discriminatory dealings, market sharing, fixing terms and conditions of sale other than price, mutually agreed distribution system, limiting, restricting and withholding supply, etc. MRTPC took up another enquiry against the 8 tyre companies based on a complaint lodged by the All India Motor Transport Congress. Allegations were price fixing concert, discriminatory dealings, restricting and withholding supplies and dumping accessories and other motor vehicle parts on dealers. Cease and desist order passed by the Commission in 1976 and in 1978 respectively. This led (?) to formal breaking up of the alleged cartel.
7.	Firestone Tyre & Rubber Co. of India (P) Ltd (now changed to Bombay Tyres International Ltd) and Others	RTPE 13 of 1978, order dated 24/3/1983	MRTPC instituted an enquiry in 1978, but closed in early 1980s on the ground that the respondents agreed not to indulge in the concerted price fixing in future and agreed to inform the price increase to the Commission for consecutive 3-year period.
8.	Madras Rubber Factory Ltd, Goodyear India Ltd, Dunlop India Ltd and Bombay Tyres International Ltd.	RTPE 6 of 1978, order dated 2/2/1983	Respondents filed an application under section 37(2) agreeing not to indulge in RTPs of concerted tying up sale of tyre flaps with either tubes or tyres or both and also agreed to inform the MRTPC about change in prices of tyre flaps in the replacement markets within three months of change for next five years. Two cease and desist orders were passed against these tyre manufacturers in late 1970s. Still the MRTPC did not punish them even though allegations of price fixing recurred again and again. MRTPC closed enquiry on the ground that respondents 'assured' it of not indulging in such practices in future.

S. No.	Case	Reference	Description
9.	Sandvik Asia	RTPE 44 of 1977, order dated 13/3/1979	Economic theory recognises that 'oligopoly pricing' is a special case of 'collusive pricing' and conscious parallelism is much-sophisticated business behaviour to guard the firms from anti-trust law. The Indian judgments did not recognise that price parallelism is a form of non-cooperative collusion. Several cases came up before the MRTPC regarding price parallelism by manufacturers or parallel price quotations for tenders, but the Commission stated that mere price parallelism or same price quotation is not a sufficient condition to prove concerted effort. In dealing with price parallelism, the Commission emphasised on direct evidence of concert and other circumstantial evidence to strengthen the case
10.	South India Mill owners' Association vs Gwalior Rayon	RTPE 83 of 1976, order dated 20/9/1979	
11.	RRTA vs India Foils and Indian Aluminium Co.	RTPE 16 of 1981, order dated 6/5/1983	
12.	Grind well Norton Ltd and Carborandum Universal Ltd	RTPE 23 of 1981, order dated 27/7/1983	
13.	DGIR vs All Gujarat Distillery Association and Others	I.A no. 109 of 1988 RTPE 315 of 1988, order dated 20/6/1988	
14.	RRTA vs Hyderabad Asbestos Cement Products and one other	RTPE 17 of 1979, order dated 20/12/1982	
15.	DGIR vs Cement Manufacturers Association and Others	Order dated 28/1/1991	
16.	National Organic Chemical Industries and Others	Order dated 25/11/1978	
17.	The Alkali and Chemical Corporation of India Ltd, Calcutta and Bayer (I) Ltd, Bombay	RTPE 21 of 1981, order dated 3/7/1984	Respondents were engaged in manufacture and sale of rubber chemicals and command a dominant share (around 75% to 82%, as per DGIR) in the market. Respondents failed to justify the arbitrariness of the price increase despite the fact that two opportunities were given to them to do so. Respondents did not deny price parallelism, but denied the allegation that it was due to

S. No.	Case	Reference	Description
			concerted effort. DGIR could not furnish other circumstantial evidences sought by the Commission. Alleged that respondents did not furnish cost data even when asked to do so In this case, the Commission relied on US judgment in deciding the case of price parallelism (346 U.S. 537, 1954, case of Theatre Enterprises) and sought for additional factors. The Commission held that there is no price collusion since DGIR did not provide with circumstantial evidences beyond price parallelism (crux: some additional factors or circumstances in the direction of concerted activity should be there to distinguish between price parallelism and tacit collusion). ⇨ Neither the law nor the Commission and investigating agency had the expertise to deal with such cases. In this case, the Commission held that like price parallelism, price leadership too is a common feature of an oligopolistic market and cannot be considered as concerted effort
18.	Hindustan Lever Ltd and TATA Oil Mills Co. Ltd	RTPE 4 of 1978, order dated 22/7/1982	Allegation of price parallelism The Commission pointed out two requirements for a trade practice to be a concerted one. First, the trade practice must either influence the market behaviour of undertakings concerned and remove in advance uncertainty as to the future competitive conduct of an undertaking or maintain or alter the commercial conduct in an uncompetitive manner. The MRTPC was satisfied with the facts presented by DGIR for proving the first requirement. But Commission emphasised on the second requirement: there should be a positive

S. No.	Case	Reference	Description
			contact, however slender, between the parties either by meeting or decision or in any manner. The Commission stated "in an oligopolistic industry, a few units will be dominating the industry and each would be having an eye on the other to see what its behaviour will be. They will be interdependent without any overt acting together. The two respondents being the executive members of ISTMA and being dominant units in the industry is consistent with this possibility. No other contact for the above acted objections was alleged. DGIR applied for a review of the judgment, but this was rejected by the Commission
19.	Major English Newspapers and Indian and Eastern Newspaper Society	RTPE 46 of 1975, order dated 18/12/1975	In 1975, four cases came up alleging concerted effort among major English newspapers and Indian and Eastern Newspaper Society and its regional committee to fix, increase and maintain price. It was alleged that even if there was substantial reduction in pages, the price was not reduced, rather increased in the said period. Interestingly, in this case, the respondents in all four cases submitted a 'cease and desist' order and MRTPC passed the order accordingly, without going for a full-fledged inquiry into price parallelism.
20.		RTPE 47 of 1975, order dated 6/2/1976	
21.		RTPE 48 of 1975, order dated 27/2/1976	
22.		RTPE 49 of 1975, order dated 19/3/1976	
23.	Coates India Ltd and five others	RTPE 7 of 1975, order dated 12/9/1975	Same as in newspapers case. Allegation of price parallelism, fixation and increase in prices in concert and concessions, discounts to dealers or customers
24.	Ghai Enterprises Pvt Ltd and Quality Ice Creams	RTPE 18 of 1983, order dated 25/4/1986	MRTPC finally linked price parallelism with tacit agreement The two leading manufacturers of ice cream had a market share of about 80% and MRTPC observed that identity of prices of a large number of varieties of ice cream was not coincidental but a mutually planned scheme.

S. No.	Case	Reference	Description
			It was also noted that the two respondents have interconnection. Not only price increase but introduction of other incentives like discount schemes, new flavours were following one another. The Commission concluded that 'preponderance of probabilities' in the case leads to an inference of concerted effort and passed cease and desist order accordingly.
25.	Bengal Tools Ltd	RTPE 120 of 1984, order dated 25/4/1984	In this case, collusive tendering was proved as concerted effort Quotes given by the respondents were totally identical for various sizes of sheer blades/knifes and slitting cutters. The cost data provided by respondents revealed stark differences in cost among the manufacturers though they quoted the same price! Respondents argued the act was not prejudicial to public interest. Anyhow, MRTPC passed a 'cease and desist order'.
26.	Excel Industries Ltd and Others	RTPE 31 of 1985, order dated 23/3/1985	Same result as Bengal Tools Ltd case
27.	Shri Gopal Metal and Wood Works Ltd and Others, Perfect Circle Victor and Others	RTPE 31 of 1976	Same result as Bengal Tools Ltd case
28.	Swastik Laminating Industries and Others	RTPE 81 of 1984, order dated 31/1/1986	Identical rates were quoted by various small-scale units against the tender floated by National Fertilizers Ltd, and prices quoted by these units were lower than others. Small-scale units contended that this benefited not only government, but also the units which depended for their survival on such large tenders. The Commission decided that the practice is not prejudicial to public interest mainly due to three reasons, (i) small-scale nature of the units, (ii) denial of any collusion by National Fertiliser Ltd and (iii) Fixed factor price,

S. No.	Case	Reference	Description
			which was quoted by respondents, was just 25-30% of the total cost of the goods supplied
29.	Chloride India Ltd and Others	RTPE 46 of 1979, order dated 12/5/1981	Case relating to price leadership Allegation revolved around quoting prices for storage batteries in concert because of the identity or near identity of prices quoted by the three respondents. The judgment stated "it was not possible to make allegation of concert against the first respondent, being the bulk supplier of batteries, having a large share of the market, other respondents could not be blamed for treating him as a price leader and quoting prices either identical with or similar to the prices quoted by it (The Commission seemed to express a viewpoint similar to that observed in a US Supreme Court order: the fact that competitors may see proper, in exercise of their own judgment, to follow the prices of another manufacturer, does not establish suppression of competition nor show any sinister domination)
30.	Baroda Rayon Corporation Ltd	Order dated 6/8/1976	Cases where manufacturers in same line of production form an association or federation that is often instrumental to fix prices or fix terms of sale. These associations were involved in price fixing and in all these cases, the Commission passed a cease and desist order
31.	Alkali Manufacturers Association	RTPE 26 of 1984, order dated 29/3/1985	
32.	Indian Woollen Mills Federation and others	RTPE 32 of 1976, order dated 25/4/1977	
33.	Food grains and kirana Merchants Association, Indian Rayon Corporation, Gujarat	RTPE 18 of 1981, order dated 22/2/1983	

S. No.	Case	Reference	Description
34.	Truck Operators and Transport Operators Association, Rampur and Other	RTPE 11 of 1987, order dated 14/8/1987	
35.	RRTA vs Hind Lamps and others	RTPE 13 of 1974, order dated 19/4/1984	(enquiry whether agreement prejudicial to public interest or not) Allegation was that the electric bulb manufacturers entered into a formal agreement which was restrictive in nature. Five foreign electric bulb companies and an Indian company floated a new electric bulb company within India named as Hind Lamps Ltd, through two agreements among them. The Commission dropped the enquiry on the ground that the agreement expired in 1972 and throughout the decade they did not hear any other complain against the respondents other than the application filed by RRTA.
36.	The Nylon pact	Civil Miscellaneous writ petition 8060 of 1974, order dated 16/4/1976 by the Allahabad High Court	(enquiry whether agreement prejudicial to public interest or not) The Nylon pact was among four nylon spinners and 18 weaver's association for the purpose of having an equitable distribution of nylon yarn at concessional prices under the supervision and approval of central government. The three-member bench differed in the matter that the agreement has the approval of central government but by majority judgment, commission decided against the nylon spinners on 21/10/1974. The writ petition was filed by one of the nylon spinners. The High Court agreed that the agreement had the requisite approval of the central government and cannot constitute the subject matter of an enquiry under section 37 of

S. No.	Case	Reference	Description
			MRTP Act. On the issue of whether the Commission can enquire into an agreement that has already expired (the agreement expired on 31/8/1975), the Court concluded that the RTP which is intended to be enquired into and prevented from being repeated must exist in *praesenti*. So the writ petition was allowed nullifying judgment given by the MRTPC
Cases Before 1991: Output Restriction, and Collective boycott [section 33(1)(g),(i)]			
37.	RRTA vs Hindustan Pilkington Glass Workers Ltd and Window Glass Ltd		The manufacturers of wired, figured and profilite glass entered into an agreement with Surat Cotton spinning and weaving mills private ltd (proprietors of Navin glass products). The latter company was prevented from making or selling certain glass products in consideration of payment of agreed compensation of Rs.12.5 lakhs by each respondent and was further required to sell its products to both. Pilkington and Window Glass also arrived at a common marketing arrangement through Associated Partners and Wired Glass, a company promoted by them for the purpose. The Commission passed a 'cease and desist order' against the respondents and declared the agreement as void.
38.	RRTA vs Jay Engineering Works	RTPE 17 of 1980, order dated 6/4/1983	In these two cases, parties submitted before the Commission under section 37(2), without admitting it
39.	RRTA vs Crompton Greaves Ltd	Order dated 29/10/1976	
40.	Andhra Pradesh Paper Mills Ltd	RTPE 1973, order dated 31/1/1976	Enquiry closed on the ground that after Paper (Control of Production) Order, 1974 had come into existence, the ordinary white printing and writing paper was no longer in short supply
41.	DGIR vs All India Organisation of Chemists and	RTPE 259 of 1988, order dated	Respondents 1 to 4 (association of traders in pharmacy products) and respondent 5 (manufacturer of certain pharmaceutical

S. No.	Case	Reference	Description
	Druggists	18/11/1991	products) entered into an agreement where certain obligations were imposed on respondent no. 5 by rest of them for appointing one stockist each geographical district where no stockists are in existence and if respondet 5 wishes to employ additional stockists in any area, it could only be done through mutual consent and discussion. Another allegation was that the agreement fixed the trade Commission to be paid to the stockists. The Commission held that it was an agreement between a seller and a purchaser and passed a cease and desist order on the ground of restrictions on persons to whom goods have been sold and territorial restriction. However, the Commission refused to consider this as collective agreement
42.	Bombay Cotton Waste Merchants Association	RTPE 127 of 1984, order dated 20/3/1986	Collective Boycott Enquiry closed on the ground that the respondents submitted undertakings under section 37(2) stating not to indulge into such practices
43.	Ghee Merchants Association	RTPE 23 of 1976, order dated 14/2/1977	Cases of collective boycott involving trade associations
44.	Truck Operators Union	RTPE 32 of 1977, order dated 20/2/1978	
45.	Motor Merchants Association	RTPE 1 of 1979, order dated 8/8/1979	
46.	General Merchants Association	RTPE 19 of 1976, order dated 18/3/1977	

S. No.	Case	Reference	Description
47.	Association of Motion Picture Studios	RTPE 17 of 1985, order dated 8/4/1991	
48.	Retail and Dispensing Chemists Association, Bombay	RTPE 10 of 1984	
49.	Motor Lorry Owners and Operators Union (A.P.) and three other lorry owners' association	RTPE 97, 98 and 99 of 1989 and 402 of 1988, order dated 3/12/1990)	Allegation that four lorry owners at four places acting in concert in fixing freight rates, not allowing transport contractors to hire other lorries at existing market rates, and not allowing them to even place their own lorries and forcing the contractors to hire lorries from its members at higher rates. The Commission held that physical obstruction is not a RTP, it should be dealt under criminal offence. The Commission refused to believe that the respondents are forcing transport contractors to hire lorries from them. In the absence of clear-cut evidence, the Commission discharged the NOE
Cases before 1991: Collective Resale Price Maintenance [Section 33(1)(f), section 39, section 40]			
50.	RRTA vs Svadesi Mills Co. Ltd	RTPE 19 of 1974, order dated 30/1/1976	Respondents collectively known as 'Tata textile mills'. A standard agreement was entered into between respondents and each of a number of stockist. Clause 2 of the agreement declared, "the stockists shall at all times, sell cloths at prices not higher or lower than those prescribed by the Tata textile mills'. According to respondents this clause was drastically changed and circulated among the stockists where they were made free to sell at any prices lower than a stipulated maximum price limit. Commission passed a consent order stating that the clause should be modified to replace, 'the prices recommended by Tata textile mills or any of them to the

S. No.	Case	Reference	Description
			stockists shall be maximum prices and the stockists shall be free to charge prices lower than those prices'.
51.	Standard Mills Company Ltd and others	Case book on MRTP cases by Rajendra, page 502	Same judgment made in this case also, where textile mills of respondents were collectively known as Mafatlal group of mills.
52.	Phillips India Ltd and Others	RTPE 18 of 1975, order dated 18/6/	Collective resale price prohibited completely (cease and desist) in these cases
53.	Phillips India Ltd	RTPE 26 of 1975, order dated 25/7/1976	
54.	RRTA vs Crompton Greaves Ltd	Order dated 29/10/1976	
55.	Amco Batteries Ltd and others	RTPE 25 of 1976, order dated 8/5/1978	
56.	RRTA vs Electric Lamp Manufacturers (India) Pvt Ltd and Others	RTPE 12 of 1974, order dated 17/9/1984	Agreement among manufacturers or dealers of electric lamps and components. Main allegation was maintaining of resale price by the respondents. Respondents filed a writ petition before Bombay High Court objecting the institution of enquiry contending that the particulars furnished to them were insufficient. On the order of Bombay high court, RRTA furnished particulars demanded by them. The respondents filed an application under section 37(2) pleading that they have never indulged in any restrictive trade practices and assured the Commission that they will not do so in future. The Commission closed the inquiry without investigating into the matter.
Cases After 1991			
57.	American Natural Soda Ash	Order dated in 2002	Court held that MRTPC has no extra-territorial jurisdiction (details to be taken

S. No.	Case	Reference	Description
	Corporation (ANSAC) vs Alkali Manufacturers Association (AMAI) and others	(SC)	from CUTS' own records)
58.	DGIR vs Reliance Industries and others	RTPE 123 of 1989, order dated 31/5/2002	Cases of price parallelism
59.	DGIR vs Modi Alkali and Chemicals Ltd and others	RTPE 118 of 1994, order dated 1/3/2002	
60.	U.O.I & Others vs Hindustan Development Corporation and Others	Special leave petition 11897-11898 of 1992, order dated 15/4/1993	A case tried in the Supreme Court In this case three essential ingredients for cartel were identified: parity of prices; agreement by way of concerted action suggesting conspiracy; gain monopoly or restrict or eliminate competition Cartel not established
61.	DGIR vs Four Wheeler Nishan Owners Union and Others	RTPE 94 of 1990, order dated 8/5/2001	Respondents were restricting non-members from lifting goods of local trade and industry and were compelling non-members to hire vehicles from them at the prescribed freight rate which was maximum. The Commission passed a cease and desist order despite the gateways pleaded by respondents
62.	DGIR vs Indian Banks' Association and its constituent members	RTPE 106 of 1995, order dated 23/8/2001	Respondents allegedly formed a cartel with a view to high bank service charges. DGIR in its preliminary report reveals that the accusation of arbitrary increase of service charges may not be established since there have been an increase in cost of operation, but there is no doubt that all the banks are fixing bank charges collectively which impairs competition within the meaning of section 2(o)(ii) and section 33(1)(d) and (g) The RBI in its letter dated 8/9/1999 stated that though the present practice of fixing benchmark rates by IBA for services rendered by banks was consistent with a regime of

S. No.	Case	Reference	Description
			administered interest rate, in the current scenario of deregulation, the above practice is not consistent with the principles of competition among banks. So RBI directed IBA not to fix or advise any benchmark fees/service charges thereafter The Commission after observing RBI's direction did not find it relevant to investigate further into the matter.
63.	Standing Committee Association of State Road Transport Undertakings vs Karmobiles Ltd and others		Allegation of cartel by respondents and identical quotations for tenders But NOE issue under section 36A and 36B pertaining to UTP and not RTP as envisaged in section 2(o) and section 33(1)(d). Surprisingly, the two respondents do not produce same product! Commission dismissed the complaint

CARTELS: A VIEW FROM BRAZIL

Mauro Grinberg

I. Initial Facts:

1. The relevant law is, in first place, Law 8884 of 1994 (the Law), at some points modified or complemented by Law 10149 of 2000 (the Complementary Law), which contains all the general provisions regarding competition matters. It establishes both merger control rules and how do define, deter and punish anti-competitive conduct, including, although not limited to, cartels (which are considered, in fact the worst conduct). There is also Resolution 20, of 1999, issued by CADE (see below), which contains some (usually not very precise) definitions of anti-competitive conduct.

2. The record of prosecution of cartels in Brazil is still poor. Considering that the statistics are also poor and unreliable, we had to develop our own (sort of in-house) statistics, in order to provide some figures. For these figures we used the initial year of 1999 because this is when the sheet steel leading case was decided.

3. So, from 1999 to 2006, during a period of time encompassing eight years, we had 47 convictions, mostly for price fixing. Of the 47 cases, 4 are in the industrial sector (sheet steel, naval construction, pharmaceuticals and stones for civil construction), 8 are in the commercial sector (gas stations and domestic gas distribution, respectively 6 and 2) and 35 refer to services. Among the latter, 26 are in the health sector (associations of hospitals, doctors and others), travel agents, accountants, air transport, urban transport, cable television, newspapers and driving education. The common interpretation of the predominance of services can be explained, with maybe two exceptions, by the general unawareness of the illegality, what makes these cases very easy for the authorities. Notwithstanding all the above mentioned convictions, there are many ongoing investigations, under different procedural phases. All mentioned cases refer to price fixing, by far the best understood practice, except for the naval construction case, belonging to the bid rigging class, and the pharmaceuticals case (see below), which cannot be easily described. This easier understanding of price fixing goes back to a past of very high inflation and a tradition of (obviously mistaken and misleading) price control.

4. Article 20 of the Law provides that "notwithstanding malicious intent, any act in any way intended to or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed a violation of the economic order: I – to remit, restrain or in any way injure open competition or free enterprise; II – to control a relevant market or a certain product or service; III – to increase profits on a discretionary basis; and IV – to abuse one´s market control".

5. Article I-1 of the Annex to the Resolution defines cartels as "specific arrangements, which may be explicit or tacit, made by competitors in the same market and covering a substantial part of the relevant market, involving matters such as prices, production quotas and territorial distribution and division, in a joint attempt to raise prices and profits to near-

monopolies levels". It is clear, according to the Resolution, that cartels are horizontal arrangements only and can involve any kind of arrangement, eg market allocation, price fixing, bid rigging, output limitation and everything that the human mind can create.

6. Paragraph 4 of article 173 of the Constitution states that "the law will restrain abuses of economic power that aim at market domination, elimination of competition or increase of profits on a discretionary basis". So, there must be some kind of intent behind the behavior for it to be anti-competitive. This leads us to the unavoidable conclusion that there are no per se violations and the expression "notwithstanding malicious effect" may not be applicable because it is against the Constitution. Anyway, there are no judicial precedents and CADE has lately been using the per se rule although not mentioning it as such.

II. Investigation:

7. It is usually said that Brazil, not sure that only one agency would do a good job, decided to have three of them. However, there is really only one agency (Administrative Council for Economic Defense – CADE), which is an independent and the ultimate decision-making agency. The investigation itself is, however, done by the Secretariat of Economic Law (SDE), of Ministry of Justice, which, at the end of any investigation, can either dismiss the case, with an automatic (*ex-officio*) appeal to CADE or send the case to CADE with a recommendation for punishment. There is also Secretariat of Economic Assistance (SEAE), of Ministry of Finance, in charge or supplying economic expertise and which, at some occasions, has triggered cases.

8. It is interesting to remark that CADE has been, during all its existence, totally independent and free from political influence. One of the reasons may be the fact that the Commissioners have tenures during which they cannot be dismissed. SDE and SEAE can theoretically be subject to political influence, because they are located in the Executive Branch. However, the tradition is independence and technical analysis, although some times biased by a natural tendency to convict. There are not, anyway, recent major problems with the due process of law.

9. CADE has 7 Commissioners, including the President, chosen by the President of the Republic (normally upon recommendation of the Minister of Justice) among lawyers and economists. It happens that, due to the low salaries, together with the conflicts faced during – and some time after - the tenures, most of the Commissioners come either from civil service or from the academia, because successful lawyers and economists of the private sectors usually do not accept such appointments. SDE, the investigative body, due to the lack of an established career until one year ago, is usually managed by very young – although talented and dedicated – people who, of course, lack some experience. The new career is also young but we expect that these people will stay there and increase the general culture of SDE. It is often odd for a senior lawyer to deliver his arguments before recently graduated (sometimes pimpled) lawyer (or economist, as the case may be). Of course they do their best to compensate the lack of experience with natural talent and thorough dedication. On top of it, there is a very high turnover. SEAE is the governmental body

with a career for its economists, who usually are experienced. However, the three of them are under-dimensioned for the important job they have to perform.

10. Keeping track of the market is always difficult for these people, due mainly to the lack of resources. Information is often problematic (in the sense that it may cost unavailable money and time. The private companies that submit their cases before the authorities are often the best (because there is no cost) source of information that the authorities find. This situation is changing, although slowly, with the communications among the various Governmental bodies supplying information to each other.

11. Investigations can be triggered either by a private notification or by the authorities themselves (although it seldom happens), due to their general obligation to monitor the markets. The investigations follow some already known procedures, but generally there is an interested party supplying evidence against the accused parties. The investigative powers are almost unlimited – except for what is related to the due process of law – and they include deposition of witnesses, documents and others. Since the Complementary Law we have the possibility of unannounced raids, which lately became very popular, although they started in a somewhat awkward way. These raids are only possible after a judicial order and thus depend on the ability of the authorities to convince the judges.

12. But the main problem is still further. The investigation is, as described above, totally administrative. However, due to a Constitutional provision, there are no exemptions to judicial reviews of administrative acts or decisions and thus just about all decisions about cartels are being challenged before the Judiciary. There are many problems here, starting with the well known lack of structure of the Brazilian Courts, which is enhanced, in competition issues, by the need of economic analysis, which is quite strange for most of the Judges. A relevant market definition, which is quite obvious and straightforward for a competition lawyer, may be a major problem for a Judge because it does not fit in any mental systems to which he/she is used; it must be remembered that Brazil is a civil law country with a codifying tradition (it is true that countries in Continental Europe also follow civil law, but their historical background may have made things easier). The outcome of this problem is that, having virtually all cases still in Court, we still did not develop a sound judicial jurisprudence.

III. Trends:

13. As seen before, there are some trends in cartel investigations, although they are not yet very clear. In Brazil it has been difficult, even with dawn raids, to go after the industrial sector, due to the lack of investigative resources. Services are the first and easiest choice, because professional associations tended to fix minimal prices, claiming to act on behalf of their members against the higher power of health insurance companies. If we look at convictions instead of ongoing investigations, we do not see trends at all. Of course and as in any other jurisdictions, oligopolies in concentrated markets dealing with homogeneous products are always claiming a special look. Leniency, although still recent, is starting to change the scene. There are a few cases in which evidence – notwithstanding challenges by the accused parties – is being provided from inside. There are still some difficulties with leniency agreements, and the main of which remains in the criminal exemption that it is

supposed to provide; some criminal lawyers are afraid that, using the Constitution against the Complementary Law, Public Attorneys may allege that the criminal exemption, as granted by the Secretary of SDE, cannot hinder the activity of prosecutors.

IV. Leniency:

14. One special point about leniency – introduced in Brazil by the Complementary Law – is cultural. Brazilian culture is against, specially due to problems arisen during totalitarian Governments, all kinds of delation. It is true that most big companies are multinational, but still there is a shock, in this particular issue, with Brazilian culture and it must be dealt with. Besides, being so new, we do not know yet how the Judiciary will see it, mainly in the criminal side (as above mentioned). On the other hand, there is no fear of, as it happens in some countries, class actions, because, on one hand, they do not exist in the same way and, on the other hand, there is no jurisprudence on this matter and the results are consequently unpredictable. Besides, the Courts are usually overloaded.

15. Another point regarding leniency is the impossibility to use the consent decree in cartel cases, since the enacting of the Complementary Law had the aim to push the interested parties toward leniency. But the plan did not work as it was supposed to, and now the authorities are stuck with cartel cases which otherwise could be settled (for everybody´s benefit) but now have to go all the way through since there is no leniency. Even those cases which started with a leniency agreement cannot be settled with the other parties. Settlement, at this point, could be beneficial because these cases would not be taken to the Judiciary.

V. JURISPRUDENCE:

16. At this point it is interesting to show a few decisions, considering that they are definitive as far as the Administration is concerned; they are all, however, still under scrutiny of the Judiciary (the convicted parties against CADE) and there is no possible forecast as to when final decisions will be issued. These are representative cases but neither of them involve leniency, since CADE still did not issue any decision in cases which started with leniency agreements.

17. The sheet steel case (08000.015337/94-48) had its leading decision issued in 1999 against the three Brazilian producers – CSN, Usiminas and Cosipa – for price fixing. The interesting point in this case was a meeting called by the three parties with the Secretary of SEAE, as it was the habit until then, to communicate the price raise. They then faced a new Secretary who accused them of price fixing, because they went together to the meeting with such a purpose. Later on, they argued that the price raise was already known by the customers, and that there was a price leadership system which exempted them from the accusation of conspiracy. The Commission, however, following the Commissioner in charge, understood that there must have been a previous meeting among the three of them, before calling the meeting with the Secretary of SEAE.

18. The evidence was that (i) the market is subject to collusion, due to uniform competitive conditions, including prices, (ii) there is significant market power, (iii) barriers to entry were found and (iv) only few customers have bargain power. These conditions were not enough and the Commission went further analyzing the economic rationale for the collusion. This is certainly the critical point, which is still under scrutiny by the Judiciary, and it is clear how difficult it is for Judges to deal with such an issue, which certainly does not fit in any code. The criticisms that can be here made refer both to the evidence of collusion (supposition, as above mentioned, is obviously a weak reason), since the price raise was already known, and to the lack of evidence related to rationale of the prices themselves, let alone the collusion. Because it was a leading case (and thus part of the competition education), the Commission kept the minimal fine (1% of the last previous year´s turnover).

19. The so called generics case (08012.009088/1999-48) had a decision referring to a meeting among some major pharmaceutical companies (Abbott, Lilly, Schering Plough, Roche, Monsanto, Biosintética, Bristol, Aventis, Bayer, Eurofarma, Akzo Nobel, Glaxo, Merck, Astra Zeneca, Boehringer, Aventis Beringer, Sanofi, Wyeth, Janssen-Cilag and Byk) that held a meeting in which supposedly there was a discussion about how to ban distributors working also in the generic drugs distribution. The minutes of the meeting, after a few versions and hundreds of messages, at some point somebody delivered it to SDE. The source was highly discussed but it became unimportant because the parties did not deny the meeting, although claiming that it was for a general discussion on distribution, with no strategic matters under exam.

20. The minutes were the main evidence not only of the meeting (together with the testimonies) but also of its contents, which was permanently denied by the parties, obviously with no success at all. However, it was clear that the practice was not consummated, given the fact that the generic market became very successful soon after. Anyway, Brazilian law provides for punishment even if the practice is not consummated, and thus the fines were the minimal (1% of the previous year´s turnover), except for the ringleader (2%).

21. There are three criticisms to be made to this decision: (i) it must be considered that being present to a meeting does not automatically turns one into a conspirator; (ii) there was no definition of relevant market (which was deemed unnecessary by SDE), considering that in some cases, in which competitors were not present (given the specific way in which pharmaceuticals are defined), a cartel was impossible; and (iii) SDE did not realize that there are two Merck companies (one originated in Germany and the other originated in the United States) and one of them was left behind. The authorities went on without the forgotten company and did not consider the allegation that if there is a cartel, all parties to it must be encompassed, it being impossible to choose who must be punished and who can be left alone.

22. The shuttle case (08012.000677/1999-70) led to a price fixing decision against the four airline companies (TAM, Varig, Vasp and Transbrasil) which, at that time, held shuttle services between São Paulo and Rio de Janeiro, by far the busiest route in Brazil. The accusation related to the apparent uniform discount policy which supposedly was discussed

in a meeting of the CEOs of the four companies, six days earlier. This, plus the rationale for collusion, was considered enough evidence for a conviction.

23. Criticisms were made by the Commissioner in charge and CADE´s President in dissenting votes. It was found that, having one of the companies (the price leader) passed its price to the Air Tariff Publishing Company (ATPC), immediately the others could know it with no special effort and free from collusion. In addition, the strong competition made it easy for a price leadership scene. It was also argued in the dissenting votes that equal prices does not necessarily mean that there is collusion, which needs unquestionable evidence. The vote considered to be impossible do dismiss the possibility of a non-cooperative strategic independence, often found in oligopolies, and this fact alone does not mean that there is collusion.

VI. CONCLUSIONS:

24. When we try to figure what lessons are to be learned from Brazilian experience, of course we tend to mention the obvious ones, related to the advantages, for the market as a whole, to deter cartels. Of course we agree with them but we want to mention lessons that may not be so obvious. The first lesson is cultural: competition education is by far the best way to deter cartels. It is, eg, clear for everybody that murder and robbery are crimes and must be punished; however, it is not yet clear for most people that price fixing is such an injury (some people still see the Government, in a very faded way, as the "enemy", even if the Government is engaged in enhancing competition by punishing anti-competitive behavior). Competition education will, at some point, penetrate the inner fabric of the society.

25. The second lesson to be learned is about the Judiciary. A lot of time and resources were spent in creating a good administrative system (still very6 under-dimensioned and still with a lot of problems to solve). However, whenever a decision is taken by the administrative authorities, it can be taken to Court. The time and resources spent to create a good administrative system are useless here, unless we develop the same attitude with the Judiciary. It is still an unsolved problem how to explain to Judges the economic fundamentals and, on top of it, demonstrate that they must be used in sentencing. Anyway, the work must be done.

26. The richness of Brazilian experience must not keep us from continuing criticism and, in this way, cooperation to develop a better system.

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