points: (i) the level of infringement of legal interest is relatively small compared to unreasonable restraints on trade (the issue of whether or not it is appropriate to treat these in the same way as cartels and bid-rigging); (ii) they are designated under the Japan Fair Trade Commission's "Public Notice." In other words, there is the question of whether it is appropriate to impose surcharges on behaviour whose prohibition is at the discretion of an administrative agency (issues of "no punishment without law"/ requirement for clarity); (iii) there are questions as to whether a reasonable calculation method could be established or not.

a) Advisory Panel on Basic Issues Regarding the Anti-Monopoly Act

In the report by the "Advisory Panel on Basic Issues Regarding the Anti-Monopoly Act", opinion is divided between those who believe it inappropriate to subject unfair trade practices to surcharges and those who believe there is no reason not to impose surcharges on such behaviour. Those in the latter group have expressed the following views in relation to the three objections raised previously: (i) although unfair trade practices may not result in substantial restrictions of competition, it is behaviour that causes de facto negative effects on competition in relevant markets; (ii) there is no reason that unfair trade practices should not be subject to surcharges if the system of designation by Public Notice is revised as required; (iii) it is thought that estimates of the increase of profits and sales derived from the illegal conducts can be obtained from historical case records, and on this basis an appropriate surcharge calculation rate can be set to act as a deterrent to violations. Moreover, in the 2009 Amendment, the "abuse of dominant bargaining position" specifically referred to in the report was also deemed to be subject to surcharges.[24]

b) Surcharges on Four Categories of Unfair Trade Practice

Apart from the abuse of dominant bargaining position, there are strong demands for the introduction of surcharges for other categories of unfair trade practices that are only dealt with by means of "Cease and Desist Orders". To avoid the adverse effects of over-regulation, it has been decided to introduce a system where surcharges are ordered only when there is a repetition of the same type of behaviour in the following categories: (i) concerted refusal to trade (Designation of unfair trade practices (1)); (ii) discriminatory consideration (same (3)); (iii) unjust low price sales (same (6)); (iv) resale price restriction (same (12)).

¶1-042 Legal Designation under AMA Art 2(9)

Until now, the substantive provisions on unfair trade practices have been defined by the JFTC in the "general designation (of unfair business practices)" based on AMA Art 2(9). If this system of designation were continued to be used once surcharges are introduced, with the JFTC itself having the authority to define what constitutes illegal conduct, the system in which surcharges with a punitive function

[24] In the report, some scholars suggested that the AMA should be amended to stipulate that a violation concerning vertical restraints, such as "abuse of dominant bargaining position," should be subject to the surcharge system. Subsequently, the Diet accepted this suggestion and added several types of vertical restraints to the surcharge system in the 2009 Amendment of the AMA.

are imposed on operators by the very administrative agency which defines the violations.[25] Such a system may be problematic because business operators might not be able to easily predict what constitutes a violation under such a system. Therefore, with regard to the surcharge system for unfair trade practices, the substantive provisions for the violations that are subject to surcharge have been designated under law, in the meantime with reference to the relevant provisions in the current "general designation (of unfair business practices)."

The introduction of surcharges for the four categories of unfair trade practices (hereafter referred to as "the four categories") was supported by the fact that those categories of unfair trade practices were illegal as a matter of general principle and there had been extremely strong demand for an effective deterrent. Consequently, unjust low price sales (in part), concerted refusal to trade and resale price restriction all became subject to surcharges for the first time. Discriminatory consideration, which shows similarities to unjust low price sales, was also included.

¶1-043 The 3% Basic Calculation Rate

It is not unreasonable to assume that business operators carry out these illegal acts because, at the very least, they hope to retain an average operating profit margin on the goods they sell. Therefore, in light of the average operating profit on sales per unit made by violators in historical cases of unjust low price sales, the basic calculation rate was set at 3%.

Regarding surcharge rates (3% for manufacturers; 2% for retailers; 1% for wholesalers) for the four categories, the JFTC explained that the surcharge calculation rates for the four categories are not especially low due to the reasons as follows:

(i) The surcharge calculation rates are based on the operating profit on sales made by violators in historical cases.

(ii) The calculation rates by business type for the four categories have been set at 2% for retailers and 1% for wholesalers in accordance with the figures used for exclusionary private monopolisation (i.e. where the degree of market control held and promoted reaches the level where it presents a substantial restriction to competition).

(iii) Compared to the categories of illegal conduct that fall under unreasonable restraints on trade and that are required to impose substantial restrictions on competition, the potential impact on competition of the four categories is limited to "impeding fair competition."

Despite the explanations given by the JFTC, a calculation rate that comprises an unfair gain and an additional deterrent "α" as per the 2005 Amendment is still

[25] It means that, "it would pose a grave danger that surcharges, which now possess a characteristic of administrative sanction, could be imposed on violators by JFTC in an arbitrary and unrestricted way, because JFTC has the authority to designate what constitutes unfair trade practices in the 'General Designation' and accordingly impose the surcharge on these practices pursuant to the Designation promulgated by itself."

(2) *Issues*

(i) The Japan Game Machine Patent Management Foundation, Inc. conducted business relating to the acquisition of patent rights for the manufacture of "Pachinko" machines. As well as granting actual licenses to its ten constituent companies, it was also entrusted with the management of patent rights held by the ten companies. Do the licensing fees for the patent rights held by the Foundation constitute a "service", as per the bracketed description[34] in the second sentence of Art 7-2 (4)?[35]

Paramount Bed Case (31 March 1998; Recommendation Decision)

- Mixed "control" and "exclusionary" → 10% "control" rate should be applied
- Specified Field of Trade = Specific order by the Bureau of Finance, Tokyo in the field of medical beds for "scheduled order amount of more than JPY5 million for municipal hospitals"
- Surcharge = 10% x sales (three years) of specific medical beds by the controlling business operators (Paramount Bed sellers)

Nordion Case (3 September 1998; Recommendation Decision)

(1) *Calculation*

- "Exclusionary" rate of 6% should be applied
- Specified Field of Trade = Domestic "Molybdenum99" Industry
- Surcharge = 6% x Sales (three years) of Molybdenum 99 to Nihon Medi-physics and Dai-ichi Radio

(2) *Issues*

(i) Does this constitute "Goods supplied by the said business operator" (as per the second sentence in Art 7-2 (4)) or "the said goods supplied by the said business operator to other suppliers of the said goods" (as per the same second sentence)?

Hokkaido Shimbun Company Case (28 February 2000; Decision on Agreement)

- Exclusionary Rate of 6% should be applied
- Specified Field of Trade = Publication of general daily newspapers in the Hakodate region
- Surcharge = 6% x sales (three years) to distributors in the Hakodate region

[34] ".....And the said goods and services supplied by the said business operator to other suppliers of the said goods and services in the said specified field of trade (including services necessary to allow other suppliers of said goods and services to supply goods and services in the said specified field of trade)."

[35] Whether the patent royalty constitutes a "service" or not would directly affect the calculation basis for surcharge in this case.

Yusen Broad Networks Case (13 October 2004; Recommendation Decision)

- Exclusionary Rate of 6% should be applied
- Specified Field of Trade = Domestic music broadcast services for business use
- Surcharge = 6% x Sales of music broadcast for business stores (14 July 2003 – 9 July 2004)

Intel Case (13 April 2005; Recommendation Decision)

- Exclusionary rate of 6% should be applied
- Specified Field of Trade = CPU sales to Japanese PC makers
- Surcharge = 6% x Sales (three years) of CPU to five Japanese PC makers

Estimate of Surcharge Amount

If the amended AMA were applied to the private monopolisation case against Intel Corporation, what would the amount of surcharges be? The business of Intel Japan is the importation and sale of CPUs to computer manufacturers from Intel America. In 2003, the annual amount of CPU sales made by Intel Japan to Japanese PC makers was JPY225 billion (a 95% market share based on sales value; an 89% market share based on volume). The surcharge amount for exclusionary private monopolisation is obtained by taking the value of relevant goods sold during the violation period (maximum three-year period) by the infringing operator and multiplying that value by 6% (for manufacturers); 2% (for retailers); and 1% (for wholesalers). Hypothetically speaking, on the rough premise that the annual sales of infringement goods made by Intel Japan were JPY200 billion and that the company was a wholesaler, the calculated amount would be (JPY200 billion) x (1%) x (3 Years) = JPY6 billion.[36]

Nipro Case (5 June 2006; Trial Decision)

- Exclusionary rate of 6% should be applied
- Specified Field of Trade = Supply of glass tubing in the Western Japan region
- Surcharge = 6% x Sales (three years) of glass tubing to ampoule processing companies

NTT Eastern Japan Case (26 March 2007; Trial Decision → 29 May 2009 Tokyo High Court: Claim Dismissal)

- Exclusionary rate of 6% should be applied
- Specified Field of Trade = FTTH (Fiber to the Home) broadband network services to detached dwellings in the Eastern Japan region

[36] Incidentally, in the EU, the eventual fine was EUR1.06 billion. Masahiro Murakami "De facto Calculation of Surcharge Amounts and the Creation of Discretionary Surcharges" Court Precedent Times, Issue 1350, Page 43 onwards.

three instances in which government officials were prosecuted under Arts 89(1) and 95(1) since the enactment of the AMA in 1947.

Apart from the AMA, the general criminal law in Japan prohibits the obstruction of public auctions and public tendering. Anyone (including public officials) who has committed that offence may be imprisoned for up to three years or fined up to ¥2,500,000 (Penal Code Art 96-3). Offering bribes is a criminal offence that may result in the same penalties (Art 198). Acceptance of bribes is also a criminal offence, and the penalty for that crime is up to five years' imprisonment (Art 197(1)). If the acceptance is accompanied by a promise to perform a certain act for the person offering the bribe, a more serious penalty, such as imprisonment of up to seven years (ibid.), may be imposed.

These criminal law provisions are applicable to public officials who engage in anticompetitive activities in public procurement. However, because criminal laws are associated with severe penalties and social stigma, they tend to be applied with caution and are only used in serious cases in which a stricter legal standard, such as beyond a reasonable doubt, applies. Under these provisions, the wilfulness of the action and clear causation must be demonstrated. The standards of proof are significantly more stringent than the ones under the AMA.

This means that a government official's involvement in bid rigging is often left unchallenged, even when the entrepreneur is condemned under the AMA by the FTC. This is despite the fact that the bidder's wrongdoing was promoted and facilitated by the government official.

The FTC's lack of power was exemplified in 2000, when it investigated bid rigging cases in the Hokkaido area and took measures against 297 bidders in total on the grounds of AMA violation (Hokkaido Kamikawa Case, FTC Decision of 16 June 2000). The bid rigging was related to construction work procured by the Hokkaido prefecture government. During the course of investigation by the FTC, government officials' systematic involvement became apparent. They set the annual winning contract target for each bidder, nominated a particular bidder as the winning bidder ahead of the public tendering process, and instructed the local industry association to coordinate the bidders' bids accordingly. The bidders followed the instruction and rigged their bids so that the nominated bidder would be selected as the winner. Although the FTC issued the elimination orders and the surcharge payment orders to the bidders under the AMA Arts 7 and 7-2, it did not take any formal action against the government officials due to the lack of competence.

The scale of bid rigging activities in the Hokkaido Kamikawa case shocked the public and prompted public discussion over whether the FTC should have the power to pursue government officials involved in bid rigging. The FTC's ability to pursue public officials is constrained by the AMA. Either new legislation or amendment to the AMA would be necessary to solve the problem.

A gap in the law exists as well with regards to the recovery of damages. A public official's involvement in collusion may be a cause for claiming civil damages under the general civil law and the laws that regulate public officials; thus, the official

concerned may be liable for repayment of damages to the government. However, governments tended to be reluctant to pursue their own officials, and hence damage claims against governmental officials were rare. There were criticisms of this reluctance from the public. But these criticisms alone were not sufficient to motivate the relevant government body to take action against their civil servants. This is because these criticisms tended to be patchy and local. Residents were only temporarily concerned with the issue after a bid rigging case was uncovered within the local government where they reside. After a while, the public focus moved to different issues.

Since the 1990s, there have been attempts to change the public procurement process so that it is more bid-rigging proof.[3] Overall, there has been a transition in the public procurement process from single tendering (or single source procurement) to a selective competitive bidding system and then to an open tendering system (also termed a 'general competitive tendering system' in Japan). More resistant to bid rigging activities, the open tendering system has begun to be widely introduced by government procuring departments. When the selective competitive bidding system is used, the locality rule is relaxed and the number of participants in each bidding procedure is increased. Also, the rules relating to confidentiality are strengthened. These ex-ante measures alone, however, have proved to be insufficient to eradicate bid rigging by public officials.

There was also scepticism concerning the procuring departments as to how seriously and consistently they would enact measures to eliminate bid rigging and involvement by government officials. The government is made up of politicians and bureaucrats. In order to secure votes, the politicians need the support of the bidders, who are in many cases influential local contractors. The bureaucrats are thus reluctant to denounce the procuring officers.

These circumstances demonstrated the necessity of substantial legislation to set out coherent legal measures to address government officials' involvement and entrust the anti-bid rigging initiative to an independent administrative organisation, the FTC.

¶2-022 Involvement Prevention Act

In 2002, the missing element in the AMA was remedied by the enactment of the Act on Elimination and Prevention of Involvement in Bid Rigging, etc., and the Punishments for Acts by Employees that Harm Fairness of Bidding, etc. (hereinafter referred to as the *Involvement Prevention Act*).[4]

The *Involvement Prevention Act* covers bid rigging activities in public auctions or in other competitive venues by which the national government, local governments, and governmental corporations, to which the government provides more than half

[3] See Ministry of Internal Affairs and Communications, Ministry of Finance and Ministry of Land, Infrastructure, Transport and Tourism, 'The Results of the Implementation Status Survey under the Act for Promoting Proper Tendering and Contracting for Public Works' of 2002-2012 (http://www.mlit.go.jp/totikensangyo/const/1_6_bt_000154.html) (Japanese).

[4] For the legislation process, see Yoshiro Hayashi and others, *Shokai Nyusatsu Dango tou Kanyo Koui Boushi-ho [Commentary on the Involvement Prevention Act]* (Gyosei, 2002) 41-42.

excessive procurement price. The scheduled prices are kept confidential by most central government ministries and many parts of local governments before the bidding procedure is completed. However, officials sometimes unlawfully disclose this information and help the bidders submit a bid within the range of the scheduled contract cost—normally towards the maximum end of the range.

Under the *Involvement Prevention Act*, three types of conduct are specified as officials' involvement activities (see ¶2-022 above). Another type of involvement activity includes endorsement of the outcome of bidders' coordination and selection. The procuring officials sometimes hold a strong bargaining position over the bidders as the purchaser, and his/her voice is called 'ten no koe' (literal translation: 'the voice from Heaven' or the 'voice of God'); he/she is regarded as decisive in the collusive allocation process. In such a situation, endorsement by the procurement official cements the collusion among the bidders.

Investigations carried out by the procuring offices and the reports published by them have been revealing just how these enabling practices took place.

A. Nomination of the Winner

In seven cases, the procurement officials unlawfully nominated the winner ahead of the public tendering process (Ibaragi, ASDF, Sapporo, GRA, DFAA, Floodgate (MLIT) and Iwamizawa).

In the Iwamizawa and Ibaragi cases, the winner was chosen in advance of the public tendering process by officials who then informed the directors of the local industry associations. The directors related this information to the bidders, who then collaborated to ensure that the preferred contractor would win the contract.[19]

In the Floodgate (MLIT) case, procurement officials chose the winner in advance for some type of services, and the bidders chose the winner for other types of service.[20] The officials selected the winner so that contracts were allocated evenly. In the selection process, officials also took account of the participant's willingness to win the contract, their capability and past experiences.[21]

In the GRA case, officials allocated the public contract among the bidders according to the number of ex-officials working for each bidder, with the aim of securing a post-employment job at the bidders. Afterward, the officials continued

[19] *Iwamizawa General Construction* (n 13); *Iwamizawa Pipe* (n 13); *Iwamizawa Electric Work* (n 13); *Iwamizawa Road* (n 13); *Iwamizawa Building* (n 13), *Ibaragi Land Reform* (n 13); *Ibaragi Sakai* (n 13); Ibaragi Prefecture Bid-Rigging Involvement Investigation Committee, *Report on Bid Riggings*, 9 February 2012; City of Iwamizawa (n 14).

[20] *Re Kurimoto and others*, FTC Order of 8 March 2007 *[Floodgate River]*; Re Ishikawazima Harimazima and others, FTC Order of 8 March 2007 *[Floodgate Dam]*.

[21] Ministry of Land, Infrastructure, Transport and Tourism, *Report on Bid Riggings in Relation to Floodgate Facilities*, 18 June 2007.

their involvement and chose the winner so that each bidder could have the same share of public contracts as in the previous year.[22]

In the DFAA case, officials allocated the contracts to the bidders, taking account of the number of ex-officials working for each bidder as well as the contractor's past involvement in related projects. Sometimes ex-officials working for the bidders were consulted by current officials in the allocation process. The result of the allocation was communicated to the bidders thorough the ex-officials employed by them. This type of involvement is motivated by the desire to secure employment after leaving the DFAA. Because of the DFAA's human resource management policy, younger officials cannot be promoted until the senior officials leave. It is thus essential for DFAA to secure sufficient jobs for departing officials for smooth human resource management. This was the background to the officials' involvement in collusion.[23]

In the ASDF case, the officials set the annual target for each bidder and chose the winner so that the target would be achieved. For this purpose, the public tender order specifications were drafted in such a way that only the product of the chosen company would be accepted as compliant with the specifications at each public tendering. The officials requested that the chosen bidders write the specifications themselves, and the bidders did so. The annual target was set so as to give the most advantageous allocation of public contracts to (a) bidders employing large number of ex-officials and (b) bidders who accepted ASDF cutting corners when it was trying to spend its yearly budget in a short time at the end of the fiscal year.[24]

B. Disclosure of Information

In the Niigata case, the bidders chose the winner and the officials informed the chosen bidders of the estimated cost. With this information, the bidders could determine the scheduled maximum price and rig the bids accordingly.[25]

In the Public Vehicle (MLIT) case, information about the bidders and where the public tendering process would be introduced was disclosed to one of the bidders, Kitakyo (vehicle management) K.K. At that time, the agency was going through a reform of the public procurement system, and the competitive tendering system was replacing single tendering. Kitakyo was employing many ex-officials of the procuring office. Using this information, Kitakyo colluded in the bid with the other two bidders.[26]

[22] *Re Shinrin Gizyutu Association et al*, FTC Order of 25 December 20007; *Re A*, Tokyo District Court Judgment of 1 November 2007, 54 FTC Shinketsu-shu 799; Green Resource Agency, *Report on Measures to Prevent Reoccurrence of Bid Rigging Activities*, 25 December 2007.

[23] *Re Goyo Kensetsu et al*, FTC Order of 20 September 2007; Defence Facilities Administrative Agency Bid Rigging Investigation Committee, *Report on DFAA Bid Rigging Activities*, 15 June 2006.

[24] *Re Office Furniture Procured by Ministry of Defence Air Self-Defence Force*, FTC Order of 30 March 2010; Ministry of Defence (n 17).

[25] *Niigata Open Cut* (n 13); *Niigata General Construction* (n 13); *Niigata Jacking* (n 13); City of Niigata (n 15).

[26] *Re Public Vehicle Management Service Procured by MLIT*, FTC Order of 23 June 2009; Ministry of Land, Infrastructure, Transport and Tourism, *Report on Bid Riggings in Relation to Public Vehicle Management Services*, 18 February 2010.

Command of the Allied Powers, in the period following Japan's resumption of independence was one of reducing the AML's influence as much as possible. The business community lobbied for a serious relaxation of several provisions of the AML. At times, there were even suggestions to abolish the AML. Business demand was heeded by an important part of the bureaucracy, namely the powerful Ministry of International Trade and Industry (hereinafter MITI).[2] One of the results of this relaxation was a proliferation of cartels, due to which Japan was even referred to as the cartel archipelago.

Cartels became the focal point of attention during the economic crisis of the 1970s. With strong support from the consumers, the Japanese Fair Trade Commission (hereinafter JFTC) saw its chance to reposition itself and give much more prominence to the AML. However, this faded once the economy recovered in the 1980s. Pressure from the United States (hereinafter US) made Japan rethink its antimonopoly policy. In terms of cartel policy, there were several gradual changes in the 1990s. All of these changes made cartelisation more difficult. However, one of the main instruments to tackle cartels, a leniency programme, was not introduced. For this, one had to wait until the then-Prime Minister, Junichiro Koizumi, led its country into major reforms in order to stop the downward economic spiral in which Japan was caught for more than a decade.

Leniency programmes have been lauded for their effectiveness in dealing with cartel behavior. Since the fact that many of the exemption legislations were already abolished in the 1990s during the gradual revision of the AML, the leniency programme can be viewed as the final dash to put an end to the cartel archipelago. This paper will therefore analyze the effectiveness of the Japanese leniency programme.

To analyze this issue, the chapter will set out why Japan has been perceived as a cartel haven. It will also present an historical perspective on the shift of the Japanese government's attitude towards cartels. One of the most recent developments in this shift has been the adoption of the leniency programme. The reasons for adopting a leniency programme will be elaborated in ¶3-030. An introduction to the leniency programme will follow this part. This chapter will review general data on the flow of cartel detection before and after the adoption of the leniency programme, followed by a more detailed breakdown of the data on leniency applications. The data will be analyzed against the backdrop of the operation of the leniency programme. Considering both the data and the operation of the leniency programme, final conclusions will be drawn, focusing on the value of having a leniency programme in Japan.

[2] Before the war, MITI was known as the Ministry of Commerce and Industry. It changed name in 2001 to Ministry of Economy, Trade and Industry (METI).

¶3-020 Japan, the Cartel Archipelago

¶3-021 Proliferation of Cartels during the First Two Decades of the AML

Once Japan regained independence in 1952, cartels soared. Akinori Uesugi informs us that by the end of 1966, and this was probably the peak in the postwar period, there were 1079 cartels exempted.[3] This number does not include quasi-legal cartels and illegal cartels. Quasi-legal cartels, which were cartels pushed for by MITI without the AML or specific legislation as a basis and which could be justified under a liberal reading of Art 3 of the AML, have not been incorporated in the number of exempted cartels. However, the numbers available indicate that they were not insignificant.[4] Of course, the number of illegal cartels is hard to guess, not only because enforcement was weak but because of the secrecy in which cartels tend to veil themselves.

It is generally accepted that this turn towards cartelisation was a demand of the industry.[5] Keidanren, the Japanese Business Federation, saw an opportunity to lobby for a less restrictive AML once the occupation ended.[6] Bestowed with a competition law that was one of the strictest of its time, the Japanese business community had not much space to maneuver.[7] Cooperation of any kind, whether it was domestic or international, was either bluntly forbidden or subject to strict control. Not wanting to sacrifice the growth of the Japanese economy, Keidanren advocated for erasing many of these restrictions and instigating procedures to facilitate cooperation. One form of cooperation that Keidanren had in mind was the formation of cartels.

[3] See Akinori Uesugi, "Japan's Cartel System and Its Impact on International Trade" (1986) 27 Harv. Int.'l L. Rev. 389, p401. A similar number is quoted by Douglas E. Rosenthal and Mitsuo Matsushita "Competition in Japan and the West: Can the Approaches be Reconciled?, Edward M. Graham and J. David Richardson (eds) *Global Competition Policy* (Institute for International Economics, 1997) 313, at 317; Kotaro Suzumura, "Formal and Informal Measures for Controlling Competition in Japan: Institutional Overview and Theoretical Evaluation", in Edward M. Graham and J. David Richardson (eds) *Global Competition Policy* (Institute for International Economics, 1997) 439, p447.

[4] Ulrike Schaede, *Cooperative Capitalism: Self-Regulation, Trade Associations, and the Antimonopoly Law in Japan* (Oxford University Press, 2000), at 84. The author indicates that in 1957 23 cartels were set up under the *kankoku soutan* and that another 18 'probable' cartels were identified. In 1958, another 15 cartels were set up. In 1959, another 28 followed. Another 15 were added in 1960. Further, 23 industries were asked to allocate markets or set price. Iyori and Uesugi speak of 30 recommendations in 1958. See Hiyori Iyori and Akinori Uesugi, *The Antimonopoly Laws and Policies of Japan* (Federal Legal Publication, 1994) p39.

[5] Schaede, supra note 4, p79.

[6] There has been much debate on why the business side demanded a more flexible AML. Whatever the correct reason may be, it is an objective fact that there has been a demand for relaxing the standards of the AML, due to which concentration of entrepreneurs was facilitated. *See*, for example, Harry First, "Antitrust Enforcement in Japan" (1995-1996) 64 Antitrust L.J. 137, pp138-148.

[7] See Simon Vande Walle, "Competition and Competition Law in Japan: Between Scepticism and Embrace", in Michael W. Dowdle, John Gillespie, and Imelda Maher (eds) *Asian Capitalism and the Regulation of Competition: Towards A Regulatory Geography of Global Competition Law* (Cambridge University Press, 2013) 123, p124.

cases the 30% reduction represents a post-investigation application. It is only in the cases that also have a 50% reduction that there is much more uncertainty about this presumption.

The cartels that have been discovered through leniency in fiscal year 2011 cannot be presumed to be linked. The conclusion for fiscal year 2012 is the complete opposite. All cartels of which the leniency application has been published can be grouped into three big categories. Denso Ltd., sometimes together with one or two other entrepreneurs, has uncovered 9 cartels divided by products like alternators,[142] starters,[143] wipers,[144] and radiators and electric fans.[145] Four cartels are linked to works that are done for the Ministry of Land, Infrastructure, Transport and Tourism.[146] Another five cartels could be grouped based upon the leniency applications of the same entrepreneurs in relation to wire harnesses for cars.[147] For the fiscal year 2013, again in the car industry, it can be observed that 5 cartels are linked because of the presence of identical leniency applicants.[148]

¶3-050 The Data in Light of the Operational Environment of the Leniency Programme

¶3-051 Simple Application Criteria, Many Applications

Whatever reason may be behind the application for leniency, it cannot be denied that Japan has had a high number of applications. 725 leniency applications in a period of seven years may suggest that there is a real demand for leniency. This high number of applications may be facilitated by a straightforward application process. Experts advising the International Competition Network on the operation of a leniency programme have concluded that the following elements are essential for an effective leniency programme: absence of uncertainty in the application process; secrecy of the application; ability to explore the availability of leniency; guarantee on the order of application; non-disclosure of the application documents; the use of standard form letters; no duty to establish a cartel offence in the application and the possibility of an oral procedure.[149]

The leniency programme in Japan is transparent and clear. The JFTC has flowcharts detailing the obligations of all parties in each stage of the leniency

[142] See Appendix G (xviii) and (xix).

[143] See Appendix G (xvi) and (xvii).

[144] See Appendix G (xiii)-(xv).

[145] See Appendix G (xi) and (xii).

[146] See Appendix G (vi)-(x).

[147] See Appendix G (i)-(v).

[148] See Appendix (i)-(vi).

[149] "Anti-cartel Enforcement Manual: Drafting and Implementing an Effective Leniency Policy" International Competition Network (May 2009), online: (http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf).

procedure.[150] Leniency is automatic for the first applicant, as long as he complies with a set of clear and simple obligations. The initial submission of information does not have to be more than a document revealing the existence of a cartel and the names of the entrepreneurs involved, thus acting as a kind of marker. The applicants do not have to establish all the elements of an offence; they only have to provide the information they have at hand. The order of the application is determined by the time the JFTC receives a fax from the applicant on a fax machine installed for this purpose. Potential applicants for leniency can inquire from the JFTC whether leniency is still available. Leniency can be obtained after the investigation has started.

Despite these positive elements, concerns have been raised. Monotobu Wakabayashi, a lawyer, has indicated that the leniency applicant still may face criminal sanctions.[151] A leniency application can reveal the cartel to other enforcement authorities, namely the public prosecutors. By extension, private parties may also learn of the cartel and start civil damages actions against the cartel participants, including the applicant for leniency. Hideto Ishida and Etsuko Hara, two other lawyers, have also pointed out that the JFTC may be jeopardising the leniency programme by the strict delineation of cartel and the tremendous backlog.[152] The possibility of facing a foreign follow-on action may also jeopardise the Japanese leniency programme if these foreign jurisdictions are perceived as more stringent than the Japanese enforcement system.[153] Further, and this has already been detailed by the ICN document, culture is something that could jeopardise the functioning of a leniency programme.[154]

¶3-052 Possible Impediments for an Effective Leniency Programme in Japan

1. Criminal Sanctions Operate within a Strict Framework

The scope of the Japanese leniency programme is limited to the administrative surcharge. The leniency programme does not apply to the criminal sanctions provided for in the AML. This means that the JFTC still has the power to file a criminal prosecution with the public prosecutor. The JFTC has the exclusive power to do so.[155] Hence, it is within the discretion of the JFTC to take steps or not in a case

[150] See JFTC, kachoukin genmen seido no nagare, trans. "Flowchart of the Leniency Program", online: (http://www.jftc.go.jp/dk/genmen/nagare.html); see also Takujiro Kono, "Marker System of JFTC's Leniency Program: Setting Up or Reforming a Leniency Programme, What Makes a Leniency Policy Successful?" online: (http://ec.europa.eu/competition/information/icn_workshop_2011/presentations/mini_plenary_4b/takujiro_kono.ppt). Please note, however, that the English flowchart has been simplified.

[151] See Intensive Lecture by Monotobu Wakabayashi, Lawyer, Oh-Ebashi LPC & Partners, in Fukuoka (Kyushu University), Japan (27 June 2008).

[152] See Ishida and Hara, supra note 103.

[153] See Van Uytsel, supra note 110, p22.

[154] See "Anti-cartel Enforcement Manual: Drafting and Implementing an Effective Leniency Policy" International Competition Network (May 2009), online: (http://www.internationalcompetitionnetwork.org/uploads/library/doc341.pdf).

[155] See Art. 96 of the AML. The public prosecutor can only file criminal prosecutions. In the case of the AML, the public prosecutor can only do so after a complaint of the JFTC.

(viii) gasuyou poriechiren kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of polyethylene pipe joints for gas"

(ix) gasuyou poriechiren kuda no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of polyethylene pipes for gas"

(x) oosaka ateji kabushiki gaisha ga hacchuu suru chuuatsu gasu doukan kouji no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to the bid participants of the construction of medium pressure gas conduits ordered by Osaka Gas Co., Ltd"

(xi) toukyou ateji kabushiki geisha ga hacchuu suru kouatsu gasu doukan kouji no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to the bid participants of the construction of high pressure gas conduits ordered by Tokyo Gas Co., Ltd"

(xii) dokuritsu gyousei houjin midori shigen kikou ga hacchuu suru rindou chousa sokuryou sekkei jimu no nyuusatsu sanka gyoushara ni tai suru ken, trans. "Case against the entrepreneurs participating in the bid rigging for forest road *(geological)* survey business and location survey planning business procured by the incorporated administrative agency "Japan Green Resources Agency"

C. Year 2008 (heisei 20)

(i) marinhoosu no seizou hanbai gyoushara ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of marine hoses"

(ii) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of flexible pipe joint for gas"

(iii) gasuyou furekishiburu kudazugite no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of flexible pipe joints for gas"

(iv) poripuropirensei shurinkufuirumu no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of polypropylene shrink films"

(v) oosakashi hacchuu no byouinra muke tokutei ekusu senshouchi no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to the bid participants of specific X-ray equipment for hospitals ordered by Osaka City"

(vi) oosakashi hacchuu suru no kenkoujora muke tokutei ekusu senshouchi no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to the bid participants of specific X-ray equipment for health centers ordered by Osaka City"

(vii) zaidanhoujin kekkaku yoboukai hacchuu no tokutei kenshinsha no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to the bid participants of specific car for medical examinations order by the Japan Anti-Tuberculosis Association"

(viii) yokohamashira hacchuu no tokutei ekusu senshouchi no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to the bid participants of specific X-ray equipment for health centers ordered by Yokohama City"

(ix) yokohamashi hacchuu no tokutei ekususen shouchi no nyuusatsu sanka gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to the bid participants of specific X-ray equipment ordered by the city of Yokohama"

(x) kouyaita no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of steel sheet piles"

(xi) koukangui no seizou hanbai gyousha ni tai suru kanchoukin noufu meirei kankei, trans. "Order for the payment of surcharges to manufacture and sales firms of steel pipe piles"

C. Year 2009 (heisei 21)

(i) enka biniiruka oyobi doukeishu no seizou hanbai gyousha ni tai suru ken, trans. "Case against the manufacturers and sellers of vinyl chloride pipes and joints"

(ii) kokusai koukuu kamotsu riyou unsou jigyousha ni tai suru ken, trans. "Case against international air freight forwarders"

(iii) kakyou kouhappou poriechiren shiito no seizou hanbai gyousha ni tai suru ken, trans. "Case against manufacturers and distributors of cross-linked high foaming polyethylene sheets"

(iv) kokudou koutsushou ga tohoku chihou seibikyoku ni oite hacchuu suru sharyou kanri jimu nyuusatsu sanka gyousha ni tai suru ken, trans. "Case against the participants in the bidding for vehicle management jobs of the Tohoku Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism"

(v) kokudou koutsushou ga kantou chihou seibikyoku ni oite hacchuu suru sharyou kanri jimu nyuusatsu sanka gyousha ni tai suru ken, trans. "Case against the participants in the bidding for vehicle management jobs of the Kanto Regional Development Bureau ordered by the Ministry of Land, Infrastructure, Transport and Tourism"

(vi) kokudou koutsushou ga hokuriku chihou seibikyoku ni oite hacchuu suru sharyou kanri jimu nyuusatsu sanka gyousha ni tai suru ken, trans. "Case against the participants in the bidding for vehicle management jobs of the Hokuriku Regional

enforcement system).[2] Even leniency programmes have one serious limitation; the cooperating parties are themselves directly involved in the illegality, raising the possibility that leniency could be used strategically. For example, one study has suggested that leniency applications in the European Union ("EU") are generally made after the cartel has failed, which may imply the motivation for coming forward is a desire to gain a competitive advantage through the enforcement system.[3]

It has been suggested that the "next logical step" in advancing antitrust enforcement may be the use of rewards or bounties to individual whistleblowers.[4] These are individuals who are aware of an infringement but are not necessarily directly involved in it. In return for a reward, they will ostensibly make the competition authority aware of an undetected infringement or help them build a more effective case against an infringement they are already aware of. South Korea has the distinction of being the first jurisdiction to have introduced an informant reward system and is therefore the innovator of this latest addition to the cartel enforcement toolkit. Cartel whistleblower reward systems have also been introduced by a handful of other jurisdictions, but some – most notably the United States ("US") – have chosen to reject such a system.

Beyond leniency programmes, whistleblowing has long played a key role in uncovering corporate misbehaviour. For example, Sherron Watkins and Cynthia Cooper are thought to have been instrumental in uncovering large-scale fraud at Enron and WorldCom.[5] This chapter also discusses a number of examples of whistleblowing in the context of competition policy, including the infamous FBI informant Mark Whitacre. Yet, despite the potential value of corporate whistleblowers, they have generally received no reward from the authorities. Nor have they enjoyed adequate protections from the retaliatory actions of their employers, or the wider consequences for their careers and personal lives. Following the plethora of large financial scandals in the last fifteen years, there appears to be growing recognition of the value of informants. In 2002, Time magazine named Watkins and Cooper as "Persons of the Year" in recognition of their role in uncovering the corporate misbehaviour.[6] More recently, a 2011 study

[2] A Stephan, "How Dishonesty Killed the Cartel Offence" (2011) *Criminal Law Review*, Vol. 6, pp446 – 455; A Stephan, "Disqualification Orders for Directors Involved in Cartels" (2011) *Journal of European Competition Law & Practice* 2(6): 529 – 536.

[3] A Stephan, "An Empirical Assessment of the European Leniency Notice" (2009) *Journal of Competition Law & Economics* 5(3): 537 – 561.

[4] G Schnell, "Bring In the Whistleblowers and Pay Them – The Next Logical Step in Advancing Antitrust Enforcement" (November 2013) CPI Antitrust Chronicle, 2.

[5] LM Baynes, "Just Pucker and Blow?: An Analysis of Corporate Whistleblowers, the Duty of Care, the Duty of Loyalty, and the Sarbanes–Oxley Act" (2002) *St. John's Law Review* 76, 875.

[6] N Schichor, "Does Sarbanes–Oxley Force Whistleblowers to Sacrifice their Reputations? An Argument for Granting Whistleblowers Non-Pecuniary Damages" 8 U.C. Davis L.J 272 2007–2008 292.

prepared by the OECD for the G20 Anticorruption Working Group called for greater protection of whistleblowers willing to expose corruption.[7]

This chapter considers whether the use of individual informant rewards or bounties are a viable cartel detection tool. It addresses: (1) the benefits of offering rewards to whistleblowers; (2) the design of informant rewards in South Korea and similar systems employed by other jurisdictions; (3) the question of which category of individuals these rewards should be available to; (4) the willingness of individuals to come forward and report a cartel in return for a reward; (5) how high the reward should be in monetary terms; and (6) the potential dangers of a cartel informant reward system. This chapter concludes by recommending that rewards could increase the detection rate of cartels but this is unlikely to happen unless rewards reflect the very significant cost and risk faced by individuals who are willing to come forward and inform on the actions of others within their firm or industry.

¶4-011 The Benefits of an Informant Reward Programme

The principal gain from informants is the potential to uncover infringements that might not otherwise be revealed through leniency or through the competition authority's investigative work. This has the potential of being significantly deterrence enhancing, by increasing the rate at which cartels are discovered without any significant increase in enforcement resources.[8] As the whistleblower can be a single individual, it is also less likely that their actions are part of strategic behaviour by one firm of the sort described above in relation to leniency. They may therefore be effective at uncovering cartels that are otherwise stable despite the presence of leniency. Three further deterrence-enhancing effects can be identified:

Cartel Instability – An informant reward programme that creates a legitimate threat to cartels could increase deterrence by making existing infringements less stable and encouraging distrust between cartel members.[9]

Raising the Cost of Collusion – Rather than simply having to ensure that no party to a cartel cheats or applies for leniency, informant rewards force the cartel to compensate every *individual* involved in the infringement or aware of its existence. Each of these potential whistleblowers must be prevented from coming forward, either through threats or bribes, both of which are associated with a cost.[10]

[7] G20 Anti-Corruption Action Plan, *Protection of Whistleblowers: Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation* (2011).

[8] WE Kovacic, "Private Monitoring and Antitrust Enforcement: Paying Informants to Reveal Cartels" (2001) 69 *George Washington Law Review* 766, p774.

[9] P Schoff, "Pay offs for cartel tip offs" (12 September 2013) MinterEllision (http://www.minterellison.com/Media/Pay-offs-for-cartel-tip-offs/).

[10] C Aubert *et al*, "The Impact of Leniency and Whistle-Blowing Programs on Cartels" (2006) 24 *International Journal of Industrial Organisation* 1241, 1251 – 1252.

policy all over the world.[3] Despite vigorous enforcement against hardcore cartels by authorities in many jurisdictions, competing economic entities often form cartels and operate as if they were a monopoly,[4] thereby furthering their collective interests at the expense of consumers through raising prices, restricting output, sharing markets or rigging bids.[5]

This type of detrimental cartel conspiracy is found in domestic and global markets. Enterprises in one jurisdiction frequently try to penetrate other markets, and their active business practices are leading to increasing interconnectivity.[6] Globalisation provides a friendly environment for communications between competing multinational enterprises ("MNEs") due to the growing number of interactions among them. Since there is no international regime for competition law harmonisation[7] which could monitor cross-border collusive activities, cartel members usually have substantial incentives to create and maintain cartels in the global market, and these have significant effects throughout the world.[8]

International trade and cartels are intertwined.[9] International cartels appear to cause particularly negative effects on the trade of those countries with governmental policies that rely heavily on economic growth derived from trade.[10] This is particularly noticeable in Asia. Although the potential impact of international cartels in these countries is considerable, their capacity to act against cartels is somewhat limited.[11]

[3] Robert H. Bork, *The Antitrust Paradox* (The Free Press 1993) 263.

[4] Gunnar Niels et al., *Economics for Competition Lawyers* (OUP 2011) 285.

[5] Michael A. Utton, *Cartels and Economic Collusion: The Persistence of Corporate Conspiracies* (Edward Elgar 2011) 2. In legal terms, cartel usually means a collective private organisation established through a secret agreement or coordination to avoid the risks of competition. See also Alison Jones and Brenda Sufrin, *EU Competition Law: Text, Cases, and Materials* (5th Edn, OUP 2014) 659; Damien Geradin, Anne Layne-Farrar, and Nicolas Petit, *EU Competition Law and Economics* (OUP 2012) 391.

[6] Alvin K. Klevorick and Alan O. Sykes, "United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on *Empagran*" in Eleanor M. Fox and Daniel A. Crane (eds), *Antitrust Stories* (Foundation Press 2007) 361.

[7] There would be noteworthy benefits in the global market if competition policy could be harmonised. However, it is unlikely to happen in the near future, despite efforts by the OECD, the WTO, and the ICN, etc. See Daniel A. Crane, *The Institutional Structure of Antitrust Enforcement* (OUP 2011) 229.

[8] Richard Whish and David Bailey, *Competition Law* (7th Edn, OUP 2012) 487.

[9] Frederic M. Scherer, "International Trade and Competition Policy" in Einer Hope and Per Maeleng (eds), *Competition and Trade Policies* (Routledge 1998) 13-4; Eleanor M. Fox, "Competition Law" in Andreas F. Lowenfeld, *International Economic Law* (2nd Edn, OUP 2008) 453-54. Scherer asserts that international cartels can distort trade between countries in many ways. For example, buyer cartels that constrict distribution channels against imported products or services have influences on the tariffs.

[10] Increased globalisation means that the effects of anti-competitive practices are often felt beyond national boundaries. Such practices can reduce the benefits of open trade and liberalisation. See Kevin C. Kennedy, *Competition Law and the World Trade Organization: The Limits of Multilateralism* (Sweet & Maxwell 2001) 1-2.

[11] Margaret Levenstein and Valerie Y. Suslow, "Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy" (2004) 71 *Antitrust L. J.* 801, 802. Some argue that many jurisdictions that have been affected by anti-competitive practices of MNEs have inadequate incentives, ability, or evidence to prevent international cartels. Furthermore, extraterritorial application suffers from serious limitation at the national enforcement level. However, it is unclear whether this problem is significant in practice since the enforcement costs may be smaller than the possible harms from cartels. See also Maher M. Dabbah, *International and Comparative Competition Law* (Cambridge University Press 2010) 494; Einer Elhauge and Damien Geradin, *Global Competition Law and Economics* (2nd Edn, Hart 2011) 1140.

Most competition regimes in Asia are relatively new, and therefore cartel-busting activities are constrained, *inter alia*, by the scarce resources of national authorities and the lack of experience in tackling competition issues.

As the number of international cartels has increased in recent years, a growth arguably brought about by the current economic downturn,[12] most Asian countries seem to be trying to improve their competition law implementation, and to adequately tackle the issue of extraterritorial jurisdiction. However, unlike the US and the EU,[13] few competition regimes in Asia have been successful in effectively enforcing against foreign cartel members.[14]

Some Asian jurisdictions with vigorous competition enforcement, such as the Republic of Korea (hereinafter Korea) and Japan, have improved their antitrust policies against international cartels through the adoption of statutory provisions and subsequent case law. In particular, Korea has improved its cooperation with other countries by entering into bilateral Free Trade Agreements ("FTAs") which contain provisions on competition. Through FTAs, it is possible to benefit from mutual legal assistance, which is helpful for countries that do not have the capacity to tackle international cases on their own. In most international cartel cases, an investigation in Western countries triggers scrutiny in other countries, and this triggers a domino effect in the global competition law arena.[15] As a consequence, it would appear that actively cooperating with authorities with experience in the extraterritorial application of the law can help create a desirable environment for anti-cartel enforcement in those less experienced countries.[16]

[12] The economic crisis in 2008 may have influenced international cartel formation. Some commentators assert that several cartels are conceived as a response to financial crisis when demand is falling. See Andreas Stephan, "Price Fixing in Crisis: Implications of an Economic Downturn for Cartels and Enforcement" (2012) 35 *W. Comp.* 511, 514-15.

[13] Regarding extraterritoriality, both competition regimes have a strong interest in remedying anti-competitive issues in international competition, given the size of their markets. See Michal S. Gal, "International Antitrust Solutions: Discrete Steps or Causally Linked?" in Josef Drexl et al. (eds), *More Common Ground for International Competition Law?* (Edward Elgar 2011) 243.

[14] John M. Connor and Darren Bush, "How to Block Cartel Formation and Price Fixing: Using Extraterritorial Application of the Antitrust Laws as a Deterrence Mechanism" (2008) 112 *Penn. State L. Rev.* 813, 814.

[15] The competition authorities in the US and the EU have shown their efforts to catch hard-core cartels by making other jurisdictions adopt strong competition laws throughout the world. See Michael O'Kane, "International Cartels, Concurrent Criminal Prosecutions and Extradition: Law, Practice and Policy" in Caron Beaton-Wells and Ariel Ezrachi (eds), *Criminalising Cartels: Critical Studies of An International Regulatory Movement* (Hart Publishing 2011) 397.

[16] For example, there are some discussions of bilateral cooperation agreements between the US and China for minimising the costs of investigations on international cases. See Zhenguo Wu, "Perspectives on the Chinese Anti-monopoly Law" (2008) 75 *Antitrust L. J.* 73, 102-03; Benjamin Ryberg, "Pro-competitive or Protective? The Chinese Anti-monopoly Law, Implications for the United States, and Bilateral Antitrust Cooperation as an Effective Response" (2010) 18 *Cardozo J. Int'l & Comp. L.* 527, 546-48.

jurisdictions,[89] and the competition law culture in one country may be somewhat different from that in other countries.

Since competition law on cartels, exemption provisions[90] and leniency are not harmonised among competition law regimes, there are practical limitations on bringing prosecutions in more than one jurisdiction. In particular, low deterrence levels can reduce the effectiveness of leniency programmes because the influence on leniency of increased parallel prosecution is very complicated. Therefore, it is possible that, if leniency is not coordinated between competition regimes, the incentive of cartel members to inform the competition authorities of collusion will be significantly decreased.[91] It is further possible that the increasing number of private cases brought in respect of international cartels may weaken the incentives of leniency notification. The different levels of competition law enforcement can also be a key obstacle to cooperation between authorities.[92] A possible solution for these existing problems is meaningful cooperation between the enforcement agencies through international agreements, leading to convergence of enforcement.[93]

Cooperation could save the costs of proving the existence of a cartel, which would eventually improve the total welfare of the global market by increasing the deterrent effect. Moreover, successful prosecutions of international cartels may serve to strengthen the competition culture in a particular jurisdiction.[94] It is inevitable that the increased number of international cartels requires more cooperation between anti-cartel enforcers in different jurisdictions in order to have successful enforcement in the domestic markets. Competition authorities will therefore be required to significantly improve their ability to cooperate to achieve success in the discovery and prosecution of international cartels.

While cooperation has become more common than before and has been achieved in some cases, there seems to be some scope for increasing the intensity and

[89] John M. Connor, "Effectiveness of Antitrust Sanctions on Modern International Cartels" (2006) 6 *Journal of Industry, Competition and Trade* 195, 214.

[90] One of the examples is the US export exemption provision, Webb-Pomerene Act, 15 U.S.C. §§ 61-66 (2000). There have been debates as to whether the exemption for export cartel should not apply to developed countries but only to developing countries. In the WTO meetings, there were discussions whether developing countries need to have exemption provision for their SMEs to join organisations to improve bargaining power in trade. See also Levenstein and Suslow, "Changing International Status of Export Cartel Exemptions", supra note 39, p796.

[91] Michal S. Gal, "Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance" (2010) 51 *Va J. Int'l L.* 57, 64-5.

[92] In addition, criminal prosecution is another hurdle in cooperation. See e.g., Mark Furse, "Issues Relating to the Enforcement and Application of Criminal Laws in respect of Competition" in Philip Marsden (ed), *Handbook of Research in Trans-Atlantic Antitrust* (Edward Elgar 2006) 480-81.

[93] Levenstein and Suslow, "Contemporary International Cartels and Developing Countries", supra note 11, pp848 - 849; Maher M. Dabbah, "Future Directions in Bilateral Cooperation: A Policy Perspective" in Andrew T. Guzman (ed), *Cooperation, Comity, and Competition Policy* (OUP 2011) 289.

[94] Gal argues the mechanism which allows national authorities to apply foreign decisions finding cartel violations in their domestic courts can offer some positive outcomes. See Gal, "Free Movement of Judgments", supra note 91, pp73 - 75.

improving the quantity of cooperation in order to have better cartel investigations. In fact, there has been more noteworthy cooperation between the authorities in merger review than there has been in cartel investigations, owing to the different nature of the proceedings. In particular, unlike in international merger cases, the parties under investigation in cartel cases normally have no interest in cooperating with the authorities because the result may be multiple sanctions, unless they can use leniency programmes in all the jurisdictions. Therefore, again, the ability to create incentives for cooperation in cartel investigations rests largely with the competition authorities.[95]

In conclusion, some suggestions for solving the problem of the lack of deterrence are, first, a comprehensive increase in the degree of enforcement and sanctions by all jurisdictions, thereby improving the competition culture in the domestic markets; second, the establishment of a global enforcement regime for effective prosecution;[96] and third, bilateral cooperation between jurisdictions to improve the effective monitoring of collusion conspiracies. Considering the second and third suggestions above, it would be difficult to create an international competition law regime at this moment; thus, bilateral cooperation should be used as an alternative method.

¶5-040 Cooperation in Enforcement through Bilateral Agreements in Northeast Asia

¶5-041 The Foundation for Designing Effective Cooperation

Countries with dynamic trade that have adopted competition laws ought to cooperate in order to prevent anti-competitive practices with an international dimension, since agreement on a multilateral law on cartels is unlikely to be achieved in the near future.[97] In particular, competition authorities other than the US and the EU find it hard to apply their laws to prevent conduct by MNEs, due to their limited investigative capability.[98] Therefore, the idea of cooperation to ensure there are opportunities for the successful deterrence of international cartels is likely to grow.[99]

However, as some commentators argue, there are noteworthy limitations and constraints on the international cooperation in enforcement against cartels: firstly, there are certain limits on the sharing of confidential information;[100] secondly, there are constraints caused by different legal frameworks, such as criminal or civil

[95] OECD, 'Improving International Co-operation in Cartel Investigations' (OECD Global Forum on Competition, 13 February 2012) 3 (http://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf).

[96] Siddharth Fernandes, "*F. Hoffman-La Roche, Ltd. v Empagran* and the Extraterritorial Limits of United States Antitrust Jurisdiction: Where Comity and Deterrence Collide" (2005) 20 *CJIL* 267, 317.

[97] Papadopoulos, supra note 19, p641.

[98] Gal, "International Antitrust Solutions", supra note 13, pp244 - 245.

[99] Whish and Bailey, supra note 8, p506.

[100] Cooperating agencies face some obstacles to the formal exchange of information due to the issue of confidentiality. For further discussion see OECD, 'Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations' (Oct. 2005) (http://www.oecd.org/competition/cartels/35590548.pdf).

for both types of applications.[14] The program imposes several obligations which candidate applicants are required to fulfill. For example, they should immediately cease the illegal actions, and cooperate completely, honestly and continually with the TFTC during investigations (Art 6). The same article also prohibits the applicant from forging, concealing, or destroying relevant material or evidence. In addition, an applicant is prohibited from revealing any information regarding the investigation to any person before the final decision on the case is made, without the approval of the TFTC.

Under Art 7 of the Leniency Regulations, full immunity from fines will be granted to the first applicant upon the fulfillment of the conditions set by the TFTC. Art 7 is applicable to both investigation-initiating and investigation-assisting applications. For investigation-assisting applicants who do not qualify for full immunity, the TFTC has the discretion to reduce the fine by between 30% to 50% for the first applicant, 20% to 30% for the second applicant, 10% to 20% for the third applicant, and up to 10% for the fourth applicant (Art 8). Unlike the US antitrust authorities' leniency policy,[15] the Leniency Regulations allow cartel initiators or instigators to file for immunity or fine reductions. This difference in the legislation is partly attributable to the difficulty in practice in verifying the role an applicant played in a cartel. In theory, initiators or instigators could also be the parties more likely to possess and provide the information with higher probative value to the TFTC. Similar to the EU model, applicants who coerced the participation in, or restrained the withdrawal from, the cartels will be prohibited from applying for immunity from fines, but they still qualify for fine-reduction applications (Art 2).

¶6-034 The Calculation of Administrative Fines

Due to the rule that administrative action takes precedence over criminal liability, cartels have never been criminally prosecuted in Taiwan, nor have we seen private litigation brought by cartel victims to seek damages. The incentive to "ride the coattails" of public enforcement and sue based on evidence gathered from TFTC investigations appears to be low. Cartels are predominantly punished using administrative fines and deterred using administrative prosecution. As the efficacy of the leniency program is highly sensitive to the penalty reductions which leniency applicants may obtain from cooperating with the government, the statutory fines for cartel violations should not be too low. Therefore, the 2011 amendments revised para 2 of Art 41 of the TFTA to increase the maximum fines for *serious* cartel violations to 10% of the *total sales income of the previous fiscal year*. In comparison with the previous maximum penalties of NTD25 million for first-time violators, the penalty increase is substantial. In 2012, under the authorisation of the TFTA, the TFTC further promulgated regulations related to some of the requirements for calculation of fines. For example, "total sale income" will be measured by the total business

[14] In summary, investigation-initiating applicants must provide novel evidence to the TFTC, potentially enabling the TFTC to acquire information regarding cartel skeleton, the time and place a collusive agreement was made, and the contents of that agreement to initiate an investigation (Art 4). Investigation-assisting applicants must detail how and to what extent they were involved in the cartel, providing any evidence in their possession and proving the culpability of the cartel (Art 5).

[15] United States Department of Justice (1993), Corporate Leniency Policy, para A6.

revenue in the fiscal year preceding the TFTC's final decision. In addition, whether concerted actions constitute serious violations will be evaluated by the violators' motives and purposes, the scope and extent of the effect of the actions, the period for which the actions lasted, the market structure in which the actions occurred, and the violator's market position. More specifically, concerted actions will be deemed serious violations if one of the following two conditions is met:

(1). The sale amount of the relevant products or services during the period of the violation exceeds NTD100 million; or

(2). The gains from the violations exceed the maximum fines stipulated in para 1 of Art 41.

The amounts of total fines are reached by first calculating a basic amount for violations and then adjusting it with the specified mitigating or aggravating factors enumerated in the Regulations. The basic fine is fixed at 30% of the *total sales income from relevant products or services during the period of violation*. The fines could be reduced if the defendants cease their actions immediately when investigations begin or cooperate genuinely with the investigations. In contrast, if the defendants are initiators or instigators of the cartels, recidivists of Art 14, or refuse to cooperate with the TFTC's investigations, the fines could be increased.

¶6-040 A Narrative of Cartel Cases under the TFTA

In the following paragraphs, various cases are discussed to describe the experience of the TFTC in enforcing the TFTA against cartels. These cases are grouped chronologically into three phases. The first ten years after the implementation of the TFTA might be viewed as a "learning-by-doing period" for both the TFTC and the enterprises. The second phase involved a more mature competition agency facing more complicated and challenging issues. The third phase can be considered "a globalised era for the TFTA," heralded by several international cartel cases that involve Taiwanese enterprises.

¶6-041 The Early Years of the TFTA

As a young agency reorganised from a previous price-control government division, the challenges facing the TFTC in the early years were vast. To spread the seed of competition culture, the TFTC had to dispel not only a deep-rooted business philosophy that placed more stress on cooperation than on rivalry, but also its own inexperience in advocating the merits of a liberalised market. The difficulty of addressing these challenges was evidenced in the way the TFTC handled bid-rigging cases during this enforcement period. Before the enactment and promulgation of the *Government Procurement Act in 1998*, bid-rigging arrangements for government projects were governed by the TFTA. By enthusiastically investigating such cases, the TFTC attempted to use prosecution to highlight its position as the "guardian" of market competition in Taiwan. For example, in a notorious 1994 bid-rigging case concerning the installation of electricity distribution pipelines for the state-owned Taiwan Power Company, 61 bidding contractors were punished for conspiring to

fact that customers could fax documents, pay their phone bills and buy their concert tickets while purchasing a cup of coffee brewed by the convenience stores. The TFTC's application of the "one-stop shopping" theory in this case was counter-intuitive and unpersuasive. It may, however, be far-fetched to argue that because customers could buy coffee and perform other actions in convenience stores, they would treat coffee sold at coffee shops or chain stores as not interchangeable for that sold by the convenience stores.

¶6-053 The "Horizontal Competitor" Requirement

Limiting cartel members to include only horizontal competitors is based on the assumption that horizontal restraints are competitively more pernicious than non-horizontal restrains. And because cartels are usually subject to stricter reviewing standards, such as the rule of illegal per se, it is justifiable to confine its coverage only to the most harmful type of violation. But first, the dichotomy of "horizontal" versus "vertical" restraints based on their different impacts on market competition is not airtight. Economic theories have demonstrated that vertical restraints could be a means to facilitate horizontal conspiracy at either the upstream or downstream markets.[44] Put differently, cooperation among horizontal competitors could reduce transaction costs, increase the transparency of market transactions, facilitate the dissemination of useful information for consumers, and eventually enhance interbrand competition, just as vertical restraints potentially do.

Secondly, the administrative courts in the *CD-R Cartel* case appeared to have lost sight of the fact that the definition of competitor in antitrust cases should include potential competitors. That is, it should include those that are not currently in the relevant market but able to make timely and sufficient market entry if the incumbent attempts to gain any non-competitive gains. From this perspective, the *CD-R Cartel* case adopted too static a view towards the cartel defendant's legal standing under the TFTA. It neglected the fact that, technologically speaking, the three defendants were quite likely to patent around each other's protected patents and to compete in each other's original markets without significant delays. Should the administrative courts' view be prevalent, it would provide future defendants a channel to manipulate the TFTA to avoid cartel liabilities. Competitors, be they existing or potential, could divide their intended cartel into several individual product and geographical markets of collusion in which cartel members are strategically assigned the responsibility to provide non-competing products in each individual colluding market. Under the administrative courts' interpretation of the TFTA, the arrangement in each specific individual market would not be held to be a violation of the TFTA. But they could in effect form a cartel having ostensible anticompetitive outcomes if those separate but agreed upon assignments were added together and assessed as an integrated whole.

[44] See Lester Telser, *Why Should Manufacturers Want Fair Trade Law?* 3 J. L & Econ. 86 (1960); Richard Posner, Antitrust Law 172, 184-85 (2nd Edn, 2001).

¶6-054 The rule of "Administrative Action Takes Precedence over Criminal Liability"

The lack of effective enforcement against cartels in Taiwan has led an increasing number of commentators in Taiwan to criticise the rule that administrative action takes precedence over criminal liability, as espoused in Art 41. They suggest abolishing the rule and allowing prosecutors to enjoy parallel investigative power with the TFTC.[45] Behind this policy suggestion lies two central assumptions regarding cartel enforcement in Taiwan. First, the current enforcement level is sub-optimal. A substantial number of cartels have escaped liability because the DOJ failed to exercise its investigative power concurrently with the TFTC. Secondly, parallel investigations would deter cartels more effectively with no or negligible probability of over-deterrence.

Whether the two assumptions hold needs to be empirically verified by future research. Regardless of the evaluation methods adopted for that purpose, the arguments for changing the current rule should not be based simply on the fact that the number of penalised cartel cases continued to rise after the implementation of the rule in 1999.[46] Two additional points must be questioned before enacting the proposal to abolish the rule. First, unlike the United States, the Department of Justice in Taiwan does not have a special division of prosecutors experienced in the enforcement of antitrust law. Most of them are not trained to deal with complicated economic issues and theories regarding market competition. It is predictable at least in the short term that prosecutors in Taiwan will tend to deal with cartel cases by resorting to criminal-law doctrines. That in turn will lead to either under or over-deterrent outcomes depending on the facts involved in each individual case. Secondly, concurrent jurisdictions and divergent enforcement philosophies between the TFTC and prosecutors in the DOJ could further increase the possibility of conflict of judgments. This problem could be more evident in issues such as the inference of collusive agreements and evaluation of market impacts. When such conflicts occur, the law enforcement process is rendered more unpredictable.

¶6-055 Harmonising Competition and Non-competition Policies under the TFTA

The conflict between competition and non-competition (for example, trade or industrial) policies is a challenging antitrust concern confronting competition agencies around the world. Similarly, harmonising the conflict is a recurring task that these agencies strive to accomplish, frequently under great pressure from legislatures or interest groups. If the problem is inappropriately resolved, competition policy could become a tool for implementing protectionism against foreign competitors or granting cronyism for domestic enterprises. Taiwan is no exception to this dilemma. However, the major problem with the current enforcement status of the TFTA with respect to Art 46 is the absence of a coherent framework rooted in *competition law*

[45] See e.g. Huang Ming-Chieh, *The Current Enforcement Mechanisms of the Fair Trade Act and their Future*, 186 The Taiwan Law Review 80, 92-94 (2010).

[46] Ibid at 92-93.

suppression arrangement entered into the between the undertakings in this case has the *object* of preventing, restricting and/or distorting competition in Singapore".[46]

¶7-033 The "Pricing-information" Cases

The infringement decisions in this category of cases might be regarded as less obvious candidates for applying the "object" limb of the s34 prohibition. The undertakings implicated in these cases did not band together in a cartelistic fashion and their conduct did not involve the classic forms of anti-competitive cartelistic conduct – price-fixing, market-sharing or output-limitations. Neither was there any collusive tendering or bid-rigging that clearly undermined the competitive process in the marketplace. Instead, the parties were found to have entered into anti-competitive arrangements with each other that had the object of preventing, restricting or distorting competition because their conduct involved disclosures of price-related information to which the CCS objected.

In *Medical Fee Guidelines*, the Singapore Medical Association ("SMA") published its Guideline on Fees ("GOF") for doctors in private practice in Singapore between 1987 and 2006, before withdrawing these guidelines in 2007 in response to concerns that it might infringe the s34 prohibition. To justify its decision to withdraw its GOF, the SMA submitted these guidelines to the CCS, using the CCS' notification process, to obtain a decision on the compatibility of these guidelines with this statutory provision. The CCS concluded that the GOF was unlawful because it had the *object* and, probably, the *effect* of restricting competition in private healthcare markets in Singapore.[47]

The GOF comprised non-binding recommended price-ranges for various medical services. The CCS decided that these professional fee recommendations were "promulgated with the objective of influencing prices" because "one of the objectives… was to influence the pricing decisions of new entrants to the market" and to "ensure that doctors were reasonably remunerated for their skills, competence, experience, specialties and service quality".[48] The voluntary character of the GOF was also brought into question because compliance could be achieved, in practice, by the SMA to place pressure on medical practitioners accused of overcharging to

[46] See *Motor Vehicle Traders*, para [61], where the CCS affirmed a line of Australian and US cases which have consistently held bid suppression agreements to be "anti-competitive '*per se*' or by 'purpose'".

[47] Having found an infringement of the s34 prohibition using the "object" limb, it was not strictly necessary for the CCS to consider the effects of the GOF on competition. However, consultants were still engaged by the CCS to carry out a quantitative analysis of prices charged by medical practitioners before and after the GOF was withdrawn by the SMA and they concluded that these guidelines did influence the pricing behaviour of market players to an appreciable extent. From the data analysed, the standard deviation of medical fees increased by 23.74% between the time when the GOF was in force and after it was withdrawn by the SMA, "suggesting that the GOF had led to price convergence when it was in force". See *Medical Fee Guidelines*, paras [81]-[93].

[48] See *Medical Fee Guidelines*, paras [59]-[63]. The CCS rejected the SMA's contention that the GOF was intended to protect patients against over-charging because the fee ranges included both maximum and *minimum* charges, while observing that market players in the medical industry "tended to frown upon, and informally exert peer pressure on, those who charged below the minimum fees in the GOF".

refund their patients any excess amount over the recommended maximum fee.[49] In addition, the CCS' conclusion that the "GOF had the object of restricting competition" followed from its observation that the GOF was not based on actual price data or the operating costs of medical practitioners, but on surveys of the professional fees stated by its members without any "objective or transparent methodology" and that "the purpose of the GOF was to recommend what prices *should* be, rather than to reflect what prices were".[50] Furthermore, the medical fee guidelines published by the SMA was regarded as having an *appreciable* influence on the relevant market because there were 2132 medical practitioners who were SMA members, out of a pool of 3,032 registered medical practitioners in private practice in Singapore, and, according to the SMA, at least 75% of private medical practitioners charged within the ranges prescribed by the fee guidelines.[51]

The *Medical Fee Guidelines* decision is problematic because it applies a *per se* rule to prohibit professional fee guidelines by characterising them as a species of conduct whose *object* is the prevention, restriction or distortion of competition. It would have been far more satisfactory, as a matter of policy, if these fee guidelines had been evaluated primarily using the "effects" limb of the s34 prohibition, rather than subjecting them to a rule which was designed to tackle the most harmful forms of cartelistic conduct. The SMA could have had multiple objectives in issuing the GOF, including the protection of patients from being overcharged by unscrupulous medical practitioners, but the "object" limb of the s34 prohibition is less concerned about the subjective intent behind the impugned conduct and focuses instead on "the objective meaning and purpose… in the economic context" in which that conduct occurs.[52] What may have been intended, initially, for the protection and benefit of patients in a market lacking in price transparency – by providing them with some guidance on what levels of fees they should expect to pay for different medical services – could have, over time, evolved into an instrument for price convergence between medical practitioners because inadequate attention was paid to the methodology behind the compilation of these fee guidelines. Unlike other fee guideline cases from other jurisdictions, where the price recommendations were communicated by industry associations to their members with a view to influencing the pricing decisions of the latter,[53] the SMA's medical fee guidelines are fundamentally different instruments

[49] See ibid, paras [64]-[67].

[50] See ibid, paras [68]-[69] and [80].

[51] See ibid, paras [90]-[93]. A market study conducted by consultants appointed by the CCS also indicated, anecdotally, that doctors usually took into account the fee guidelines when setting their prices, and that these guidelines were also referred to by the SMA in disciplinary proceedings against its members against whom complaints of overcharging were made. The SMA also submitted that the fee guidelines were also used to "educate young doctors how to charge… [so as to] imply that the influence of [the fee guidelines] on professional fees spanned from SMA members to non-members and from actual to potential competitors."

[52] See *Medical Fee Guidelines*, para [57], citing *Compagnie Royale Asturienne v Commission* [1984] ECR 1679.

[53] See *Medical Fee Guidelines*, paras [52]-[56], where the CCS refers to European decisions involving recommended prices and fee guidelines regarded as anti-competitive by competition authorities. One case involved a federation of Dutch freight forwarding organisations (*Fenex* OJ [1996] L 181/28), while another concerned an English association for architects (*Royal Institute of British Architects Case* GP/908, 14 March 2003, OFT Competition Case closure summaries 1-31 March 2004).

category that exceed the 30% threshold may be permitted if it can be shown that such agreements satisfy *any* of the six criteria prescribed by law. In particular, the law exempts cartels that have the purpose of: rationalising the business organisation of the cartel members; promoting technical advantages; promoting the uniform application of quality standards and technical norms of products of different kinds; harmonising business operation conditions; enhancing the competitiveness of SMEs; or enhancing the competitiveness of Vietnamese enterprises on the international market. However, there is no further guideline on how these criteria should be elaborated as opposed to the effects on competition.[21] Therefore, it is unclear how the competition authority will balance the positive and negative effects of the restrictive agreements as a ground for granting exemptions. A further inquiry into the aforementioned exemption criteria also suggests that the design of this provision would appear to protect the interests of weak and vulnerable domestic producers that make up for the vast majority of enterprises in the marketplace. In particular, the first and second criteria resemble Japanese rationalisation cartels, which have been effectively abolished in Japan.[22] Likewise, two legal and standard cartels that are still in effect have been outlawed in both US and EU law. And the last two criteria expressly exempt small and medium cartels and export cartels.

Finally, another peculiarity of the VCL resides in the method of categorising cartels. Agreements falling within the first category of Art 8 of the VCL are illegal *per se*, while an additional market share threshold is required for determining the illegality of the types of cartels included in the second category – including price-fixing and customer and market allocation – which may qualify for an individual exemption. There is no explicit explanation of the rationale for this classification. However, it is clear that hard-core cartels, with the exception of bid-rigging, might be tolerated under some circumstances. This approach, contrary to that of most other modern competition law regimes, can only be explained in the context of the Vietnamese political economy mentioned above. With regard to the first category of cartels contained in Art 8 of the VCL, the prohibition of market foreclosure agreements and boycotts is purposely intended to maintain a competitive market structure that is consistent with the goal of protecting competitors, so as to preserve a competitive environment in the domestic market. It is expected to help national SMEs, which accounted for approximately 96% of active enterprises in Vietnam at the time of drafting the VCL, by intensifying their competitiveness through cooperation and preventing private monopolisation by big businesses.[23] Bid-rigging cartels are included in this category because they largely involve government procurements

[21] For example, EU competition law requires restrictive agreements to allow consumers a "fair share" of the benefits (Art 101(3) TFEU). Likewise, the prerequisite for granting an exemption under the UNCTAD model is that an agreement must produce a "net benefit" – that is to say, the resulting benefits of the agreement must outweigh any anti-competitive effects.

[22] In the past, Section 23-4(1) of Japan's Antimonopoly Act ("AMA") prescribed that reasons for rationalisation cartels to be exempt from the AMA include the purposes of "effecting an advancement of technology, an improvement in the quality of goods, a reduction in costs, an increase in efficiency, or any other rationalisation." This was abolished in 1999. See Hiroshi Iyori and Akinori Uesugi (1983), *The Antimonopoly Laws of Japan*, Federal Legal Publication, pp75-76.

[23] Lê Danh Vĩnh, Hoàng Xuân Bắc, Nguyễn Ngọc Sơn (2006), Law on Competition in Vietnam, (Pháp Luật Cạnh Tại Việt Nam), Tư Pháp Publisher, Hanoi, p314.

and thus attract public attention and foreign parties. A strict prohibition of collusive tendering by law would appease both the public opinion and cautious donators.[24]

Meanwhile, Vietnam's business and regulatory culture also accounts for the inclusion of hard-core cartels in the second category. As mentioned in the introduction, Vietnamese businesses traditionally tend to cooperate rather than to compete. Price-fixing cartels are not naturally perceived as competition evils, unlike in other market economies. To the contrary, before the enactment of the VCL, the government tended to encourage entrepreneurs to avoid cutthroat price competition and to keep retail price stable as part of market stabilisation measures.[25] This perception can be partly explained by reference to the historical development of Vietnam's economy. Before the implementation of the Doi Moi Policy, Vietnam was a centrally planned economy. The government set prices, limited quotas, and designated territories for production and distribution. Therefore, to the generation of law drafters and representatives of the National Assembly, practices involving price-fixing, output restrictions or market sharing might not have seemed as bad as they are often perceived in other jurisdictions. This way of thinking is similar to how cartels and inter-firm relationships were perceived in Japan 50 years ago.[26] When the matter was debated at the National Assembly, there was little support for a strict *per se* prohibition of these types of hard-core cartels.[27]

The above discussion suggests that cartels in Vietnam are generally not perceived as harmful as in other market economies. This is manifested not only in the structure of substantive law but also in sanctions and remedies that might be imposed on cartels. These will be analysed in the next section.

¶8-030 Sanction and Remedies

In the context of cartels, given their special characteristics, the OECD has typically recommended a carrot-and-stick approach to cartel busting. According to this tactic, since financial benefits are the principal motivation for forming cartels, an effective sanction must, on the one hand, impose punitive remedies on

[24] During the last two decades, the Vietnamese government has received significant donations from developed countries and international institutions, most of which are used for infrastructure development and public procurement. See, e.g., statistics of the Official Development Assistance ("ODA") disbursements to Vietnam in 2006 to 2010 by the Ministry of Foreign Affairs of Japan (http://www.mofa.go.jp/policy/oda/data/pdfs/vietnam.pdf). As it was regularly reported in the media, the companies often engage in bid-rigging practice to win the public tenders at higher prices. These cases normally involve bribery of government officials, therefore they have been handled under the criminal procedures in lieu of competition procedures. For example, recently an executive of the Japan Transportation Consultants, Inc. ("JTC") admitted that he had bribed officials of the Vietnam Railway Corporate to win the bid for an ODA project in Vietnam (http://english.vietnamnet.vn/fms/society/98155/top-officials-of-railway-corporation-suspended-for-oda-related-corruption-probe.html).

[25] Supra note 8. It is legal for manufacturers to print retail price on the products' packaging and it is a legal requirement that retail price has to be listed publicly in stores.

[26] Kenji Suzuki (2002), *Competition Law Reform in Britain and Japan: Comparative analysis of policy networks*, The European Institute of Japanese Studies, Routledge, pp33-35.

[27] Supra note 8.

Though there has been no specific guidance given as to the nature and detail of evidence required, it seems that the submission of documentary evidence is usually better for ensuring a smoother and higher penalty reduction by the CCI.

¶9-041 Effectiveness of the Indian Leniency Regime: Internal Factors

In spite of having a leniency regime in place for five years, not much success seems to have accrued in terms of the number of leniency applications. Even in cases where CCI has found evidence of the existence of cartel behaviour, none of these were uncovered through leniency application. In comparison, the competition law enforcement experience in some of the more established jurisdictions suggests that the majority of their successful cartel enforcement actions stem from leniency applications. A recent newspaper report stated that since the European Commission launched its leniency program in 2006, 33 of the 43 (over 75%) statements of objections issued in cartel cases have come from information provided by leniency applicants.[50] Similar remarks were made by the Director of Criminal Enforcement of the US Department of Justice ("DOJ"), recognising that the US Corporate Leniency Program ("Amnesty Program") has proven more effective in detecting and cracking international cartels than all of their search warrants, secret audio or videotapes, and the FBI interrogations combined.[51]

An effective leniency program, besides prompting cartel members to confess their conduct before an investigation is opened, induces companies under investigation to abandon the cartel stonewall, race to the competition authority and provide evidence against the other cartel members.[52] Therefore, a leniency program, in its most effective sense, can provide both detection and deterrence—the two pillars of successful cartel enforcement. Strong detection and deterrence mechanisms can contribute towards combating "hard-core cartels" which otherwise operate in secrecy and are notoriously difficult to discover and prove.[53] As stated above, the success in detection and deterrence of any leniency regime and cartel enforcement predominantly depends on three cornerstones: stiff potential penalties, heightened and real fear of detection, and certainty in enforcement policies.[54] Below, we will assess the Indian regime on the basis of these three cornerstones to find reasons for its purported inefficacy, and to consider possible solutions for the creation of an environment conducive for corporate confessions.

[50] Melissa Lipman, *Most Cartel Complaints Follow Leniency Apps, EU Says*, Law 360 (http://www.law360.com/articles/449890/most-cartel-complaints-follow-leniency-apps-eu-says).

[51] Scott D. Hammond, Detecting and Deterring Cartel Activity Through An Effective Leniency Program, International Workshop on Cartels, Brighton (England), November 2000 (http://www.justice.gov/atr/public/speeches/9928.pdf).

[52] Scott D. Hammond, *Cornerstones of an effective leniency program*, ICN Workshop on Leniency Programs (Sydney, Australia), 2004 (http://www.justice.gov/atr/public/speeches/206611.htm).

[53] OECD, Hard Core Cartels, 2000 (http://www.oecd.org/competition/cartels/2752129.pdf).

[54] Scott D. Hammond, *Detecting and Deterring Cartel Activity through an Effective Leniency Program*, International Workshop on Cartels, England (2000) (http://www.justice.gov/atr/public/speeches/9928.htm).

(a) First Element: Stiff Potential Penalties

The first element common to both deterring cartel activity and creating a successful leniency program is the threat of severe sanctions for violators.[55] Competition law experts agree that the most severe sanctions available under a competition statute should be reserved for cartel operators. Sanctions — whether civil or criminal — play a crucial role in deterring the cartel conduct by creating a credible threat of being fined, or even imprisoned in some regimes, which weighs sufficiently in the balance of expected costs and benefits to deter companies from forming cartels.[56] Another reason for having severe sanctions is to provide an incentive for cartel members to cooperate with an investigation in order to avoid (or minimise) punishment. It seems logical to think that the severity of the punishment is an important factor considered when deciding whether or not to cooperate with the competition authority through the leniency program.[57]

From the above assertions stem a discussion as to what may be the optimal level of penalty to deter cartel conduct. For decades, there has been a serious debate about whether criminal sanctions, in the form of imprisonment for individual executives are justified when it comes to cartels. Breaches of competition law other than cartels may fall in the grey area of culpability. For instance, the conduct of a dominant company may at first sight appear exploitative or exclusionary, while in fact it may just be lawful efficient and pro-competitive behaviour. Similarly, a vertical arrangement between players at different levels of production or distribution may seem harmful, but have efficiency- and consumer-welfare-enhancing effects. However, in case of cartels, it is widely accepted that there is always a harmful intention preceding the formation of a cartel, and that the effects on consumers and the society are systematically negative.[58] As a consequence, some competition law scholars call for the application of both stiff civil and criminal sanctions.

Before going deeper into the discussion regarding propriety of applying criminal sanctions to cartel cases, another related and equally relevant discussion is whether individual officials should be punished, in addition to the corporation itself. Cartels are the result of a positive act (*actus reus*) coupled with an intention (*mens rea*) to make illegitimate profits at the cost of adversely affecting the consumers, the potential competitors (who may not be willing to become a part of the cartel) and economy at large. Since cartels are deliberate and are planned by individuals, it would make

[55] Scott D. Hammond, *Detecting and Deterring Cartel Activity through an Effective Leniency Program*, International Workshop on Cartels, England (2000) (http://www.justice.gov/atr/public/speeches/9928.htm).

[56] CUTS International and NLU 9Jodhpur), *Study of Cartel Case Laws in Select Jurisdictions: Learnings for the Competition Commission of India* (http://www.cci.gov.in/images/media/completed/cartel_report1_20080812115152.pdf).

[57] CUTS International and NLU 9Jodhpur), *Study of Cartel Case Laws in Select Jurisdictions: Learnings for the Competition Commission of India* (http://www.cci.gov.in/images/media/completed/cartel_report1_20080812115152.pdf).

[58] K. J. Cseres, Katalin Judit Cseres, Maarten Pieter Schinkel, Floris O. W. Vogelaar (eds.), *Criminalization and Leniency: Will the Combination Favorably Affect Cartel Stability*, Criminalization of Competition law Enforcement, Edward Elgar Publishing (2006).