

Competition Commission of India
Case No. 66 of 2011

April 16, 2013

In the matter of:

Shailesh Kumar

Informant

And

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|---|-----------------------------|
| 1. M/s Tata Chemicals Limited | Opposite Party No. 1 |
| 2. M/s DCW Limited | Opposite Party No. 2 |
| 3. M/s Gujarat Heavy Chemicals Limited | Opposite Party No. 3 |
| 4. M/s Nirma Limited | Opposite Party No. 4 |
| 5. M/s Saurashtra Chemical Limited | Opposite Party No. 5 |

Coram:

Mr. Ashok Chawla
Chairperson

Mr. HC Gupta
Member

Dr. Geeta Gouri
Member

Mr. Anurag Goel
Member

Mr. M. L. Tayal
Member

Mr. Justice (retd.) S.N. Dhingra
Member

Present: Shri Sharad Bhansali and Ms. Surbhi Mehta, advocates for the informant.

Order under section 26(6) of the Competition Act, 2002

1. The present information has been filed by Shri Shailesh Kumar ('the informant') under section 19(1)(a) of the Competition Act, 2002 ('the Act') against M/s Tata Chemicals Limited ('the opposite party No. 1'/ TCL), M/s DCW Limited ('the opposite party No. 2'/ DCW), M/s Gujarat Heavy Chemicals Limited ('the opposite party No. 3'/ GHCL), M/s Nirma Limited ('the opposite party No. 4'/ Nirma) and M/s Saurashtra Chemical Limited (the opposite party No. 5'/ SCL) alleging *inter alia* contravention of the provisions of section 3 of the Act.

2. Shorn of details, facts, as stated in the information, may be briefly noted:
 - 2.1 The informant alleged cartelization by the aforesaid enterprises in the market of manufacturing and sale of soda ash in India under the umbrella of Alkali Manufacturers Association of India (AMAI).

 - 2.2 It was alleged that the opposite parties, under the aegis of AMAI, formed a cartel with a view to manipulate prices and volume of production of soda ash in India by sharing information relating to data

on production, installed capacity, capacity utilization, capacity expansions including data on demand and supply, imports, exports, international prices in violation of the provisions contained in section 3 of the Act.

2.3 It was averred that the said information was shared by the opposite parties through the website of AMAI (www.ama-india.org) and that the contents of the said website were password protected and available only to the members of AMAI.

2.4 It was further alleged that whenever any consumer of soda ash invited quotation for procurement, all the opposite parties quoted either the same price or a price with little difference from each other. Similar revision in price was made in quotations by the opposite parties when called for around the same time without any viable justification. The informant also alleged that change in the price of soda ash by the opposite parties did not correspond with increase in the costs.

2.5 It is the case of the informant that cartel like phenomenon could be seen from the fact that production, sales, capacity utilization and market share of the manufacturers were showing upward trend and that they were making super normal profits. The informant has alleged that there existed an understanding among the opposite parties to

reduce competition among them which emanated from exchange of information under the aegis of AMAI.

2.6 The informant also submitted that the opposite parties had manipulated information while approaching the Director General (DG Safeguards) and the Director General of Anti-Dumping (DGAD) for imposition of safeguards duty and anti-dumping duty. On account of such manipulation, the claim of the opposite parties was accepted by the DG Safeguards resulting into imposition of safeguards duty at the rate of 20% *ad valorem* on import of soda ash from China from 05.11.2009 till 19.04.2010, which was reduced to 16% from 20.04.2010 to 19.04.2011 and 14% from 20.04.2011 till 19.04.2012. The informant has also stated that AMAI was manipulating the data before DGAD, with the aim of ensuring that imports of soda ash in Indian market did not threaten its ability to control soda ash prices in India. It has been submitted that the above said duties were limiting the supply of soda ash in the Indian market and hindering fair price competition.

2.7 In support of its allegations, the informant has enclosed snap shots of the web site of AMAI and the opposite parties, copies of the quotes and revised quotes sent by the opposite parties to *Source 1*, a report titled 'Working Group on Indian Chemical Industry' of the Planning

Commission, a research paper titled 'Indian Soda Ash Industry: Recent Developments and Industry Outlook' of Care Analysis & Research Limited, copies of the petitions filed before DGAD and DG Safeguards, copies of the findings of DGAD and DG Safeguards at various stages, Customs Notifications dated 05.11.2009 and 28.06.2010.

3. The matter was considered by the Commission in its ordinary meeting held on 20.10.2011 and *vides* its order of even date passed under section 26(1) of the Act, it was observed that the opposite parties were engaged in manufacturing and sale of soda ash in India. The Commission found substance in the allegations made in the information with regard to cartelization among the soda ash manufacturers who also happened to be the members of AMAI. On the basis of the information, the Commission observed that these soda ash manufacturers of AMAI appeared to be involved in the activities of sharing business and commercial information amongst themselves through the web-site of AMAI *i.e.* www.ama-india.org, quoting same or similar price in response to various tender notices, sharing information/ data relating to their business and trade to decide and control the price and other commercial policies of soda ash industry in India. The Commission, thus, was of the view that all the aforesaid factors *prima facie* were indicative of meeting of mind and

collusion amongst the soda ash manufacturers. The Commission also felt that various acts and conduct of the soda ash manufacturers mentioned in the information *prima facie* appeared to be in contravention of the provisions contained in section 3(3) read with section 3(1) of the Act. In light of the above, the Commission was of the opinion that there existed a *prima facie* case to direct the Director General (DG) to causes an investigation into the matter.

4. In terms of the aforesaid order of the Commission, an investigation was conducted by the DG and an investigation report finding no contravention was submitted to the Commission on 09.08.2012. The DG report was considered by the Commission in its various ordinary meetings. The Commission *vide* its order dated 27.11.2012 decided to forward copy of the report of the DG to the informant for filing its replies/ objections thereto, if any. The informant was also granted oral hearing, if so desired. Accordingly, the informant filed its objection to the report of the DG on 10.01.2013. The counsel appearing for the informant made submissions before the Commission on 15.01.2013. After hearing the submissions, the Commission decided to pass appropriate order in due course.

5. Based on the directions of the Commission, the DG identified the following issues for the purpose of investigation

(i) Whether the opposite parties have been acting in tandem while bidding for sale of soda ash by quoting either the same price or price with a minor difference?

(ii) Whether the manufacturers are using AMAI as a platform for sharing confidential and commercially sensitive business data relating to capacity, capacity utilization, capacity expansion, demand and supply, exports, expected capacity growth, installed capacity, International prices, sector wise consumption *etc.*, with a view to manipulate prices and volume of production of soda ash in India and to function as a cartel?

(iii) Whether the conduct of the opposite parties constitutes an infringement of the provisions of section 3(3) read with section 3(1) of the Act.

6. The DG in order to investigate issued probe letters to the opposite parties calling for information pertaining to the period from October 2009 till October 2011. Probe letters were also issued to Alkali Manufacturers Association of India (AMAI). Further, based on the

information received from the soda ash manufacturers regarding their respective top ten customers, probe letters were issued to each of their top four customers. The parties were examined and statements were recorded during the course of the investigation as detailed in the report. Besides, the relevant information from the various sources *i.e.* websites *etc.* was also collected and considered.

7. It was noted by the DG that the informant alleged cartelization by the domestic soda ash manufacturers, under the aegis of AMAI, and submitted three sets of documents as under:

(i) In support of his allegation that the soda ash manufacturers were sharing commercially sensitive information under the aegis of AMAI, the informant has furnished copies of screen shots from the password protected website pages of AMAI *i.e.* www.ama-india.org.

(ii) In support of his allegation of cartel behavior, the informant has furnished copies of quotations received by *Source 1* from the various soda ash manufacturers, stating that they were either same or similar with irrelevant or insignificant price difference.

(iii) In support of his allegation that the manufacturers were guilty of cartelization by colluding together, under the aegis of AMAI, to abuse/

misuse the regulatory procedure before DGAD and DG Safeguards, the informant enclosed orders of the designated authorities and related documents.

8. The DG examined each of the above documents and the related allegations.

Examination of alleged sharing of commercially sensitive information by the Soda ash manufacturers under the aegis of AMAI

9. The DG, on analysis of the allegations made by the informant based on the first set of documents, the submissions of the parties on the exchange of information with AMAI and amongst themselves observed that:

(i) The website of AMAI contains information which is also available in its Annual Reports. Such information are also made available to the government authorities from time to time as also to industry associations like CII, Assocham and economic think tanks like CRISIL. Similar information is also being sent directly by the soda ash manufacturers to the government bodies and many of such reports are sent on a monthly and weekly basis. Thus, it was observed that the data contained in the website of AMAI are of statistical nature.

Besides, such data are being asked for by the government from time to time and are in public domain.

(ii) The analysis of the minutes of the meetings and the documents / submissions of soda ash manufacturers on the issue of exchange of information amongst themselves did not reveal that the soda ash manufacturers were using the forum of AMAI or making direct communications amongst themselves to exchange confidential and commercially sensitive data.

(iii) During the course of investigation, the Office of the DG could not come across evidence to suggest that common policy decisions and commercial strategies on issues like forecasts of production/ capacity utilization rate, increase of prices, allocation of markets and market shares, terms of discounts and other trading terms, reciprocal exchange of customer information and prices, production costs and quality *etc.*, which may constitute competition sensitive variables, have been discussed/ exchanged.

10. In view of the above, it was concluded by the DG that the allegation of the informant that confidential and commercially sensitive business data were being shared by the manufacturers on the website of AMAI or under the aegis of AMAI was not corroborated.

Examination of the alleged cartel behavior of soda ash manufacturers based on the similar quotations received by Source 1.

11. In this connection, on the basis of the information collected from the manufacturers and the customers during the course of investigation, it was noted by the DG that the tenders constituted a very small percentage of the total sales of the companies. It was further noted that the majority of the sales took place by sending RFQs to the manufacturers, followed by negotiations and finalization of contracts where the prices/ the discounts were fixed for the specified period of time.

12. It was further noted by the DG that the tenders were floated generally by industries other than the glass and detergent manufacturers and as such their requirement was small. Since the tender quantities were small, they did not appear to attract the participation of soda ash manufacturers. The companies did not furnish the details of the other parties who had participated along with them against the respective tenders but it appeared from the reply of TCL that the dealers/ local suppliers participated against such tenders.

13. On examination of the quotations, it was concluded by the DG that the soda ash manufacturers had not made similar quotations against the

respective tenders. Further, from the nature of orders placed during the period of two years, it did not appear that the manufacturers had indulged in bid rigging or collusive bidding in violation of clause (d) of sub-section (3) read with sub-section (1) of section 3 of the Act, noted the DG.

14. Adverting to the allegations of the informant that the prices of soda ash manufacturers were same or similar and that they carried out similar price revisions, it was noted by the DG that the documents furnished by the informant pertained to communications regarding price revisions. From the replies of the soda ash manufacturers and the above documents, it was concluded by the DG that the said documents were communications of GHCL to its customers regarding price revisions while some documents pertained to communications of TCL regarding price revisions to its customers.
15. It was, however, noted by the DG that the informant had not furnished any copy of similar price revisions made by other soda ash manufacturers. Accordingly, details of price revisions made by the soda ash manufacturers were collected by the DG from the parties concerned and the same were discussed and analyzed in the report while dealing with the issue of same or similar prices and price revisions.

Examination of the allegation that the manufacturers were guilty of cartelization by colluding together, under the aegis of AMAI, to abuse / misuse the regulatory procedure before the anti-dumping and safeguards authorities

16. The DG, on examination of proceeding before the DG Safeguards and DGAD as also submissions of the opposite parties, concluded that the allegations of the informant that the domestic producers presented their case 'in a particular manner' before the designated authorities of safeguards and anti-dumping duties to abuse/ misuse the regulatory procedure, were not made out.

The analysis of the economic facts and market behavior of the soda ash manufacturers

17. After examining the allegations of the informant, the DG also examined the economic actions of the market players and other related cluster of facts of the soda ash market to ascertain whether the manufacturers had indulged in any concerted action in violation of clauses (a) to (d) of sub-section (3) of section 3 of the Act.
18. In this connection, it was noted by the DG that as a general rule, firms that collude : (i) reach a consensus on pricing, output or other terms of the trade; (ii) design allocation mechanisms that divide the collusive

gain, and (iii) monitor compliance and stand prepared to punish non-contrite deviant behavior. Accordingly, the prices-list/ catalogue prices and the effective transaction prices, the output/ sales/ stocks/ exports and their relation to the price movement, cost of production/ cost of sales/ net sales realization and net margins *etc.* were examined by the DG. Further, the various methods used for allocation of collusive gains like geographical allocation, customer allocation and market share analysis were also examined.

Prices

19. The DG examined the soda ash prices in two parts, namely, the list prices and the transaction prices.

Examination of the List Prices

20. The DG asked all the soda ash manufacturers to furnish certified true copies of the price lists during the last two years. Further, the companies were also required to furnish information/ documents based on which the periodic revision of list prices were carried out by them. The manufacturers furnished copies of their price circulars for the years 2009-11 along with the supporting documents for revision of prices.

21. Based on analysis of dates of revision of soda ash list prices during the years 2008-11; comparison of absolute prices; list prices of soda ash dense of the manufacturers in different parts of the country; direction and quantum of changes and submissions of the soda ash manufacturers, it was noted by the DG that the companies explained that the prices were revised on account of decrease/ increase in the cost of input materials and other overhead costs, the import parity prices for different regions, the pricing trends in major international markets, the need to protect their respective market shares, demand supply situation in the market, changes effected by their competitors, *etc.*

22. The DG also analyzed the issue of parallel pricing. In order to examine as to whether the near simultaneity of change by the manufacturers for almost the same amount was the result of meeting of minds/ illicit collusion or the normal outcome of rational economic behavior of each player in the market where the number of manufacturers were few and the product was homogenous, the DG examined the effective transaction prices *vis-a-vis* the list prices. The ability of the soda ash manufacturers to either individually or collectively raise the prices or reduce output to the detriment of the soda ash buyers was also examined to ascertain their market power.

23. With regard to the revision of prices by the domestic soda ash manufacturers, it was noted by the DG that out of eight price revisions, TCL was the first to revise its prices in as many as five / six occasions. It was further observed by the DG from the documents pertaining to price revision and oral testimonies of GHCL, Nirma, DCW that price revision by the other companies was factored/ considered by them for their price revisions. It was noted that the soda ash manufacturers, apart from the import volumes and import prices, also factored in the decrease/ increase in raw material costs for their price revisions, which was found to be reflected in the documents on price revision furnished by TCL and others.

24. Based on the analysis conducted, it was observed by the DG that the different price lists for Gujarat, rest of India and for the southern & eastern parts of the country were due to imports, logistic costs, nature of demand, tax structure, volume of sale *etc.* which had to be factored by the manufacturers for the different regions.

Examination of effective transaction prices

25. During the course of investigation, it was observed by the DG that there was a significant gap between the list prices and the effective transaction prices charged to the customers across the different regions of the country. It was noted by the DG that this was so

because the customers of soda ash were large industrial users who negotiated prices with the manufacturers based on the amount of discounts and rebates offered by them and on the basis of the net delivered prices to them. The ability of an enterprise to negotiate discounts was noted to be dependent on a number of factors like the size of the order, period of credit and other payment terms, past relationships, urgency of purchase and the import prices prevailing in the region.

26. Based on the analysis of the submissions of the manufacturers, customers and examination of the customer delivered prices, it was noted by the DG that it did not appear that the soda ash manufacturers had coordinated their discounts. As a result, it was noted that the net sales realization of the companies also differed from customer to customer and period to period.

Other evidences of competition in the market

27. The soda ash manufacturers submitted before the DG that the soda ash market was highly competitive and manufacturers competed with each other on very low price differentials. It was also contended that the price expectations were actually set by customers, which were communicated to manufactures to be met if they wanted to secure orders for supply and if the customers were unable to negotiate

favorable prices with one supplier; they did not hesitate to switch to other domestic suppliers or resort to cheaper imports.

28. Based on a detailed market feedback, it was concluded by the DG that the import volumes/ prices and the discounts offered by the competing domestic manufacturers had been a constant concern for the companies. It also reflected that the other soda ash manufacturers competed aggressively in the market by offering their best rates and terms. From this, it was noticed by the DG that the customers chose to switch suppliers even on small price differential. As such, it was observed that the soda ash market was a contestable market wherein the manufacturers strived to offer competitive rates to win new customers or to retain existing customers.

29. In view of the above, it was observed by the DG that similar changes in the list prices did not result in similar changes in the transaction prices and the prices at which customers procured soda ash varied from manufacturers to manufacturers during the same period. Further, the movement of the domestic soda ash prices had been in tandem with the movements in the international prices and the import volumes/ prices. It was also noted that the feedback received by the soda ash manufacturers from the distributors/ customers/ marketing officials revealed that there was fierce competition amongst the soda

ash manufacturers in offering differential discounts so as to retain the existing or win new customers.

30. Resultantly, it was concluded by the DG that there was no evidence to show that the soda ash manufacturers had entered into an agreement or indulged in concerted practice to fix or determine the sale price of soda ash in violation of clause (a) of sub-section (3) read with sub-section (1) of section 3 of the Act.

Production/ dispatches and their relation to the prevailing prices

Annual Production & Capacity Utilization

31. The DG also examined as to whether the domestic manufacturers tried to restrict/ limit production so as to reduce supplies and elevate the prices.
32. From the analysis of capacity utilization and output, it was observed by the DG that the soda ash manufacturers increased their output from year to year. The overall changes in output relative to the changes in demand, the availability of excess stocks and exports having been made at declining net margins revealed that soda ash manufacturers had not acted in a concerted manner so as to limit supplies and thereby influence prices. Further, the monthly variations

in production, domestic sales and stocks did not reveal any uniformity or pattern *pari passu* with the movement of prices.

33. In view of the above, it was concluded by the DG that there was no evidence to suggest that the soda ash manufacturers had taken concerted action so as to limit or control production, supply, or market thereof in violation of clause (b) of sub-section (3) read with sub-section (1) of section 3 of the Act.

Analysis of cost of production, cost of sales, net sales realization & net margin

34. Further, the DG examined the cost of production, cost of sales, net sales realization and net margin of the soda ash manufacturers to ascertain the profitability of domestic soda ash manufacturers during the period 2008-09 to 2010-11. The analysis was done with respect to light soda ash produced and sold domestically since all the manufacturers produced light soda ash (DCW did not produce dense soda ash). Further, dense soda ash is manufactured by compacting light soda ash only. The analysis was confined to the domestic market as two of the domestic soda ash manufacturers *viz.* DCW and SCL did not export.

35. On a detailed analysis, it was noted by the DG that all the soda ash manufacturers had been selling soda ash at positive margins before the interest and depreciation costs were factored. However, even these margins have been declining for TCL, GHCL and DCW during the successive years from 2008-09 till 2010-11. For Nirma, the said margins increased in 2009-10 but declined in 2010-11 and for SCL, it has decreased in 2009-10 but increased in 2010-11. The declining margins or the net negative margins showed that the domestic soda ash manufacturers have not been able to elevate or even keep their margins constant during the period 2008-11, concluded the DG.

36. In view of the analysis of the cost of production, cost of sales, net sales realization and net margin, it was found by the DG that the soda ash manufacturers had not been able to raise their selling prices commensurate with the increase in the cost of sales which showed that the domestic prices of soda ash had been suppressed during the period 2009 to 2011. Therefore, it was observed by the DG, a cartel seemed unlikely in such a situation.

Examination of various methods normally applied for allocation of collusive gains

37. It has been observed by the DG that the members of cartel normally devise a geographic allocation, a market share agreement, a

customer allocation to allocate / divide the collusive gains. Certain regions being serviced only by specific firms, no churning of customers or a stable market share may indicate collusion even though each of them may also arise as part of non-collusive conduct by oligopolists in a repeated game setting.

Geographical allocation

38. The DG examined as to whether any geographical allocation of territories existed amongst the soda ash manufacturers. A geographic allocation within an explicit cartel specifies geographic areas where specific cartel members can and cannot sell product so as to divide the collusive gains by allocating the area geographically.
39. On analysis of sales in the different geographical territories, it was concluded by the DG that the soda ash manufacturers had not designed a territorial allocation mechanism to divide the collusive gains.

Market Share Allocation

40. Further, the DG examined the market share of the soda ash manufacturers so as to analyze whether the soda ash manufacturers had designed an overall market share allocation mechanism during the period 2008-09 to 2010-11. It was noted that if the firms in the

market have maintained identical or nearly identical market shares relative to each other for a substantial period of time, it might be indicative of division of the market and thereby elimination of *inter se* competition.

41. From the share in the domestic soda ash market of different companies, it was deduced by the DG that the market share of each of the domestic manufacturers of soda ash was changing during the period which indicated that there was no market share allocation among the domestic manufacturers of soda ash.

Customer Allocation

42. It was further observed by the DG that cartel members may also resort to customer allocation so as to reduce inter-firm competition and suppress competitive rivalry in the market. Therefore, the purchases made by a customer from one or many manufacturers were examined. Based on the replies, purchase orders and statements of the domestic soda ash manufacturers, it was concluded by the DG that most of the customers were procuring from more than one source. None of the customers alleged that the manufacturers have indulged in customer allocation. In view of the same, no customer allocation can be said to have been made by the soda ash manufacturers, recorded the DG.

Countervailing Buying Power

43. The DG noted that in the Indian soda ash market, there were large number of customers having bargaining strength *vis-à-vis* the sellers due to their size, commercial importance to the seller and ability to switch to alternative suppliers. All the customers submitted that they compared the domestic prices with those of import prices to make their purchase decisions. Many of the customers were having dedicated procurement teams and few of them operated on a global basis like P&G, HUL and Saint Gobain.
44. Thus, the DG, in order to assess the countervailing buying power of the customers, the share of some of the major buyers to each domestic manufacturers' total domestic sales, (light or dense depending on whether the customer is a detergent or glass manufacturer) was calculated separately for the period Oct 2009- Oct 2011.
45. Based on the analysis conducted, it was found by the DG that the major buyers in the domestic soda ash market exercised considerable countervailing power. Apart from the major buyers, it was noticed from the e-mails/ market presentations furnished by TCL that buyers who purchased small quantities also switched to importers of soda ash or to other domestic manufacturers very often even on small price

differentials. Thus, it was concluded by the DG that in the domestic soda ash market it was unlikely that the manufacturers could resort to customer allocation amongst themselves so as to divide collusive gain arising out of any agreement to fix prices.

46. In view of the analysis of sales by the soda ash manufacturers in the major geographical regions of sale, changes in the market shares during the period 2008-09 to 2010-11, sales to the major customers in the glass and the detergent industry, it was found by the DG that the soda ash manufacturers had not entered into an agreement so as to devise geographic allocation, market share agreement or customer allocation to allocate / divide the collusive gains in violation of clause (c) of sub-section (3) read with sub-section (1) of section 3 of the Act.

Conclusions of the DG

47. The analysis of information submitted by the informant on same or similar quotation received by *Source 1*, abuse of regulatory procedure of safeguards duty and anti-dumping duty, sharing of confidential and commercially sensitive information under the aegis of AMAI, the analysis of cluster of economic facts such as the list prices and transaction prices, discounts and the net realized prices, production, sales, stocks, cost of production, cost of sales, net sales realization and net margin, the examination of various methods normally applied

for allocation of collusive gains like geographical allocation of territories, market share allocation, customer allocation and countervailing buying power of the customers did not reveal that the soda ash manufacturers had acted in concert to determine and fix the prices or control the supply of goods in the relevant market.

48. Resultantly, the DG concluded that the allegation of cartelization on the part of the soda ash manufacturers could not be established. The investigation in the matter based on extensive analysis of data, documents/ evidences on record, submissions of the manufacturers, customers and the informant, did not find any cartelization or anti-competitive conduct on the part of the soda ash manufacturers in violation of clauses (a) to (d) of sub-section (3) read with sub-section (1) of section 3 of the Act.

49. The informant filed its objections to the report of the DG disputing the findings. It was submitted on behalf of the informant that the DG failed to fully investigate the activities and the conduct of the opposite parties. It was argued that the DG failed to fully appreciate the nature of the allegations made and the documents/ evidence brought on record resulting in wrong conclusions on the issue of contravention of section 3 of the Act by the opposite parties.

50. Referring to the conclusions drawn by the DG on sharing of commercially sensitive information, it was submitted by the informant that the DG misled himself by not applying the appropriate criteria and tests for judging whether exchange of any particular information was anti-competitive in nature or not. It was specifically pointed out that the appropriate criterion is whether the information is strategic in nature or not. The informant challenged the conclusions of the DG relating to categorization of information shared as historical and statistical on the ground that such an approach is contrary to sound and reasonable legal principles.

51. The informant also challenged the findings of the DG on the issue of alleged cartel behavior of soda ash manufacturers based on the similar quotations received by *Source 1*. It was submitted that the DG failed to appreciate that the scrutiny in the present investigation was not confined to *prima facie* evidence submitted by the informant only but the investigation should have inquired into the conduct of the opposite parties in relation to their pricing decisions in the market as a whole. It was submitted that the DG could not merely deal with the underlying transactions for the three emails submitted by the informant in support of its allegations. It was submitted that the correct methodology for the DG to assess the pricing behavior of the opposite parties was to analyze the list and effective prices of random

invoices picked by a statistically valid sampling technique. This analysis would have resulted in an in-depth investigation and would have effectively dealt with the allegations raised by the informant.

52. It is the case of the informant that it is an acknowledged fact that the modern day cartels usually act in sophisticated arrangements and, therefore, any semblance of any cartel-like activity has to be dealt with sternly. It was submitted that uncanny similarity of practices by the opposite parties in the market was clearly visible and indicated a tacit understanding amongst the opposite parties to create entry barriers in the import market in India.

53. It was contended on behalf of the informant that it was incorrect to suggest that the prices of soda ash in the market were customer driven as all the buyers exercise a countervailing buyer power. It was further submitted that a buyer power can only be exercised effectively if the buyer has an adequate choice of alternative suppliers. In the present oligopolistic market of soda ash players, there was a limited choice as the soda ash manufacturers together constitute the dominant share in the market. Also, given the myriad use of soda ash, it is used in an array of industries for manufacturing various finished products. Thus, the huge number of buyers compared to the source of supply does not support the finding of existence of any

countervailing buyer power. It was also averred that collectively these companies account for around 85% of the total market of soda ash in India which shows the high level of concentration and the absence of any choice. In fact, only 20% of the total soda ash consumption in India is catered to by imports, a part of which is also controlled by these players through their foreign subsidiaries, submitted the informant.

54. It is the case of the informant that the DG failed to take note of the fact that economic factors like limited number of producers, input products needed by large buyers, cost of input being small relative to the value of end product, frequency of interaction through trade associations, homogenous or fungible nature of the product suggested that circumstances exist for collusion to take place.

55. It has been further contended that the DG failed to take note of the fact that the market share of imports as a percentage of total demand in the market has been too low to create a competitive pressure in the market. It was submitted that it is an established fact in the report of DG that imports as a percentage of total demand have only been 18.04% in 2008-09, 24.60% in 2009-10 and 20.30% in 2010-11. It has also been pointed out that the market share of imports has decreased by 4.30% from 2009-10 to 2010-2011. In any case,

submits the informant, the DG has failed to analyze the imports by the opposite parties or the supplies made by their own subsidiaries.

56. Objection was also taken on the ground that imposition of safeguards duty created an impact on supply of soda ash from China. Grievance was made of the fact that the DG failed to appreciate that all the user industries supported indications of collusion/ cartel in the sector. It was alleged that the DG chose not to take cognizance of overwhelming evidence in this regard, rather the DG relied upon the self-serving and selective documents adduced by the opposite parties. The findings of the DG that declining net margins did not indicate any collusion amongst the opposite parties were also challenged. It was argued that there was no reason as to why the comparison had to be made for net margins and not operating margins. Further, it was argued that the DG could not have reached the conclusion that declining net margins did not indicate existence of cartel as admittedly the net margins were getting adversely affected by import prices.

57. Impugning the conclusions of the DG on similar price revisions by soda ash manufactures, it was submitted that the DG failed to take note of the established fact in the report that the price revision of all the soda ash manufacturers moved in the same direction. It was

inconceivable that price revisions were similar despite different cost structures. Further, it was contended that the argument of countervailing buyer power also did not offer any defence in case of price revisions.

58. Coming to the issue of collusion to misuse regulatory procedure of anti-dumping and safeguards duties, it has been submitted that the DG failed to fully investigate the averments and has superficially concluded the same without conducting an enquiry into the aspect of a tacit collusion between the domestic soda ash manufacturers in manipulating and selectively presenting data/ information before the respective designated authorities. It was submitted that the DG cannot abdicate its duties to fully investigate the matter on the misplaced reliance on the fact that such averments were unsuccessfully raised before the designated authorities and various High Courts. It was argued that the designated authorities as well as other High Courts did not have the mandate to inquire into the meeting of minds on the part of the soda ash manufacturers to selectively present data/ information aimed with a view to create entry barrier for imports in the country. It was further submitted that the DG failed to analyze whether there had been a meeting of minds amongst the soda ash manufacturers to misuse or manipulate the system of anti-dumping and safeguards to their advantage. In this context, it

was argued that while the actions of the anti-dumping and the safeguard authorities were valid under their respective laws, the core issue was that if the domestic producer colluded to present their case in a particular manner, then such an act on the part of the participating parties including the association was actionable under the provisions of the Act.

59. Serious objection was taken by the informant to the conclusion of the DG that participation or non-participation of TCL before the authorities has been in furtherance of its legitimate business interests. It was submitted that the DG wrongly concluded that there has been no meeting of minds as far as participation or non-participation of TCL in the safeguards and anti-dumping proceedings was concerned. It was submitted that the DG could not form a conclusion on the same without getting into the reasoning behind the same. No enquiry was made as to why the said company had been paying to the consultant without participating in the proceedings. It was submitted that the meeting of minds to project the data in a particular manner cannot be achieved unless there was exchange of strategic information amongst the members of AMAI. Further, the DG made no inquiry as to why only the information of certain members was forwarded to the concerned authorities, and not of others.

60. Concluding the objections, it was submitted by the informant that there are several inadequacies and anomalies in the investigation conducted by the DG. Accordingly, it was submitted that neither the investigation report nor the conclusions drawn therein can be relied upon. In the result, the informant prayed that the DG should be directed to conduct further investigation into the matter in light of the objections filed by it.

Views of the Commission:

61. The Commission has very carefully perused the material available on record. The counsel appearing for the informant was also heard at length. The Commission has gone through the report of the DG and the objections of the informant thereon.

62. Before adverting to the issues projected in the present matter in the light of the allegations made by the informant, the Commission notes that the informant did not fully co-operate and was not forthcoming during recording of his statement before the DG during the course of investigations. Having moved the process of the Commission, it was expected of the informant to co-operate in the investigation to support the allegations. Be that as it may.

63. At the outset, it would be apposite to note that there are product market characteristics that make the market of soda ash amenable to cartelization. These include homogeneous products; highly concentrated market with an HHI of 2538.67 and stable market shares; large barriers to entry; absence of substitutes and demand being inelastic with the detergent and the glass industry being heavily dependent upon soda ash industry for their critical input; and underutilization of capacity.

64. The Commission, however, notes that existence of such conducive scenario for cartelization in itself is not enough to reach a finding of contravention against the parties. The same has to be established with the help of cogent evidence. Though, such evidence may be of circumstantial nature and the anti-competitive conduct may be inferred from the circumstances brought on record.

65. The allegations made in the information relate to contravention of the provisions of section 3 of the Act. The Commission notes that in terms of the provisions contained in section 3(1) of the Act, no enterprise or association of enterprises or person or association of persons can enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an

appreciable adverse effect on competition within India. Section 3(2) of the Act declares that any agreement entered into in contravention of the provisions contained in sub-section (1) shall be *void*. Further, by virtue of the presumption contained in sub-section (3), any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which-(a) directly or indirectly determines purchase or sale prices; (b) limits or controls production, supply, markets, technical development, investment or provision of services; (c) shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way; (d) directly or indirectly results in bid rigging or collusive bidding, shall be presumed to have an appreciable adverse effect on competition.

66. To invoke the provisions of section 3 of the Act, the existence of an 'agreement' is *sine qua non*. The term 'agreement' has been defined in section 2(b) of the Act as including any arrangement or understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings. The

understanding may be tacit, and the definition covers situations where the parties act on the basis of a nod or a wink. There is rarely direct evidence of action in concert and the Commission has to determine whether those involved in any dealings have some form of understanding and are acting in co-ordination with each other. In the light of the definition of the term 'agreement', as noted *supra*, the Commission has to find sufficiency of evidence on the basis of benchmark of 'preponderance of probabilities'.

67. Since the prohibition on participating in anti-competitive agreements and the penalties which offenders may incur are well known, it is normal for the activities which those practices and those agreements entail to take place in a clandestine fashion, for meetings to be held in secret and for the associated documentation to be reduced to a minimum. Considering the remote possibility of getting direct evidence in the case of a cartel in many cases, the existence of an anti-competitive practice or agreement can also be inferred from the conduct of the colluding parties which may include a number of coincidences and indicia which, taken together, may, in the absence of any other plausible explanation, constitute evidence of the existence of an agreement.

68. In support of the allegations made in the information, the informant has submitted that the manufacturers have indulged in limiting supply of soda ash in the Indian market by manipulating data while approaching DGAD and DG Safeguards for abuse of the system of anti-dumping and safeguards in relation to soda ash imports in India. It was further submitted that the same was done to ensure the imports of soda ash in the Indian market did not threaten their ability to control prices in India. Such a manipulation was done under the auspices and guidance of AMAI resulting in filing of petitions for both safeguards as well as anti-dumping duties before the aforesaid authorities. The same resulted in imposition of safeguard duties on soda ash thereby limiting the supply of soda ash in the Indian market and has further reinforced the manufacturers' market dominance in India in an undesirable manner hindering fair price competition.

69. The submission is misconceived. The proceedings before DGAD and DG Safeguards are *quasi-judicial* in nature and the correctness or otherwise of the rulings of such authorities cannot be examined in collateral proceedings before the Commission unless it is further shown that once insulated from the cross border competition, the domestic players colluded to fix the prices or to limit the output with a view to raise the prices to the detriment of the consumers and the competition. From the DG report, it appears that the proceedings

before DG Safeguards and DGAD as also the notifications issued by the Central Government were challenged by the importers/ users of soda ash in several writ petitions. From the *extant* orders of the various High Courts, it was noticed by the DG that their contentions were not upheld by the courts.

70. Notwithstanding the above stated legal position, it may be observed that despite imposition of anti-dumping duty and safeguards duty, around 20 per cent of the market is catered to by imports. In such a scenario, any concerted supply constriction and price elevation effort of the domestic suppliers may be countered by the buyers by shifting demand to overseas suppliers. Moreover, although the supply increase in the period under investigation was not found to be commensurate to the growth in demand for soda ash in India, this has to be viewed in the context of significant imports into the country. As mentioned earlier, in the wake of any attempt by the domestic players to artificially restrict supply and increase prices, the buyers have the option of shifting their demand to imports. HUL in its statement made before the DG, has said: *“In 2009-10 when the global prices had dropped but the domestic manufacturers were not willing to drop prices and hence we had imported 38000 tons post which the local manufacturers drop the prices and we have reduced our imports”*. It is evident from the statement that imports do pose competitive

constraint to the domestic industry and the imports influence the market price.

71. In view of the above, the contention of the informant that the opposite parties presented the manipulated information before the designated authorities and succeeded in getting anti-dumping duty imposed has no substance and is liable to be rejected.

72. The DG examined in detail the allegations of the informant relating to sharing of commercially sensitive information by the soda ash manufacturers under the aegis of AMAI. It was noted by the DG that the website of AMAI contains information which is also available in its annual reports. Such information are also made available to the government authorities from time to time as also to industry associations like CII, Assocham and economic think tanks like CRISIL. It was further noted that similar information is also being sent directly by soda ash manufacturers to the government bodies and many of such reports are sent on a monthly and weekly basis. Moreover, it was noticed by the DG that such information was being asked for by the government from time to time and the same was also in public domain.

73. The above finding of the DG has not been dislodged by the informant. In fact, the informant has admitted that it is not its case that AMAI should not collect and collate information on behalf of the industry. The informant has further conceded that AMAI as a trade association should submit information pertaining to the industry to the various government departments. The Commission notes that there is no evidence on record to show that AMAI was collecting the pricing or production data of soda manufacturers and sharing this data with them. If AMAI was disseminating the aggregated data of the industry, it cannot be held that it was facilitating collusion among the soda manufacturers. In view of this, the allegations made by the informant against the opposite parties on sharing of commercially sensitive information by the soda ash manufacturers under the aegis of AMAI also do not stand corroborated and substantiated.

74. So far as the specific instance given by the informant in relation to cartel behavior of soda ash manufacturers based on the similar quotation received by *Source 1* is concerned, the DG, on the basis of the information collected from the manufacturers and the customers during the course of investigation, noted that the tenders constituted a very small percentage of the total sales of the companies. It was further noted that the majority of the sales take place by sending RFQs to the manufacturers, followed by negotiations and finalization

of contracts where the prices/ the discounts remain fixed for the specified period of time.

75. In this regard, the Commission observes that negotiated contractual transactions are the prevalent mode of transaction between the manufacturers and buyers of soda ash in the Indian market. From the statement made by the top customers, it was seen that HUL purchases its requirement of soda ash through six monthly contracts entered by its global buying team based in Singapore; RSPL purchases through monthly contracts placing orders on 1st and 3rd of every month; Fena contracts supply typically on monthly or quarterly basis; while HNGIL and Gold Plus Glass have periodic contracts with their suppliers. On the other hand, from the sellers' side, TCL sells 55% of its produce through quarterly contracts, 34% for period ranging from one month to one year and the rest to walk-in customers. Nirma sells 60% of its produce on fixed contract basis, for DCW the corresponding figures is 65-70% and for SCL 75% sells 62% of their total sale on spot. However, it was stated that even the on-spot sale was on negotiation basis and discounts offered to walk-in customers vary depending on the size of procurement. Because many of the buyers in the user industries have continuous process of production, availability and continuous supply of soda ash is a

primary concern and it is therefore that they prefer negotiated fixed price supply contracts over on-spot purchase.

76. The statements of key customers of the opposite parties recorded by the DG reveal that the buyers invite quotations from multiple suppliers. Thereafter, the negotiation process starts. Negotiations centre on discounts and supplies. The basis rates or list prices of the manufacturers are close to each other; the discount is the main element which varies from manufacturer to manufacturer. The negotiations on discounts generally take place telephonically and once settled, purchase orders are made. The list prices quoted by the firms and the final effective transaction prices are thus very different. Customers also generally compare the net delivered price of domestic manufacturers with landed cost of imports and decide their purchase decision based on cost-benefit analysis. Buyers such as RSPL require all the suppliers to match the lowest net delivered price, while HUL, Fena *etc.* buy soda ash at different rates from different manufacturers during the same time. The lowest cost supplier is typically given a higher share of business. Mostly, the buyers purchase from multiple sources for ensuring supply security.

77. From the price data collected by the DG, it can be seen that the list prices of different players are not identical but they vary within short

bands for a given region/ state. Difference in list prices of soda ash light ranged from Rs. 70 to Rs. 500 per MT. However, as discussed above, net delivered prices inclusive of discounts are the relevant prices for making purchase decisions and not list prices. As per the statement of a customer, the basic rates of the companies vary by about Rs. 100 to Rs. 300 per MT and the discounts offered by the companies vary from each other by Rs. 100 to Rs. 200 per MT. Therefore, there are differences of few hundred rupees per MT in the net delivered prices for different players. HUL, in its statement noted, *“Discounts are given in the back end so that the suppliers can avoid disclosing the prices to the general trade”*. The DG has annexed excerpts of various e-mails received by TCL from its distributors/ customers which support the contention that the soda ash manufacturers do compete on discounts.

78. In view of the above discussion and after considering the report of the DG and the material available on record, the Commission is of the view that there is not sufficient evidence to show that the soda ash manufacturers indulged in bid rigging or collusive bidding or otherwise entered into an agreement or indulged in concerted practice to fix or determine the sale price of soda ash in contravention of clause (a) of sub-section (3) read with sub-section (1) of section 3 of the Act.

79. From the analysis of capacity utilization and output made by the DG, it appears that no clear cut pattern has emerged to support the

contention that the soda ash manufacturers decreased their output on year to year basis. The overall changes in output relative to the changes in demand, the availability of excess stocks and exports having been made at declining net margins negates the possibility that soda ash manufacturers have acted in a concerted manner so as to limit supplies and thereby influence prices. Further, the monthly variations in production, domestic sales and stocks did not reveal any uniformity with the movement of prices. In view of the above, the Commission is of the opinion that there is not sufficient evidence to suggest that the soda ash manufacturers have taken concerted action so as to limit or control production, supply, or market thereof in violation of clause (b) of sub-section (3) read with sub-section (1) of section 3 of the Act.

80. The DG also made detailed analysis of cost of production, cost of sales, net sales realization and net margin of the soda ash manufacturers to ascertain the profitability of domestic soda ash manufacturers over the period 2008-09 to 2010-11. On a detailed analysis, it was concluded by the DG that the soda ash manufacturers have not been able to raise their selling prices commensurate with the increase in the cost of sales which showed that the domestic prices of soda ash have remained suppressed during the period 2009 to 2011. In such a scenario, the possibility of formation of a cartel by soda manufacturers appears to be remote.

81. In this connection, from the cost audit report submitted by the companies, it can be observed that the net margins as percentage of net sales realisation of the companies have been declining during 2008-09 to 2010-11.

82. On the issue of market share allocation, from the share in the domestic soda ash market of different companies, it may be observed that the market shares of each of the domestic manufacturers of soda ash was changing, albeit not in a very significant measure, during the period which indicates that there is no market share allocation among the domestic manufacturers of soda ash.

83. From the analysis of the evidence available on record in this case it appears that like in many oligopoly markets, soda manufacturers recognized their interdependence and simply mimicked their rivals conduct. The theory of interdependence posits that firms in a highly concentrated market may maintain their prices at supra-competitive levels, or even raise them to those levels, without engaging in any overt concentrated action. Oligopoly pricing will result in prices above the competitive price level (although below the full monopoly or cartel prices level). Though not desirable, it is an outcome of the structure of the market and a consequent conduct that the firms cannot avoid.

84. The non-competitive nature of a market, standing alone, does not imply an 'agreement'. Interdependent behaviour is not an 'agreement' (*i.e.*, price and output decisions are arrived at independently, but take into account rivals reactions). There is not enough evidence in the DG report from which an agreement on prices or supply between the players can be inferred. Further, no fact points towards geographic allocation or customer allocation as well.

85. For all the aforesaid reasons, the Commission is of the opinion that not sufficient evidence has been brought on record to establish a finding of contravention against the opposite parties. In such a scenario, the Commission deems it appropriate to order closure of the case.

86. It is ordered accordingly.

87. Before parting with this order, it may be noted that TCL *vide* its letter dated 17.08.2012 requested the Commission to reconsider the grant of confidentiality period as ordered by the DG. It was averred in the application that the DG granted the period for confidential treatment of the information submitted by TCL till the date of passing of the final order by the Commission. Now, TCL *vide* its instant application is seeking the period for confidential treatment of the information to be

enhanced till the final disposal of the proceedings at the appellate levels.

88. The Commission after considering the above application of TCL in its ordinary meeting held on 03.10.2012 noted that the appropriate order in this regard would be passed alongwith the final order.

89. On a careful consideration of the averments made in the application, it is ordered that the confidential treatment as granted by the DG to TCL shall continue to operate for a further period of 60 days from the date of receipt of this order by TCL.

90. With the aforesaid directions, the application moved by TCL stands disposed of.

91. The Secretary is directed to inform the parties accordingly.

**Sd/-
(HC Gupta)
Member**

**Sd/-
(Geeta Gouri)
Member**

**Sd/-
(Anurag Goel)
Member**

**Sd/-
(M L. Tayal)
Member**

**Sd/-
(Justice S. N. Dhingra [Retd.])
Member**

**Sd/-
(Ashok Chawla)
Chairperson**