

COMPETITION COMMISSION OF INDIA

M RTP Case: RTPE No. 20 of 2008

Date: 30.10.2012

In re:

All India Tyre Dealers' Federation

Informant

vs.

Tyre Manufacturers

Opposite Parties

Present:

- (i) Shri S P Singh convenor, AITDF
- (ii) Shri K Venugopal, Sr. Advocate and Shri AdityaNarain Adv. for M/s J K Tyres & Industries Limited
- (iii) Shri Manas Chaudhuri, Adv. for M/s Ceat Ltd.
- (iv) Shri A N Haskar, Sr. Adv. and Shri AdityaNarain, Adv. for M/s MRF Ltd.
- (v) Ms. Pallavi Shroff, Adv. and Shri Harman Singh Sandhu for M/s Apollo Tyres Ltd.
- (vi) Shri A.N.Haskar, Sr. Adv. and Shri AdityaNarain, Adv. for M/s Goodyear India Ltd.
- (vii) Shri Pinaki Addy, Adv. for M/s Kesoram Industries Ltd.
- (viii) Shri Amitabh Kumar and Shri Gautam Shahi, Advocates for M/s Michelin India Tyres Pvt. Ltd.
- (ix) Shri RaviSekhar Nair and Ms.Nidhi Singh, Advocates for ATMA

Order under section 27 of The Competition Act,2002

Factual Background

1. The present information was originally filed by the All India Tyre Dealers' Federation (AITDF) against the tyre manufacturers before the Ministry of Corporate Affairs and the same was forwarded by the Ministry to the MRTP Commission (MRTPC). Consequent upon the repeal of the MRTP Act, the matter stood transferred to the Competition Commission of India (Commission) under section 66 (6) of the Competition Act, 2002 ('the Act').

2. In the said information dated 28.12.2007, AITDF alleged that the tyre manufacturers were indulging in anti-competitive activities. In the information, statements of Ministers of Finance and Corporate Affairs were quoted to indicate that the Ministers were also aware about the behaviour of the tyre manufacturers.

3. It was alleged that the domestic tyre industry was the best example of indulgence in the anti-competitive activities and resorting to trade mal-practices. The tyre trade has been reeling under this exploitative behaviour of these handful of domestic tyre majors. The domestic tyre industry, operating at 95%-100% capacity, on the back of almost 25% annual growth in commercial vehicle population in last four-five years, has been working in unison and usurping the excise duty reduction contrary to the interest of tyre users.

4. The AITDF alleged that since independence, the behaviour of domestic tyre majors has been anti-competitive, anti-consumer and they have been indulging in various pricing and trade mal-practices, which had direct bearing on the revenue of the state exchequer. The tyre majors are having history of restrictive trade practices and even 35 years back the MRTP Commission had passed its first 'cease and desist' order against the cartelization by domestic tyre industry in October 1974. Hence, domestic tyre industry has the 'distinction' of being indulgent in restrictive

trade practices in the market and as a consequence creating chasm among the dealers creating a 'creamy layer' within the tyre trade and generally exploiting the tyre user by price rigging and strangulation of production and supplies. AITDF also alleged that the truck and bus operators are not the only victim of their machination, but also the vehicle manufacturers like Tata Motors have been exploited in recent past by the domestic tyre majors.

5. The AITDF submitted that they have been continuously feeding the concerned Central Ministries about the anti-trade, anti-consumer and restrictive trade practices of domestic tyre majors. The AITDF also approached the Competition Commission of India regarding the anti-competitive behaviour of domestic tyre majors *vide* letter dated 09.06.2007.

6. Following the receipt of the information, the erstwhile MRTP Commission ordered an investigation into the matter. From the record, it appears that as the DG (I&R) could not complete the investigation when the MRTP Act, 1969 was repealed, the matter was transferred to the Commission.

Prima Facie Opinion

7. The Commission considered the matter in its meeting and on perusal of the material on record and after giving thoughtful consideration to all the facts and circumstances of the case, passed an order dated 22.06.2010 under section 26(1) of the Act directing the Director General ('DG') to conduct an investigation into the matter and submit a report. The order of the Commission specifically mentioned the five major domestic tyre manufacturing companies *viz.* Apollo Tyres Limited, MRF Ltd., Ceat Tyre Ltd., Birla Tyre Ltd. and JK Tyre Ltd.

Investigation and Findings of DG Report

8. In pursuance of the direction of the Commission, the DG conducted the investigation into the matter and submitted his investigation report to the Commission.

9. During the course of the investigation, the DG issued notices to the following tyre manufacturers to seek information and to collect data:

- (i) J K Tyre & Industries Ltd. (J K Tyre)
- (ii) Apollo Tyres Ltd. (Apollo)
- (iii) Birla Tyres (Unit of Kesoram Industries Ltd.)
- (iv) Ceat Tyre Ltd. (CEAT)
- (v) MRF Tyres Ltd. (MRF)
- (vi) Dunlop India Limited (Dunlop)
- (vii) Goodyear India Ltd. (Goodyear)
- (viii) Bridgestone India Private Limited (Bridgestone)
- (ix) Michelin India Tyres Pvt. Ltd. (Michelin)

10. Besides, the information was also collected from Original Equipment Manufacturers (OEMs), AITDF and Automotive Tyre Manufacturers' Association (ATMA).

11. A brief summary of the replies/information submitted by the tyre manufacturers to the DG is noted below:

J K Tyre & Industries Ltd. ('J K Tyre')

12. J K Tyre stated that it is engaged in the manufacturing and selling of tyres produced at the factories located in different parts of the country. It also stated that it imports tyres (Bias/Radial) for the purpose of testing, product evaluation, benchmarking etc. It further stated that it sells its products in different parts of the country through dealers and it does not enter into any written agreement with the dealers and goods are supplied to dealers under invoice which contains the terms and conditions of the sale. It was averred in the reply that natural rubber is procured domestically or through imports on daily basis. It also stated

that the selling price is dependent on demand & supply, cost of production, competitive position of the company etc. It was submitted that the ex-factory price comprises of cost of production and the selling expenses. It was further stated that the OEMs are the bulk buyers and are in a position to dictate the prices based on purchase orders. It was stated that the prices dictated by the OEMs are arbitrary. It was also submitted that in comparison to the replacement market prices, the tyres are sold at a loss or marginal profit to OEMs.

13. It also provided the actual and the installed capacity details and the same are noted below:

(Nos. in Lakhs)

Year	Installed Capacity (Qty in Nos.)	Actual Production (Qty in Nos.)	Utilization %	% Increase/ decrease from previous year
2002-03	56.56	49.59	87.7%	13.3%
2003-04	60.55	53.96	89.1%	8.8%
2004-05	62.96	56.15	89.2%	4.1%
2005-06	62.96	63.61	101.0%	13.3%
2006-07	75.98	70.33	92.6%	10.6%
2007-08	87.00	75.26	86.5%	7.0%
2008-09	87.93	74.86	85.1%	-0.5%
2009-10	91.44	79.31	86.7%	5.9%

Apollo Tyres Ltd. (Apollo)

14. It was stated in the reply that Apollo sells tyres/tubes on a principal to principal basis to the dealers who, in turn, sell the same to the customer/end user. It was also stated that no sole selling agent/distributor/stockist is appointed for marketing the products. It was further averred that Apollo does not enter into any written agreement with the dealers and the business conditions are governed by the terms and conditions set on the reverse side of the invoice. It was also stated that the price determination depends upon the various factors, viz., desired market share, desired product positioning, strategic intent of the products, cost inputs for the products, target return on investment and financial fluctuations etc. Further, it was stated in the reply that the cost of production includes raw material cost, conversion cost, power, steam/air, direct wages, salaries,

repair& maintenance, R&D, plant depreciation and other factory overheads etc. It was stated that Apollo procures natural rubber from dealers on daily basis at the prevailing market rates

15. It provided details of the actual tyre production, installed capacity and the utilized capacity. The same are noted below:

Capacity Utilization

(Nos.in Lakhs)

Particulars	Installed Capacity (Qty in Nos.)	Actual Production (Qty in Nos.)	Utilization %	% increase/decrease from previous year (over actual production)
2005-06	79.34	70.29	89%	18%
2006-07	88.22	78.41	89%	12%
2007-08	96.59	88.67	92%	13%
2008-09	98.96	85.92	87%	-3%
2009-10	131.53	105.28	80%	23%

16. It also submitted details of the truck/bus tyre production and the export for the period 2005-2010. The same is quoted below for ready reference:

Production and Export

(Nos. in Lacs)

Year	Production (Qty)		Export (Qty)	
	Truck Bus bias	Truck bus radial	Truck Bus bias	Truck bus radial
2005-06	31.76	-	4.62	-
2006-07	33.20	0.06	4.35	-
2007-08	35.42	0.35	4.23	-
2008-09	32.17	0.68	3.61	-
2009-10	37.44	0.81	3.25	-

17. It further provided details of cost of production for the above mentioned two segments of tyres. The same is shown below:

Year	Cost of Production – ₹ Per Unit	
	10.00-2016 Amar (in ₹)	10.00-2016XT-7(in ₹)
2005-06	4674	5144
2006-07	5343	5998
2007-08	5184	5718

2008-09	6206	6612
2009-10	6047	6356

Birla Tyres (Unit of Kesoram Industries Ltd.)

18. It was stated in the reply that Birla Tyres produces truck and bus tyres, LCV and passenger car tyres by using state of the art machineries and the latest technology. It was stated that Birla Tyres is continuously increasing the capacity outlay to increase the installed capacity and its capacity utilization has improved from 93.62% in 2004-05 to 104.57% in 2009-10. It was further stated that the raw materials constitute 85% of the total cost of production. It was stated that raw material prices are directly influenced by prices of rubber and crude oil. Further, it was stated that Birla Tyres procures natural rubber from rubber dealers on daily basis as per the requirements. Prices of natural rubber are stated to be volatile. It was also stated that Birla Tyres is continuously decreasing the supplies to the export market in terms of percentage of total production.

19. The year wise capacity utilization details, as provided, are shown below:

(No. of Tyres in lakhs)			
Year	Installed Capacity(Qty) (Truck Tyres)	Actual Production(Qty) (Truck Tyres)	Utilization % (Truck Tyres)
2004-05	10.66	9.98	93.62
2005-06	11.66	10.58	90.74
2006-07	13.08	11.75	89.83
2007-08	14.58	14.24	97.67
2008-09	13.80	11.26	81.59
2009-10	13.80	14.43	104.57
Increase% age	29.46	4.59	

20. It was further submitted that the raw material constituted 85% of cost of production. Raw material prices are directly hit by prices of rubber and crude oil on which are dependent other major raw materials such as Synthetic Rubber, Carbon Black and Tyre Cord Fabric. It further submitted that it procures

natural rubber from rubber dealers on daily basis based on its requirements. The prices of natural rubber are volatile and fluctuate on daily basis. It submitted the major price increase of essential raw material over last 6 years as shown below:

(Rs. /Kg)

	% of total RM consumption	2004-05 (₹/Kg)	2005-06 (₹/Kg)	2006-07 (₹/Kg)	2007-08 (₹/Kg)	2008-09 (₹/Kg)	2009-10 (₹/Kg)	% increase from 2004-05
Natural Rubber	42.05	65.82	69.73	95.41	97.24	117.82	110.90	68.49
Synthetic Rubber	12.06	81.26	100.60	101.03	100.46	159.38	136.46	67.93
Carbon Black	11.04	28.41	32.78	41.74	40.07	54.09	53.02	86.62
Fabric	20.01	170.14	196.54	178.08	171.24	215.84	218.26	28.29
Total	85.16							50.06

21. With regard to the production and export, Birla tyres submitted that it is continuously decreasing the supplies to the export market in terms of percentage of total production.

(No. of tyres)

	2004-05	% of prod	2005-06	% of prod	2006-07	% of prod	2007-08	% of prod	2008-09	% of prod	2009-10	% of prod
Production	1524363		1533451		1674147		1933172		2419916		4498207	
Export	452223	29	471477	30	503461	30	498344	25	465656	19	692526	15

CEAT Ltd. (CEAT)

22. It was stated in the reply that CEAT is engaged in the manufacture of tyres, tubes and flaps. The actual production, capacity utilization details for the period 2005-2010 were provided and the same are noted below:

Capacity Utilization

Year	Plant	Installed Capacity	Actual Production	Utilization (%)	% Increase/decrease from previous year
2005-06	Nasik	4,310,930	3,864,051	90%	
2006-07	Nasik	4,310,930	3,925,091	91%	1%

2007-08	Nasik	4,542,220	3,768,703	83%	-8%
2008-09	Nasik	4,542,220	3,411,444	75%	-8%
2009-10	Nasik	4,726,048	3,820,647	81%	6%

23. It was submitted that CEAT has established a network of sales offices across India and it sells the goods on principal to principal basis to the major customers, viz., government accounts, fleet accounts, state transport undertakings, vehicle manufacturers and to over 3000 dealers in different parts of the country who, in turn, sell the same to the consumers. It also stated that these dealers also sell the competitors' products and CEAT does not enter into any agreement for the sale of its products with the dealers and the supplies are effected under an invoice which contains the terms and conditions. CEAT submitted that for manufacturing tyres/tubes it uses basic raw materials, viz., natural rubber, synthetic rubber etc. The raw material prices fluctuate on day to day basis with changes in crude oil prices, foreign exchange rates, international raw material prices etc. Pricing of the products was stated to depend upon raw material prices, landed price of competitive products (imported), demand & supply in the country and abroad. Natural rubber is stated to be the most important raw material required for manufacture of tyres.

24. With regard to the tyre production, quantity exported and imported, the details, as provided, are shown below:

Year	Total production		Qty. exported of the total production	
	Bias	Radial	Bias	Radial
2005-06	1,771,797	0	495,896	0
2006-07	1,820,828	0	385,068	0
2007-08	1,875,991	0	485,964	0
2008-09	1,737,233	0	340,170	0
2009-10	1,958,922	0	364,233	0

25. The details of the imports provided by CEAT for the period 2005-2010 are shown below:

Import		
Year	Bias	Radial

	Replacement Market (Nos.)	Original Equipment Manufacturer (Nos.)	Replacement Market (Nos.)	Original Equipment Manufacturer (Nos.)
2005-06	24,997	0	3,826	0
2006-07	33,876	0	6,891	0
2007-08	42,222	0	13,917	0
2008-09	19,217	0	30,667	0
2009-10	25,059	0	29,377	0

MRF Tyres Ltd. (MRF)

26. In its reply, MRF has stated that it manufactures and sells all categories of tyres and tubes used in automobiles. Details of capacity utilization, as provided, are shown below:

Year	Installed Capacity			Actual Production			Utilization %	% Increase/Decrease from previous year
	Bias	Radial	Total	Bias	Radial	Total		
2005-06	2973333	233333	3206666	2329968	65268	2395236	74.7	
2006-07	3192223	168000	3360223	2597438	66170	2663608	79.27	4.57
2007-08	3095540	197502	3293042	2611930	92803	2704733	82.13	2.86
2008-09	3068889	286458	3355347	2630853	81932	2712785	80.85	-1.28
2009-10	3235052	334105	3569157	2957026	220795	3177821	89.04	8.19

27. It was stated in the reply that it sells its products to OEMs, STUs, the replacement market, export market *etc.* MRF in the reply stated that it procures natural rubber from around forty dealers on daily basis. It was also stated that MRF has no formal contract for purchase of natural rubber. Additionally, it was stated in the reply that natural rubber is imported from various countries and the price is fixed and payment is made in US dollar terms. MRF has also stated in the reply that it does not import tyres/tubes. It was admitted by MRF that it is a member of ATMA. However, it denied any discussion relating to the issue of price rise at the meetings of the association.

28. The details relating to total production of Truck/Bus (both Bias & Radial) tyres for the years 2005-06 to 2009-10 and quantity exported were provided and the same are noted below:

Production and Export

Year	Total Production		Qty Exported of the total Production	
	Bias	Radial	Bias	Radial
2005-06	2329968	65268	419760	55020
2006-07	2597438	6170	440453	41443
2007-08	2611930	92803	402294	34182
2008-09	2630853	81932	347754	20562
2009-10	2957026	220795	424142	

Dunlop India Limited (Dunlop)

29. In the reply, Dunlop stated that it has manufacturing facilities in West Bengal and Tamil Nadu and both these units were stated to be under the management of Chabria Group till 2005. These units were subsequently stated to be taken over by the new management *i.e.* Ruia Group in December, 2005, but the operations remained suspended till 2008 and thus there were no manufacturing operations in the market from 1998 to 2008 and the production and sale was negligible in comparison to the Indian tyre industry. It was also stated that Dunlop is not member of any tyre related association. Details of capacity utilization of the plants were also provided in the reply. Further, it was stated that market share of Dunlop is negligible and the import of tyres is nil and the export was also stated to be very negligible.

Goodyear India Limited (Goodyear)

30. In the reply it was stated that Goodyear sells its products in India on principal to principal basis. The products are stated to be sold through dealers and the business dealings are stated to be governed by the terms and conditions of the invoice. Details relating to actual production, installed capacity, utilization percentage were also supplied in the reply. Further, details of

production and exports were also provided. It was stated by Goodyear that it was asked to provide details by the Competition Commission of South Africa. However, it maintained that the said action/proceeding is wholly irrelevant for its business operations in India.

Bridgestone India Pvt. Ltd. (Bridgestone)

31. It was stated in the reply that the core business of the company comprises manufacture and marketing of steel belted passenger vehicle radial tyres as also import and marketing of truck and bus radial tyres. It was stated that the company is not involved in manufacturing of truck and bus tyres (radial or bias) in India. It was further stated that the company does not manufacture any kind of truck/bus radial tyres in India but it imports the same from the Bridgestone group companies from Japan and Thailand for sale in India. It was also stated that the company is not involved in manufacturing or importing/marketing/trading of bias tyres in India and it was stated that the company is only in the business of radial tyres. The company is stated to be member of ATMA since 2007 and it was stated that during the meetings of the association various issues concerning the tyre industry viz. import license, mandatory BIS certification on tyres and tubes, availability and increase in price of natural rubber, recommendation to the Government for allowing import of natural rubber at concessional duty, reduction of import duty on natural rubber etc. were discussed. Further, it was stated that the Ministry of Finance vide its notification dated 19.02.2010 has imposed antidumping duty on the radial tyres used in buses and lorries/trucks originating in, or exported from Thailand and China. Lastly, it was stated that the investigation conducted by the South Africa Competition Commission against Bridgestone South Africa (Pty Ltd.) has no connection with Bridgestone India Pvt. Ltd. as both the companies are independent entities and carry out their business operations independently.

Michelin India Tyres Pvt. Ltd. ('Michelin')

32. In the reply, it was stated that the company is not engaged in the manufacture of tyres. It was stated that the company imports and sells tyres in India which are manufactured by its affiliate companies outside India. It was further stated that the company markets tyres in India through dealers. It was also stated that the company imports tyres for two wheelers, earth movers, buses and trucks. Details of the imports were also supplied by the company.

33. Besides, the DG also collected information from ATMA and OEMs and a brief resume thereof is noted below:

All India Tyre Manufacturers' Association (ATMA)

34. ATMA is stated to be an association of the domestic tyre manufacturers. ATMA submitted that it is registered as a section 25 company under the Companies Act, 1956. It was stated by ATMA in the reply that it has never been associated with or interfered with the day to day operational activities and freedom of its member companies. It also stated that it was never involved in the affairs of any individual company and it has never provided its members with any platform for carrying out any activity which is unlawful or illegal or in contravention of any law for the time being in force including the Competition Act, 2002.

Original Equipment Manufacturers (OEMs)

35. Information relating to import and pricing was collected by the DG from the major OEMs, viz. Tata Motors, Ashok Leyland and Eicher Motors (V E Commercial). It is noted from the information supplied that OEMs procure tyres from domestic tyre manufacturers and also import from various countries based on their requirement. The DG also noted that OEMs too are dependent on the supply of tyres from the domestic tyre manufacturers.

36. During the course of investigation the DG analysed the data for the reference period *i.e.* 2005-2010 collected from the five major domestic tyre manufacturers (Apollo, MRF, J K Tyre, Birla and CEAT). At the outset, it is noted that, for the purposes of the present investigation, the DG, considering the commercial utility of truck and bus tyre segment in transportation and public importance at large, took into consideration the truck and bus tyres both cross (or bias) and radial. However, with regard to the specific and detailed study on cost of production, *ex-factory* price, price parallelism *etc.*, the bias tyres were taken into consideration for investigation as this segment was generating major chunk of revenue.

37. Besides, the DG also made a detailed reference to the secondary documents to corroborate the above findings as these documents also reflected the conduct of the domestic tyre manufacturers. In this connection, the DG has referred to the reports (phase-I, 1985 and Phase-II, 1988) of the studies conducted by the Bureau of Industrial Costs and Prices (BICP), Ministry of Industry; Market study on Tyre Industry conducted by the Jawaharlal Nehru University (2007); final findings dated 29.06.2007 pursuant to the anti-dumping investigation concerning imports of Bias Tyres originating in or exported from China PR and Thailand and final findings dated 01.01.2010 pursuant to the anti-dumping investigation involving import of Bus and Truck Radial Tyres, originating in or exported from China PR and Thailand of the Designated Authority, Directorate General of Anti-Dumping & Allied Duties, Department of Commerce, Ministry of Commerce & Industry, respectively.

38. The DG also examined the conduct of Automotive Tyre Manufacturers' Association (ATMA). The DG on examination of the minutes of the meetings held from 2005-2010 noted that the members of the association collectively tried to resolve the common issues which were affecting the domestic tyre manufacturers adversely. It was also noted that the domestic tyre manufacturers were facing stiff competition from the importers.

The members of ATMA collectively adopted the various courses of action to protect themselves in this regard viz. by filing of Anti-Dumping Duty petition, by devising low cost tyre strategy, by black listing of importers, by discussing issues on export realizations and by deliberating the issue of unremunerative prices of tyres supplied to OEMs in various meetings.

Price Analysis

39. The price data for the period of 2005-2010 of domestic tyre manufacturing companies viz. MRF, J.K. Tyre, Birla, Ceat& Apollo was analysed.

40. It was noted by the DG that the major components which affect the prices of tyres are the cost of natural rubber and the excise duty. It was noted that the excise duty over the investigation period has gone down from 16% to 10%.

41. With respect to another component viz. natural rubber, it was noted that the tyre industry is highly dependent on it which accounts for 43% of the tyre production cost. Natural Rubber is procured by domestic tyre manufacturers on daily basis and the price of natural rubber fluctuates on daily basis. The weighted average price of the natural rubber during the reference period was noted and analyzed.

42. Based on the analysis, it was concluded by the DG that during the investigation period, excise duty has shown a downward trend and the natural rubber has increased in 2008 but has fallen in 2009 and then again increased in 2010. It was noted that during the investigation period the net dealer prices of all the domestic tyre players have continuously increased except in 2009 wherein a limited decline in prices was observed.

43. Accordingly, the DG noted that these tyre companies have not passed on the benefit of reduction in excise duty to the consumers. To buttress the conclusion, reliance was also placed on the Tariff Commission findings on Tyre Industry.

44. To examine the price movement for the specific Lug Tyre segment of the five domestic tyre manufacturers under investigation, the DG analysed the weighted average of the net dealer price.

45. By analyzing the said data, it was concluded by the DG that the net dealer price (weighted average) of lug tyre in respect of all the companies was more or less the same with marginal difference in their price except Apollo tyre.

46. Further, it was noted that the movement of net dealer price (weighted average) in terms of actual quantum as also % change was also found to be similar. It was also noted that the % change of net dealer price whether upward or downward was showing close correlation amongst the five tyres manufacturing companies.

47. Based on the above analysis, it was observed by the DG that price parallelism existed amongst the five major tyre manufacturing companies which is a good measure/indicator to show that some kind of information sharing in price had taken place amongst them.

48. Further, the DG, after finding price parallelism amongst the five tyre manufacturers, proceeded to analyze the plus factors. In this regard, the DG made elaborate analysis of data relating to production; capacity utilization; cost analysis; cost of sales/sales realization/margin; cost of production and natural price movement; net dealer price & margin and market share, the same may also be noted.

Production and Net Dealer Price Analysis

49. The DG examined the relation between the actual production and net dealer price (weighted average) of Lug Tyres of the five domestic tyre companies.

50. On examination of the above, the DG noted that the actual production of domestic tyre companies has increased except during the year 2008-09. Further, the same was collated with the net dealer price (weighted average) change and concluded that there was a decline of 3% to 20% in actual production of the domestic tyre companies. It was, however, pointed out that the corresponding decline in net dealer price was only between 3% - 5% which implied that the companies have not reduced the net dealer price (weighted price) in proportion to the actual production.

Capacity Utilization Analysis

51. The DG also examined the capacity utilization of all the 5 major domestic tyre manufacturing companies.

52. It was noted by the DG that the overall capacity utilization of the tyre manufacturers has been showing a downward trend and the utilized capacity has dropped down in the case of companies *viz.* Apollo, Ceat and J.K.Tyre except MRF & Birla from 2005 to 2010. In the case of Birla, the variations in capacity utilization were noted as very high as it dropped from around 97% to 81% in the year 2008-09 and then drastically increased from 81% to 104% in the year 2009-10. In J.K. Tyre, a drastic decline in the capacity utilization was noted during the entire investigation period which reflects under-utilization of capacity.

53. From the above analysis, it was inferred by the DG that these companies were not utilizing their capacity in full thereby resulting in limiting the supply.

Cost of Sales, Sales Realization and Margin

54. The DG made a detailed analysis of cost of sales, sales realization and margin. It was noted that sales include cost of production, selling and distribution cost, administrative overheads, advertisement *etc.* Sales realization is the amount

received on sale of each unit. Margin indicates the profit or loss realized on sale of the product. The analysis was done to get an idea about the profitability or otherwise of sale of each product.

55. Based on the analysis, it was concluded by the DG that margins for Apollo Tyres have been showing a very healthy trend and it has reached the highest in year 2009-10. In the case of JK Tyres, the margin has been improving and has gone up drastically. The margin, which was ₹ 76 during 2008-09, has gone up to ₹ 617 in year 2009-10 which is more than 8 times compared to previous year. In the case of MRF, the margins have shown significant improvement in the year 2008-09 and have further improved in 2009-10. As regards Ceat, it was noted that it has been able to reduce the negative margin from ₹ 802 to ₹ 216 in year 2009-10. Birla Tyres has shown lower margin for 2009-10 compared to previous year.

56. It was further noted that the cost of sales showed increasing trend year after year and there has been sharp increase during 2008-09 in almost all the companies which could be due to increase in the price of natural rubber. Accordingly, the DG concluded that the companies have the motive of making profit and hence have been able to earn positive margins in most of the period in the 5 years.

Analysis of cost of production and natural rubber price movement

57. The DG also conducted a detailed analysis of cost of production and natural rubber price movement. It was noted that natural rubber is one of the major components in the cost of production of tyres. Therefore, examination of the relation and corresponding movement of cost of production and natural rubber was undertaken by the DG. The weighted average of cost of production and natural rubber during the investigation period was taken for the five domestic tyre manufactures.

58. From the analysis of percentage change in the price of natural rubber *vis-à-vis* the percentage change in cost of production in respect of all five domestic tyre companies, the following findings were recorded:

- (i) In the case of J.K.Tyre, MRF and Birla the price change of natural rubber dropped from 2009 to 2010 showing a reduction of 10% whereas the cost of production in all these companies increased substantially, which was contrary to natural market forces. No satisfactory explanation to such increase in cost of production from 2009 to 2010 despite substantial reduction in price of Natural Rubber was available on record. In fact, in the case of Birla Tyres and MRF Tyres there is an increase of 22.8% and 41% respectively as against the decline in price by 10% in Natural Rubber.
- (ii) In cases of Apollo Tyres and Ceat, the rate of percentage change in the price of Natural Rubber from 2009 to 2010 does not show the corresponding rate of change in the cost of production. Thus where the percentage change of Natural Rubber price was at 10.5% these two companies have shown a decline of 3% and 3.8% respectively in their cost of production.
- (iii) The analysis therefore shows that the tyre companies have been inflating some miscellaneous expenses into the cost of production to reduce their net profit margins. Similarly, the analysis also explains that the change in price of natural rubber has no impact on the cost of production and therefore, it does not explain the possible reason for the increase in price of tyres by these companies.

Analysis of Net Dealer Price and Margin

59. The DG also conducted the analysis of the Net Dealer Price (Weighted average) of Lug truck tyres *vis-à-vis* the margin of each of the five domestic companies under investigation.

60. It was noted by the DG that the analysis of the Net Dealer Price (Weighted average) of Lug truck tyres *vis-à-vis* the margin of each of the five domestic companies under investigation showed a significant increase in margins from 2006-2010. Thus, it was concluded that all the companies have been operating on high margins barring some exceptions as highlighted in the tabulated data. It was also noted that the margins have increased from ₹ 42.04 to ₹ 617.92 in the case of J.K. Tyre which is an increase of almost 15 times in a short span of 4 years. Similarly, in the case of Apollo Tyres the margins have almost doubled in the last four years. In view of the above analysis, the DG noted that these domestic tyre manufacturers have been operating on large margins.

Market Share

61. A comparative study of the market share was undertaken for the domestic tyre manufactures.

62. It was noted by the DG that the market share of Apollo remained consistent at 27% throughout the 3 year period starting from 2005-2008 and decreased by only around 1.5% in the year 2008-09. The market share of Birla increased substantially by around 8% in the year 2006-07 and thereafter again decreased by around 6% in the year 2007-08. The market share of Birla increased drastically by 10.76% during the investigation period. No major change in market share of MRF could be noticed during the investigation period except a decline of 1.7% in 2009-10. Similar was the case with CEAT where no major change could be noticed in the market share throughout the 5 year

period from 2005-2010 but it was reduced by 1% in 2009-10. In the case of J.K. Tyre, it was observed that the market share kept on decreasing throughout the 5 year period by around 1-1.5% each year.

63. It was further noted that during the investigation period the five domestic tyre companies consistently accounted for around 95% of the market share of the total production which implied very high concentration resulting in high dependence of OEMs and the replacement market on these five companies.

Summary of findings of the DG

64. Based on above analysis the DG returned the following findings:

- (i) The tyre companies have not passed on the benefit of reduction in excise duty to the consumers.
- (ii) Price parallelism existed amongst the tyre companies.
- (iii) The tyre companies have not reduced the Net Dealer Price (weighted price) in proportion to the actual production.
- (iv) The tyre companies have not utilized their full capacity which resulted in limiting the supply.
- (v) The companies have been able to earn positive margins in most of the period under investigation.
- (vi) The tyre companies have been inflating some miscellaneous expenses into the cost of production to reduce the net profit margins. Similarly, the analysis also explains that the change in price of natural rubber had no impact on the cost of production and therefore, it does not explain the possible reason for the increase in price of tyres.
- (vii) The tyre companies are operating on high margins and the same is not passed on to the consumers.
- (viii) The five domestic tyre companies occupy about 95% of the market share of the total production. This high

concentration made OEMs and the replacement market highly dependent on these companies.

Conclusion of the DG

65. Based on the above findings, the DG concluded that the major domestic tyre companies acted in concert and ATMA provided the platform to the members for exchange and sharing of information relating to price, export, import, OEMs etc. Thus, the DG concluded that ATMA and its five major domestic tyre manufacturing companies (Apollo, MRF, J K Tyre, Birla and CEAT) have acted in concert in contravention of the provisions of section 3(3)(a) and 3(3)(b) of the Act.

Replies of the Parties

66. The Commission, after considering the investigation report submitted by the DG, decided to forward copies thereof to the following parties for filing their replies/objections thereto *vide* its order dated 02.06.2011 :

- (i) All India Tyre Dealers Federation (AITDF)
- (ii) M/s J.K. Tyres & Industries Ltd.
- (iii) M/s Ceat Ltd.
- (iv) M/s MRF Ltd.
- (v) M/s Apollo Tyres Ltd.
- (vi) M/s Goodyear India Ltd.
- (vii) M/s Kesoram Industries Ltd.
- (viii) M/s Dunlop India Ltd.
- (ix) M/s Michelin India Tyres Pvt. Ltd.
- (x) M/s Bridgestone India Pvt. Ltd.
- (xi) Directorate General of Anti-Dumping & Allied Duties
- (xii) M/s Automotive Tyre Manufacturers Association
- (xiii) M/s Modi Tyres Company Pvt. Ltd.
- (xiv) M/s Falcon Tyres Ltd.
- (xv) M/s TVS Srichakra Ltd.

67. None appeared for M/s Dunlop India Ltd., Directorate General of Anti-Dumping & allied Duties, M/s Falcon Tyres Ltd. and M/s TVS Srichakra Ltd.

68. Further, on the request of counsel for M/s Modi Tyres Company Pvt. Ltd. and M/s Bridgestone India Pvt. Ltd., the Commission *vide* its order dated 03.11.2011 struck off their names from the array of parties as M/s Modi Tyres was reported to be a sick company and was referred to BIFR and further M/s Modi Tyres and M/s Bridgestone India Pvt. Ltd. were stated to be not in production during the period of alleged cartelization. Moreover, no relief was prayed against them.

69. In view of the above, before proceeding further, it would be appropriate to record a brief resume of the replies of the parties to the report of the DG.

Reply of AITDF

70. AITDF filed its reply to the report of the DG supporting the same. It has contended that report of the DG vindicates the consistent stand of the tyre dealers and tyre users that domestic tyre companies led by ATMA have been indulging in restrictive trade practices by increasing the tyre prices in concerted manner and by not passing on the benefits of reduction in excise duty to the end consumers.

71. It has also contended that despite variation in economies of scales and scale of product mix for variety of tyre sizes, the tyre companies, through collective mechanism, have been staggering tyre price revisions exploiting the market. The price revisions since 2005-06 to 2010-11 and till date *i.e.* July 01, 2011 display the same trend *i.e.* when input prices have gone up, the prices of tyres and tubes have been increased by all of them within the virtual same range by varying the revisions by small differential to give an impression that they have been working in an independent manner. Similar has been the case with regard to

reflection of reduction in excise duty from 32% to 10% in the last 5-6 years and the tyre companies have failed to reflect the reduction in price of tyres in a similar manner with a minor variation in percentage and timing. Hence, the price to the dealer on reduction of excise duty on each occasion has virtually remained same or with marginal change by way of cosmetic reduction in price and, consequently, the basic *ex-factory* price minus excise duty has been increased *pro rata* by all of them for all categories of tyres *i.e.* truck/bus, LCV, passenger car, tractor tyre, two/three wheeler tyres *etc.*

72. It has submitted that while the natural rubber price during December, 2010/January, 2011 to June/July, 2011 has gone up from Rs. 205 per kg. to Rs. 240 per kg. till the beginning of June, 2011, in the next four weeks, the natural rubber price has come down and was prevailing at Rs. 210 per kg. Yet all the tyre companies have increased the tyre prices. It has also been pointed out that while the prices of other major raw materials like synthetic rubber, carbon black, nylon tyre fabric, rubber chemicals (all driven from crude oil) have not crossed the peak average price of crude oil prevailing during the year 2008 when the tyre prices were raised on the same pretext and again in the year 2010, the tyre prices were raised on the back of record increase in natural rubber price while the Central Government reduced import duty on natural rubber by 7.5% to protect the domestic tyre industry. It is further stated that during the year 2006, the tyre prices by all the tyre companies at regular intervals went up in concerted manner but were not reduced even after drop in raw material prices to the previous prevailing low levels. Similarly, in the year 2008 similar exercise was committed by the manufacturers in unison through several price increase till August/September, 2008. However, subsequently when natural rubber price and prices of all other crude oil based raw materials dropped to a 3-4 year low, the tyre prices were not rolled back by these non-competing tyre companies which are members of ATMA. It is also stated that again in the year 2011, the same

exercise was repeated between January to July, 2011 despite ongoing investigation ordered by the Commission.

73. Lastly, it has been submitted on behalf of AITDF that the rate of return on capital employed in the international tyre manufacturing industry is traditionally low at 1.5%-2%, but in case of Indian tyre makersthey have been having a rate of return ranging from 4% to 6% on annual basis during the last 5-6 years. The tyre industry world over makes low returns by nature of its business model as against high rate of returns in case of hospitality, travel garments, computers, white goods, FMCGs *etc.* This only proves that the rate of return among the domestic tyre majors, irrespective of their size, age and investment and even product mix has been high at the cost of hapless consumers and any weak performance for a quarter or so is more cosmetic and doctoring/management of financial results just to display wrong impression about their true health, which they cleverly hide in their deceptive data management.

Reply ofATMA

74. ATMA in its reply to the report of the DG has stated that it was never named as an opposite party in the complaint filed by AITDF norany specific information/complaint was made against it.

75. It has stated that the DG, after requisitioning information/ documents from ATMA has recorded an adverse finding against it in the investigation report. However, the DG, apart from making bland references to ATMA minutes/circulars has neither identified nor placed reliance on any specific minutes of ATMA meetings where any discussions pertaining to any alleged cartel like activity is said to have taken place.

76. ATMA has also submitted that the *prima facie* order passed by the Commission dated 22.06.2010 identified the parties against which the DG was to conduct investigation. It has been pointed out that ATMA does not figure in that list. Subsequently, the DG despite not having sought permission from the Commission to either expand the period of investigation or the scope of investigation, has recorded adverse findings against ATMA. Even assuming that the DG under the provisions of the Act has the power to expand period and scope of investigation, the investigation undertaken by the DG is fundamentally flawed and the investigation report is devoid of any merit. The conclusions set out therein are baseless and unsubstantiated in as much as the DG ought to have identified the evidence/ documents on the basis of which the adverse finding against ATMA was recorded.

77. It has further submitted that during the course of investigation, ATMA, in full compliance with the multiple requisitions, submitted all relevant documents/ information including minutes of ATMA meetings. It has alleged that the DG has failed to identify any specific documents and/or place reliance on the same in the investigation report and has not annexed any such minutes/circulars to the investigation report.

78. By way of preliminary objections, it has argued that Anti-Dumping (AD) proceedings are initiated under applicable laws/rules/regulations. The AD proceedings are pro-competitive and are aimed at preventing anti-competitive pricing practices through imports which would have an appreciable effect on the domestic industry. It is stated that India is not the only country where ADD has been imposed on Chinese/ Thai tyre imports.

79. It has further urged that AD rules require industry representation and trade associations, such as ATMA, are best suited to represent the domestic industry before the AD authority. It is stated that a significant number of cases have

been filed by trade associations before the AD authority. If the findings and conclusions set out by the DG in the investigation report are adopted by the Commission, this would be contrary to the provisions of section 62 of the Act which states that the provisions of the Act are in addition to and not in derogation of any other law for the time being in force. The AD rules are a law for the time being in force and adoption of the DG's argument *qua* the AD proceedings will be contrary to the provisions of section 62 of the Act itself.

80. It has averred that the vexatious and persistent litigation/proceedings undertaken by AITDF is nothing but a counter blast to imposition of ADD on Chinese and Tyre imports by the AD authority which directly impacts members of AITDF. This is a motivated proceeding and the DG has failed to establish the credentials of the informant. This has been stated as a critical flaw since it allowed the process of the Commission and the provisions of the Act to be abused. It has further argued that AITDF information and the DG findings essentially seek to build in the *anti-trust defense* doctrine into the legal system in India, which is clearly not allowed. As per ATMA, to suggest that the process of the Commission and the provisions of the Act can be deployed as a defensive measures to adverse findings under other laws (ADD in this case) would be an affront to the legislative intent.

81. It has also asserted that ATMA minutes, supplied by the Commission, relate to the years 2005-2007, which is a period prior to coming into force of the relevant provisions of the Act. It has further stated that while the DG appeared to have collected and analysed data from companies for 2005-2010 period, he has clearly not placed reliance on any ATMA minutes/circulars/documents after 2007 (April). Thus, it has argued that the entire investigation report in as much as it relates to ATMA, is clearly unfounded, baseless and illogical and ought to be set aside.

82. Responding to the findings of the DG, it has been pointed out by ATMA that every tyre manufacturer offers products with identical specifications. The tyre 'brand' commands significant visibility when compared to almost all other components fitted on vehicles. Tyre production requires highly specialized knowledge and technology as also significant investment. Tyre producers have to compulsorily comply with a number of regulatory requirements in India *e.g.* BIS which is now mandatory since May, 2011.

83. It has pointed out that the DG in its report has treated 'Cross Ply' and 'Radial Tyres' as constituting one product when in fact they are separate and distinct products.

84. Referring to the findings based on price parallelism or information exchange, ATMA has pointed out the peculiar features of the tyre industry. It has submitted that product prices in the tyre tend to be similar or move in tandem because of market forces. Further, price parallelism in the tyre industry arises on account of the fact that the products sold are homogenous (a consumer can potentially use tyres belonging to different brands on the same vehicles so long as the specifications are the same) which makes it difficult for businesses to charge different prices to customers. Products in the tyre industry share similar sources of inputs, which means that competitors are subject to similar cost fluctuations in setting their product prices. Prices of products in the tyre industry are highly visible, which allows businesses to collect real time market intelligence and monitor each other's prices closely and match competitors' price movements.

85. It has been pointed out that the DG in its report has failed to appreciate the critical fact that none of the following actions

undertaken by ATMA was aimed at determining the individual conduct of any of its members:

- i) Anti-Dumping Petition
- ii) Low Cost Tyres
- iii) Blacklisting Importers
- iv) Export Realization
- v) Supply of Tyres to OEMs

86. It has further submitted that the abovementioned steps/activities are in line with the roles and responsibilities of an association such as ATMA *i.e.* representing an industry group. It has been contended that if the logic adopted by the DG in its report is accepted by the Commission, it would lead to an untenable situation where trade associations representing the interests of an industry group, will be barred from adopting any measure necessary to protect the interests of the concerned industry. Lastly, it has asserted that forming a trade association *per se* is not anti-competitive in any manner.

Reply of M/s MRF Limited

87. MRF in its reply to the investigation report of the DG has submitted that the report fails to demonstrate the conditions precedent for showing the existence of a cartel. Cartelization is a serious misconduct and must be set out with particularity. The report fails to show the existence of an agreement between MRF and other tyre manufacturers to limit or control the production or sale or price of goods. It has contended that for this reason, no allegation under section 3(3)(a) and 3(3)(b) of the Act can be made and the report ought to be rejected.

88. It has submitted that an 'agreement' between competitors is a condition precedent to establish an allegation of cartel. Reference has been made to a decision of the Supreme Court in the case of *Union of India v. Hindustan Development*

Corporation, (1993) 3 SCC 499 at p. 531, para 14 to contend that mere offering of a lower price by itself, though appears to be predatory, cannot be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. The investigation report fails to show that there was an 'agreement' between the tyre manufacturers.

89. It has further averred that the report also fails to show the causation of appreciable adverse effect on competition in India in terms of the statutory factors laid down under section 19(3) of the Act. It has urged that this is a condition precedent for the allegation of a cartel against the tyre manufacturers which has not been taken into account and hence the report is bad in the eyes of law.

90. It has been pointed out that the DG has adopted a theoretical approach and wrongly relied upon the economic principles of price parallelism out of context ignoring the facts and data given by MRF. The entire exercise of the DG in this regard appears to have been based on his own prejudicial perception about tyre industry rather than on facts and data produced by MRF during the course of investigation, which have been totally overlooked.

91. Further, it has argued that the report is wholly without jurisdiction, fraught with fallacy against the tyre industry and particularly against MRF based on mere surmises and conjectures emanating from AITDF complaint, obsolete reports and ought to be rejected on this count. The investigation has been fishing and roving enquiry in a premeditated manner without any reasonable ground or cogent data against MRF and the report which has been prepared without any basis, should be set aside on this ground alone.

92. It has been also submitted that the report consists of and relies upon annexures of more than 400 pages. Many pages in

the annexures including the Tariff Commission Reports are not legible and even otherwise annexures do not have any relevance being obsolete, unrelated to the subject of investigation and the conclusion drawn against the tyre companies and particularly against MRF. It has been contended that the report ought to be rejected on this ground also.

93. It has contended that the investigation is allegedly conducted based on information/ allegation filed by AITDF which is an agency without credibility and has been acting at the behest of interests which are against the domestic tyre industry which supports import of tyres. Thus, AITDF is a party having direct conflict of interest and is a motivated 'informant'. AITDF is not a representative body of the consumers or dealers. It is only a self-styled representative of the alleged tyre dealers. It does not have any legal character even though it claims to be of considerable standing and seems to be an unregistered association. Except for presumptive allegations without basis, there has been no credible contribution in the form of information and the sole purpose of AITDF is to make frivolous representations to mislead the Government machinery against the domestic tyre companies.

94. It is also argued that since the case was transferred under section 66(6) of the Act, the allegation and the period of coverage should have been limited to the MRTP Act, 1969 as section 3 of the Act has come into force only *w.e.f.* 20.05.2009. The investigation is liable to be closed on this ground alone.

95. It is argued that the investigation report has ignored the order of the Commission dated 22.06.2010 and has proceeded to unilaterally extend the period of investigation of the transferred case from 2005 - 2007 to 2005 - 2010, without giving any reason whatsoever. This was done since the DG was fully aware that the provisions relating to anti-competitive agreements under the Act had come into force from 20.05.2009 and the same could not be

invoked unless the period of investigation was extended. The report is, therefore, without jurisdiction.

96. In the absence of any material facts or particulars constituting a cartel, the information cannot be regarded as a valid and proper allegation of cartel, which needs to be answered by MRF.

97. Referring to case law, it is argued that it is settled law that price parallelism by itself cannot amount to a price cartel. In this regard, reference has been made to the decisions of the Full Bench of the Hon'ble MRTP Commission in the cases of *RRTAv. ACCI Bayer* (1993) 1 CTJ 7 at para 25 as well as other decisions given in *Grindwell Norton* 1984 Tax LR 2219, *India Foils* 1984 Tax LR2010, *Hindustan Lever TOMCO* 1983 Tax LR 2443, where it has been held that price parallelism does not amount to cartel. It is however denied that the investigation report shows price parallelism of the tyre companies including MRF.

98. MRF denied any allegation of price parallelism or cartel, as alleged or at alleventhough the information does not make any clear and specific allegation with material facts and particulars.

99. The letter dated 28.12.2007 from the AITDF is the starting point of the investigation, which has been lost sight of during the conduct of the investigation by the DG and in the conclusions arrived at in the report which travels beyond the allegations which clearly shows non-application of mind and the report ought to be rejected on this count.

100. It is submitted that the investigation is purported to be carried out pursuant to an order under section 26(1) of the Act dated 22.06.2010 by the Commission on a transferred case from the DG (I&R), the MRTP Commission under section 66(6) of the

Act. The scope of the investigation hereunder cannot be extended beyond the scope of the complaint under the MRTP Act, 1969. The letter dated 28.12.2007 from AITDF to Ministry of Corporate Affairs cannot be considered under the provisions of section 19 of the Act. No new information has been relied upon by the Commission to extend the scope of investigation upto 2010, nor was an order to that effect passed. The investigation, hence, is without jurisdiction and the investigation report needs to be rejected on this count.

101. It is the case of MRF that the investigation proceeded allegedly on the allegations by AITDF. Apart from the general allegations made against the tyre industry *viz.* anti-trade, anti-competition and anti-consumer *etc.*, one of the main allegations against the tyre manufacturers is that they are usurping the excise duty reduction. However, it has been pointed out that the main grievance as seen from the alleged complaint is related to imposition of Anti-Dumping Duties which are not under the purview of the scope of the Commission for the following among other reasons:

- a) Both the provisions work under different statutes and the authorities work under different ministries of the Government of India. In free trade, firms are allowed to charge different rates in different market. The result would be that firms would charge lower prices in foreign markets and higher prices in domestic markets, leading to material injury to the domestic producers. Had price discrimination taken place by a monopoly firm within one economy, the Government can intervene to stop consumer exploitation by enforcing law like the Competition Act, in India. However, in the international context, it is the anti-dumping duty that protects the domestic producers initially and consumers in the long run.

- b) The main purpose of imposition of Anti-Dumping Duty is to protect the domestic industries from predatory pricing. Dumping is a pricing practice where a firm charges a lower price for exporting goods than it does for the same goods sold domestically. It is said to be the most common form of price discrimination in international trade. It is a subtle measure of protection which comes under the non-tariff barriers and is product and source specific. Anti-dumping duties were initiated with the intention of nullifying the effect of the market distortions created due to unfair trade practices adopted by aggressive exports. The duty is justified because in case of many industries the start-up period is long and start-up costs are also high. Once these firms are forced out of the market as a result of dumping by exporters, it is very difficult for them to restart when the same exporters raise prices which is detrimental to the domestic industry affecting the livelihood of many.
- c) Usually the intentions of charging such low price to foreign consumers are to be able to wipe out the domestic industries and eventually acquiring monopoly power in the foreign market through predatory pricing. Thus, it is on this ground that the anti-dumping duties have been justified. AITDF is making its intentions amply clear regarding its prejudice directly to the domestic manufacturers and indirectly to the consumers in the long run. The intention of AITDF to stall or influence the Anti-Dumping Proceedings by initiating action against the tyre companies including MRF is illegal and uncalled for and hence the report made thereon ought to be rejected.

102. Besides, para wise comments have also been filed by MRF to the report of the DG.

103. Summing up the submissions, MRF has contended that the DG has erroneously proceeded to target it overlooking and ignoring the conduct of the Chinese tyre manufacturers who are dumping both bias and radial tyres in India at prices which are extremely low thereby adversely impacting the domestic tyre industry as a whole. The approach of AITDF is to support the said interests. The DG in its report has totally lost sight of the interest of the domestic tyre industry and is insistent on giving a report against the MRF and other tyre manufacturers and thereby furthering and advancing the interests of the Chinese tyre manufacturers.

104. The DG has also ignored the fact that AITDF is acting in an unfair manner by addressing representation in respect of levy of anti-dumping duty notwithstanding the fact that there is a Final Finding by the Designated Authority both in respect of bias tyres by its order dated 29.06.2007 and radial tyres by its order dated 01.01.2010.

105. The DG has ignored the fact that the Designated Authority is a distinct and different authority constituted under the Customs Tariff Act and AITDF is trying to do indirectly what cannot be done directly by seeking the intervention of the Commission in respect of matter relating to levy and removal of anti-dumping duty under the said Act.

106. The DG has completely ignored the fact that AITDF is abusing the process of law by having a second round before the Commission in respect of levy and removal of anti-dumping duty. The DG has also ignored the findings of the Designated Authority, which are final findings of fact and which can only be challenged in appeal before CESTAT.

107. The DG has also overlooked the order dated 31.03.2011 passed by CESTAT where the appeals against the Final Finding dated 29.06.2007 filed by ATIA and ACOG were dismissed.

108. It is further submitted that the letter/representation dated 28.12.2007 filed by AITDF to Corporate Affairs Ministry, news item dated 28.12.2007 in the Times of India and a document dated 09.06.2007 signed by Mr. S.P. Singh, Convener, AITDF cannot be regarded as information within the meaning of the Act either individually or collectively, warranting the conduct of any investigation by the DG, CCI. However, the letter dated 28.12.2007 was treated as information by the MRTP Commission resulting in the commencement of the investigation and the same is being continued by the DG, CCI.

109. It has been submitted that a bald and bare allegation of price cartel in the absence of any specific instance, any specific period or any specific type of tyre cannot be regarded as a valid and proper allegation of price cartel.

110. It has been contended that the only grievance made in the complaint is that the tyre manufacturers failed to reduce prices when rubber prices dropped to Rs. 82/kg. during July, 2006. This cannot and does not constitute an allegation of cartel which calls for an investigation. The allegation has to be viewed in the context of MRF having not effected price increase proportionate with the increase in natural rubber prices during the period January to June, 2006 when the natural rubber prices had peaked. Merereference to price cartel or price concert or price unison, in the absence of any facts or material particulars, cannot be regarded as a valid and proper allegation of price cartel.

111. Reference has been made to a decision of the Supreme Court in the case of *Union of India v. Panduram Kashinath More* AIR 1962 SC 630 at para 10 to contend that an allegation of improper conduct has to be made with material particulars and in the absence thereof, cannot be regarded as a valid and proper allegation of improper conduct. The said decision of the Supreme Court was followed by the Bombay High Court in the case of *Raymond Woollen Mills v. MRTP Commission*, 1982 Taxation Law Report 2590 and also by the Karnataka High Court in the case of *Micov. MRTP Commission*, 67 Company Cases 377.

112. It is argued that the aforesaid legal principle of setting out an allegation of *improper* conduct with material particulars is applicable to any allegation of anti-competitive agreements made under section 3 of the Act including section 3(3)(a) and 3(3)(b) thereof sought to be invoked in the present case which is patently wrong and hence the report is liable to be dismissed.

113. It is sought to be contended that general allegations however strong may be the words in which they are stated, are insufficient to amount to an averment of fraud of which any court ought to take notice. It is not a sufficient compliance with the rule to state facts and circumstances which merely imply that the defendant, or someone for whose action he is responsible, did commit a fraud of some kind. There must be a probable, if not necessary, connection between fraud averred and the injurious consequences which the plaintiff attributes to it; if that connection is not sufficiently apparent from the particular stated, it cannot be supplied by general averments.

114. It has been pointed out that the Ministry of Corporate Affairs by letter dated 28.01.2008 forwarded AITDF representation to the MRTP Commission. The MRTP Commission had by order dated 13.02.2008 considered the representation/letter dated 28.12.2007 and directed an investigation under the provisions of the MRTP Act, 1969 even

though the MRTP Commission had noted that the allegations of restrictive trade practice were not substantiated or elaborated.

115. Reference has been made to the decision of the Supreme Court in the case of *Competition Commission of India v. SAIL*, (2010) 10 SCC 744 where certain directions were passed in para 135 of the order and the same have been quoted to the following effect:

“(D).The Director General in terms of Regulation 20 is expected to submit his report within a reasonable time. No inquiry by the Commission can be proceeded any further in absence of the report by the Director General in terms of Section 26(2) of the Act. The reports by the Director General should be submitted within the time as directed by the Commission but in all cases not later than 45 days from the date of passing of directions in terms of Section 26(1) of the Act.”

116. From the above, it is sought to be urged that there has been a considerable delay on the part of the DG, the MRTP Commission and the DG, CCI in conducting and completing the investigation and submitting the investigation report. It is argued that the delay in completing the investigation and submitting the report has resulted in grave prejudice to MRF as a tyre manufacturer besides being in total and complete violation of the direction given by the Supreme Court to complete the investigation and submit the report in all cases not later than 45 days from the date of passing of direction in terms of section 26(1) of the Act.

117. It is further contended that the Customs Tariff Act, 1975 and the Customs Tariff (Identification, Assessment and Collection of Anti-dumping duty on dumped articles and for determination

of injury) Rules, 1995 form a complete and comprehensive code and the orders passed thereunder cannot be agitated in these proceedings though a backdoor approach by AITDF.

118. It is alleged that though AITDF has referred to final findings dated 29.06.2007 of the Designated Authority imposing anti-dumping duty on truck/bus Bias tyres imported from China and Thailand and final findings dated 01.01.2010 of the Designated Authority imposing anti-dumping duty on truck/bus Radial tyres imported from China and Thailand, AITDF has failed to point out the Final Findings dated 26.08.2010, being a Mid-Term Review and Order dated 18.11.2010 passed by the Customs, Excise and Service Tax Appellate Tribunal (CESTAT).

119. In conclusion, it has been prayed that the investigation report should and ought to be rejected on account of the fact that the investigation was without jurisdiction and the scope of the transfer of the case under section 66(6) of the Act was to conclude the proceedings under the MRTP Act, 1969 and not purported to extend the scope under the Act. Finally, it has been prayed that the proceedings may be closed.

Reply of Apollo Tyres Limited

120. Apollo has filed detailed objections to the report of the DG. At the outset, it has contended that the DG failed to prove any specific allegation against it. It has been stated that it is an essential ingredient to prove any allegation of anti-competitive conduct to demonstrate how a particular enterprise has violated provisions of the Act *i.e.* how such an enterprise has entered into an agreement which is in violation of the provisions of section 3(1) read with section 3(3) of the Act.

121. It has been submitted that the findings of the DG are based purely on circumstantial evidence of parallel behavior which,

according to the DG, is a violation of the provisions of the Act. It is stated that mere price parallelism cannot be considered as evidence of collusive conduct. The DG's report is purely based on speculation and the conclusions about parallel behavior are wholly unsustainable, particularly given the complete lack of any specific or direct evidence relating to Apollo in particular or the alleged cartel generally.

122. It has been stated that in the absence of any specific allegations being made and without backing of any cogent evidence, and even on the balance of probabilities, the DG's report must be dismissed in its entirety.

123. It has been pointed out that the DG has committed a fundamental error in failing to establish the timeframe in which the alleged cartel/anti-competitive activities took place, which is essential to many aspects of the case, including the period during which section 3 of the Act was not in force. Further, it is stated that the DG's report fails to give any reason for extending the period and scope of investigation beyond 2008 without any specific direction from the Commission. The mere fact that the DG has investigated the conduct of tyre manufacturers, between 2005 and 2010, in the absence of precise and coherent proof, does not in any manner indicate that any infringement occurred during such time frame.

124. It is the case of Apollo that the Commission formed its *prima facie* opinion only on the basis of the information and record available till 2008. There is no evidence on record which shows that the Commission collected or gathered any evidence relating to any alleged infringement after 20.05.2009 *i.e.* after the Act came into force but before the Commission formed its *prima facie* opinion. Therefore, it is urged, the investigation could not have been extended beyond the timeframe originally alleged in the information, which relates to the period prior to 20.05. 2009.

125. It is argued that for a cartel to survive there must be mechanisms in place for (a) coordinating the cartel agreement and ensuring the functioning of the cartel, (b) monitoring the behavior and conduct of the members of the cartel, and (c) punishing members of the cartel who do not fall in line with the decisions of the cartel. In the present case, the DG has failed to produce any evidence whatsoever that suggests that any of the above mentioned elements, which are critical to the operation and sustenance of any cartel arrangement, are present in the Indian tyre industry.

126. It is the case of the informant that in an industry (a) which is fragmented, (b) where market shares are unstable, and (c) where there is ease of entry, collusion is highly unlikely. This has been stated as a reason to contend that the industry conditions in India are simply not conducive to cartelization in the tyre sector.

127. Objection has also been taken on the ground that the DG has made very general and unsubstantiated statements regarding the industry without any specific reference to and evidence against Apollo in relation to its alleged role in the alleged cartel. It is alleged that the intention of the DG while conducting the investigation was to reach a finding of infringement under any circumstance, whatsoever, demonstrating a significant bias against Apollo.

128. Apollo emphatically denied that it engaged in any anti-competitive behavior in violation of the provisions of the Act. It specifically denied that it entered into any agreement, anti-competitive or otherwise, with any other tyre producer regarding pricing, manufacturing or distribution of tyres in India.

129. It is averred that without any direct, precise or coherent evidence, which is essential to prove an agreement and come to a conclusive finding of infringement under section 3(1) read with section 3(3) of the Act, the findings in the DG's report are not sustainable. Reference has been made to the decision of the Commission in the case of *NeerajMalhotrav. Deutsche Post Bank*, Case No. 05 of 2009 which provides that, in order to establish a finding of infringement under section 3(1) read with 3(3) of the Act, the agreement must be established unequivocally.

130. It is asserted that Apollo neither engaged in any activity nor ever entered into any agreement or concerted practice to directly or *indirectly* fix prices, limit production or supply, or in any other way, violated any provision of the Act. The DG has merely relied on the parallel nature of price movements, production and dispatches to suggest that there exists a cartel in the Indian tyre industry, which is a completely skewed and convenient conclusion, in gross ignorance of the market conditions in which the Indian tyre industry operates.

131. The DG failed to appreciate that there exists significant differentiation and heterogeneity in the Indian tyre industry with different producers producing a large variety of tyres. The DG completely ignored the fact that the availability of wide-range of tyres makes it more difficult to monitor cheating, essential to any alleged cartel's sustenance, making collusion harder to sustain. Therefore, argues Apollo, coupled with significant variance in the product offering in the Indian tyre industry and lack of any evidence adduced by the DG on the mechanism of the operation or enforcement of the alleged cartel clearly suggests, that the operation of a cartel in the Indian tyre industry is neither likely nor possible.

132. It is averred that Apollo has not engaged in limiting the supply or production of tyres as it has been consistently operating on 89% - 94% of its available capacity, during the last

five years, which cannot under any circumstance be considered to mean that it has been withholding its production artificially to the detriment of the consumers. It has been pointed out that capacity utilization in the Indian tyre industry is 70-90%.

133. It has been contended that the prices of tyres are not above competitive levels as stated by the DG. Tyre prices, as they currently stand, are not sufficient to sustain re-investment in the additional capacity to meet expected demand in future. In addition, while many tyre producers have reported losses in the last few financial quarters, all of them have reported a fall in profits and margins over many quarters. It has been further submitted that the tyre price rise has been far below the general Indian inflation level. On this basis alone, it is argued that it is inconceivable that there is cartelization in the Indian tyre industry. The tyre industry has faced steeply rising input costs. Over time, it is averred, which increases have, to a large extent, been absorbed by Apollo because of the inability to pass on costs through price increases due to intense competition in the market place.

134. It has been urged that the Indian tyre industry is highly competitive and has witnessed and continues to witness significant growth, both in terms of capacity addition and entry of new competitors. Further, the Indian tyre industry has seen significant new entrants such as Michelin and Yokohama coupled with imports from other low cost countries such as China despite anti-dumping duties, clearly indicates that the market is highly competitive and therefore, the issue of existence of a cartel does not even arise.

135. It is the case of Apollo that it always acts independently in determining its commercial affairs and does not engage with its competitors on any issue which might be considered as a violation of the provisions of the Act.

136. Challenging the findings of the DG holding Apollo in contravention of the provisions of section 3(1) read with sections 3(3)(a) and 3(3)(b) of the Act, it has been contended that the DG has failed to establish the required elements to make out a sustainable case under the provisions of the Act and therefore, the Commission must set aside the findings of the DG and close the case against Apollo.

137. Assailing the findings of the DG which suggest that the mere fact that prices for one particular T&B LUG tyre have moved in parallel is sufficient to establish an agreement for the purposes of section 3 of the Act, it has been argued that the existing jurisprudence in India, the European Union (EU) and the United State of America (US) does not in any way suggest that mere price parallelism, which is the only evidence put forth by the DG, would suffice. Further, it has been suggested that the same can never be conclusive measure of collusive behavior. The DG has also mis-stated the law which has been clearly laid down by the MRTP Commission in various cases and by other courts in the EU and the US.

138. It is averred that the DG has relied purely on circumstantial evidence *i.e.* economic evidence of market behavior to suggest there is an indication of collusive behavior in the tyre industry. It is alleged that the DG failed to accurately analyze the circumstantial evidence and its analysis is not supported by strong economic principles.

139. Referring to the findings of the DG relating to price parallelism, it is argued that price parallelism essentially means that prices for a particular product move in a similar manner. It has been highlighted that the DG in its report noted that prices of the tyre companies moved in a similar direction, and finally concluded that there exists price parallelism in the Indian tyre

industry. Based on the price parallelism, the DG concluded that there is a concerted action. Challenging this finding, it is argued that the DG jumped to conclusions based on its half-hearted attempt at proving price parallelism, other than which the DG's report adduces no evidence of the alleged cartelization. It is sought to be contended that it is well-settled globally that price parallelism, by itself, cannot amount to an evidence of collusive behavior.

140. It is the case of Apollo that sporadic parallel and independent behavior of tyre producers, responding to the prevalent market conditions, cannot be demonstrative of any agreement under section 3 of the Act. The DG has failed to provide any evidence of such an agreement.

141. It is also alleged that the DG made significant computational errors in arriving at its findings on price parallelism. The DG, for reasons only known to him, has examined prices of only one specific type *i.e.* LUG tyre to ascertain the evidence of parallel pricing.

142. The DG has not produced any evidence, including economic evidence, to show that mere parallel pricing leads to an inference of an agreement. Further, the DG failed to adduce any evidence to prove that the parallel pricing in the tyre industry, taking into account the nature of the products and the industry, the size and the number of producers and the volume of the market in question, cannot be explained otherwise than by collusive behavior. Even if it is assumed, without admitting, there was price parallelism, there is no reason to believe that the pricing behavior of the tyre manufacturers was not a result for the legitimate market conduct but some collusive conduct. If the Commission were to accept the DG's conclusions purely on the basis of parallel pricing, then no supplier/seller, in any industry, will be able to follow a general price increase/ decrease introduced by a competitor. If pure price parallelism is

considered to be sufficient proof of an agreement, even in the absence of conclusive evidence proving an express or implied agreement which is the clear requirement under the Act, it would result in the absurd outcome as competing manufacturers in any given market would not even be able to match price cuts, which would clearly be detrimental to the consumers and to competition in the market at large.

143. Alluding to the findings of the DG to the effect that the average capacity utilization in the Indian tyre industry dropped during 2005-2010 leading to an inference that the tyre manufacturers were not utilizing their capacity in full and therefore limited supply, it is contended that the DG has applied an incorrect measure to assess the industry-wide capacity utilization levels on the basis of installed capacity and has not considered the capacity that is actually available for production which takes into consideration various factors associated with functioning of a tyre plant such as ramp-up time, downtimes due to maintenance and /or breakdowns, age of the plant, plant lock-outs *etc.*

144. It is agitated that one of the key objectives of a cartel is to enhance the profits earned by the cartel members by fixing prices at levels that are close to monopoly level *i.e.* well above levels that would have prevailed if the producers had actively competed with each other. Prices cannot be kept at elevated levels if producers do not keep supply levels sufficiently low in relation to demand. In order to ensure that production and supply are low, it is often the case in cartels that there is very little capacity addition over time and in some cases, even a reduction of capacity. By ensuring that capacity and capacity additions are kept in check, cartelists can prevent other members of the cartel from 'cheating' on the rules by secretly producing more (with their unused capacity) and increasing their individual market share. This is clearly not the case here, as there have been significant industry-wide capacity additions over the last few years. It is

urged that Indian tyre industry generally and Apollo in particular, have added significant capacity over last few years. This fact alone completely discredits any argument made by the DG that Apollo has limited the production and supply of tyres in collusion with other tyre producers.

145. Impugning the analysis of the DG relating to capacity utilization, it has been pointed out that the DG erred in its report by focusing on capacity utilization and concluding the existence of a cartel based on perceived low capacity utilization levels, without analyzing the key variables that drive capacity utilization viz. capacity, demand and production etc. Technical constraints relating to operation of new capacity need to be factored into the calculation of capacity utilization. It is widely understood in the tyre industry that 100% of the installed capacity is not available for production from the first year a plant is commissioned and even thereafter. This is primarily because of various issues such as lead time (ramp-up) that is required by a plant to stabilize production, maintenance (both scheduled and un-scheduled), labour unrests etc. The DG has further ignored the fact that there was global economic crisis in or around 2008-2009 and the tyre industry was also adversely affected by the same because of the reduced demand by original equipment manufacturers i.e. automotive manufacturers and reduced demand in the replacement segment. The DG has drawn generalized reference to capacity utilization without considering specific aspects of each company and why there are movements in relation to the capacity utilization data. It is the case of Apollo that its capacity utilization has been consistently very high except for a short period in 2008-2009. It is alleged that the DG has completely failed to take into consideration that the lock-outs took place during the investigating period, thereby grossly mischaracterizing Apollo's capacity utilization. A closer scrutiny of the production figures reveals that Apollo has continuously added capacity and increased its production during the last 5 years and there was a drop in production in 2008-09 due to *force majeure* (lock-out at

its plants). In spite of lock-out at one of its plant in 2009-10, Apollo's actual production has gone up by 23%. In fact, on an industry wide basis, Apollo is the only tyre manufacturer in India which has added highest capacity during last 5 years.

146. Dealing with the issue of pricing of tyres above competitive levels, it is sought to be contended that the Indian tyre industry is highly raw material intensive, with raw material accounting for about 65-70% of the production cost for tyres. The key raw materials used in the manufacturing process are natural rubber (about 43% of the total raw material); synthetic rubber (about 15%); nylon tyre cord fabric (NTCF) (about 18%); carbon black (about 11%) and rubber chemicals (about 5%).

147. Challenging the findings of the DG to the effect that the major component which affects the price of tyres is the cost of natural rubber and the excise duty, it is argued that purely from the raw material input costs, there are number of other components which contribute significantly to the price of tyres, which the DG failed to take into account.

148. It has been argued that tyre manufacturers' cost of production and consequently margins are dependent on the price movements of raw materials. The prices of natural rubber, the key raw material constituting around 43% of the total tyre production costs, witnessed a sharp rise during fiscal 2010-11. Domestic rubber prices increased from lows of Rs. 95/kg in May 2009 to highs of Rs. 240/kg in April 2011 while global natural rubber prices rose from USD 1.64/kg to USD 4.83/kg during the same period. This unprecedented price was on account of a sharp increase in demand-particularly from the global tyre industry, rise in crude oil prices, and speculative interest in global rubber futures. Coupled with the demand spike, supply was disrupted by adverse climatic conditions in key rubber cultivating countries like Thailand (largest producer in the world), Indonesia, India and China. It has also been pointed out that the DG has considered

per kg weighted average cost of natural rubber as derived from the Rubber Board's database, which gives an indication of cost on yearly basis whereas the cost of natural rubber fluctuates on daily basis. Further, the cost of natural rubber to the tyre manufacturer depends on the cost of imported natural rubber which also fluctuates in international markets, coupled with fluctuations in foreign exchange rates. Hence, it is argued that considering average domestic price is incorrect. Additionally, it is contended that the average price of natural rubber has increased significantly over the last eight years, which in turn have had a significant 'knock-on' impact on the cost of production of tyres and consequently increase in tyre prices.

149. It has been pointed out that the report has failed to analyze movement in other elements of the cost of production *i.e.* utility cost, crude oil, nylon prices, salary & wages, depreciation, general administration cost *etc.* The tyre industry involves heavy investment in research and development (R&D) and technological advancements. The DG has failed to appreciate the other costs involved in the tyre industry and has gone merely by price movement in natural rubber. This is a faulty approach, argues Apollo.

150. Grievance is also made of the fact that the DG has made general observations that tyre manufacturers have not passed on the benefits of the decreased excise duty to the customers. It is alleged that in complete contrast to the assertions/findings by the DG, Apollo has been diligently passing on the benefits of excise duty reductions in the best interests of its customers.

151. It is also contended that the mere fact that Apollo is making profits on the sale of tyres cannot be suggestive of violation of the Act. The DG has failed to appreciate that Apollo's profits have fallen, clearly showing that the market conditions are volatile and competitive, which cannot support the formation or existence of a cartel either in theory or in the 'real world'. The DG has also failed

to appreciate that the cost of sales has increased substantially over last five years. The DG's method of considering absolute operating margins to measure profitability are fatally flawed because gross or operating margins on their own cannot indicate whether prices charged by any company are supra-normal.

152. Coming to the market share analysis of Apollo and the industry, it has been pointed out that the DG has examined market shares for the period 2005-10 for the five manufacturers using the information submitted by Birla Tyres. The DG has concluded that during the investigation period the five domestic tyre companies consistently accounted for around 95% share of the total production. This, according to the DG, implied very high dependence of OEMs and the replacement market on these five companies. In addition to that, the DG also noted the movement in the shares of the respective manufacturers for the period under investigation.

153. Apollo has challenged the market share analysis conducted by the DG. It has been pointed out that the market shares of key players in an industry can have significant impact on their ability to arrive at an agreement. The analysis has been challenged *inter alia* on the grounds that the DG failed to take into consideration imports as also the fluctuations in market shares.

154. Challenge is also laid to the findings of the DG to the effect that Apollo's prices are higher than the other major domestic tyre manufacturers which strengthened the argument that there exists price leadership. It has been submitted by Apollo that whilst the DG has made some theoretical assertions, it has completely failed to prove that there exists price leadership. The DG has not adduced even a single piece of empirical evidence to prove that price leadership exists in this market. Further, the mere fact that Apollo charges a higher price than other tyre manufacturers does not in any way, in the absence of any direct

and cogent evidence, suggest that other manufacturers follow Apollo's price as a result of some kind of anti-competitive agreement. If the DG's logic is to be believed, it would mean that all manufacturers who independently decided to follow the pricing of a company with a higher price in the market would be unable to do so without breaching the Act. Such a result would not only be erroneous but also absurd as it would lead to suppression of independent decision making and completely destroy the dynamics of a competitive market.

155. Referring to the findings of the DG that the domestic tyre manufacturers have collectively tried to resolve or frame collective strategy in order to protect themselves and exchanged information in relation to developing strategy on low cost tyres, export realizations, anti-dumping proceedings *etc.*, it has been strenuously argued by Apollo that it has not indulged in any exchange of information, either on its own or through ATMA, which may in itself be considered as or result in anti-competitive agreement.

156. Apollo is also aggrieved of the fact that the DG relied upon historic data, which in some cases was more than 25 years old to substantiate his findings. Such reliance on these historic reports was completely fallacious and sought to portray an incorrect picture, which is divorced from the reality of present day demand and supply conditions faced by market participants. Further, the findings in these reports/studies cannot even be considered as circumstantial evidence since it is purely historic and in some cases is more than 35 years old, and the conclusions given in the reports (especially the academic studies) is not based on complete data. There are inherent gaps in these reports. Further, these reports do not in any event suggest that there is an agreement among various tyre manufacturers in violation of provisions of the Act.

157. The DG has sought to produce the findings of the Tariff Commission, to suggest that the tyre manufacturers were making huge profits and the market forces have been unable to bring benefits to the consumers in the form of lower price. The Tariff Commission reports, are in respect of Tariff Commission Report Phase I (1985) and Tariff Commission Report Phase II (1988) which clearly suggests that one was prepared approximately 26 years ago and the other was prepared 23 years ago. It is alleged that these reports are completely out of date and relate to a period which was steeped in License Raj, when there were little or no imports and are therefore completely divorced from the market realities of today. The reliance by the DG on these reports is totally misplaced and the same must be out-rightly rejected by the Commission, submits Apollo.

158. Additionally, referring to the Anti-Dumping Duties, it has been submitted that consequences of Government action or policy cannot be attributed to the enterprises carrying on business in the industry. Government policy is not a result of an agreement amongst enterprises. Therefore, the Commission is not an appropriate forum to challenge Government policy. Anti-dumping measures by the Government are purely policy decisions which are out of the jurisdiction of the Commission. Apollo cannot be held liable on account of anti-dumping duties levied as result of the policy decision of the Government of India and allegations in relation to these should be dismissed in their entirety. Further, it is averred that the anti-dumping duty has been removed with effect from August 2011 placing imported tyres in direct competition with the domestic tyre manufacturers.

159. Lastly, grievance has been made relating to some alleged procedural errors *viz.* extension of investigation period by the DG; infirmity in the *prima facie* order; lack of reasons *etc.* Besides, some miscellaneous arguments have also been made by Apollo.

160. Based on the above submissions, it has been prayed to the Commission to dismiss the findings of the DG in its entirety and to exonerate Apollo from all the allegations.

Reply of M/s JK Tyre & Industries Ltd.

161. J K Tyre has filed its reply to the report of the DG. It has pointed out that the report overlooks and ignores the scope of the AITDF letter dated 28.12.2007 which has been treated as information limiting the allegation to removal of anti-dumping duty and not passing on the benefit of excise duty reduction. It is stated that both the aforesaid allegations are outside the scope of the MRTP, Act, 1969 and the Competition Act, 2002. The allegations relating to the anti-dumping duty and removal thereof fall under the purview of the Customs Tariff Act, 1975 and the Customs Tariff (Identification, assessment and collection of anti-dumping duty on dumped articles and for determination of injury) Rules, 1995 (Anti-Dumping Rules).

162. To buttress the point, reference has been made to the decision of the Supreme Court in the case of *Haridasv.All India Float Glass Manufacturers Association*, (2002) 6 SCC 600 where it was held that the two statutes and regimes operate in different and distinct spheres and there is no conflict between them. Referring to para 48 of the order, it has been pointed out that the Supreme Court held that whether to allow imports or not and the terms on which an item may be imported is a matter of policy and regulated by law. In para 49, it was held that to allow a challenge to actual import will amount giving to MRTP Commission jurisdiction to adjudicate upon the legal validity of the provisions relating to imports, which jurisdiction the MRTP Commission does not have. Thus, it is contended that the rate of import duty, which is imposed, is a legislative act and is, thus, not amenable to jurisdiction of the MRTP Commission. The levy or non-levy of anti-dumping duty or other duty being a legislative act under the Customs Tariff Act is also not a matter of judicial review by the MRTP Commission.

163. Further, it has been averred that the Customs Tariff Act, 1975 and the Customs Tariff (Identification, assessment and collection of anti-dumping duty on dumped articles and for determination of injury) Rules, 1995 (Anti-Dumping Rules) form a complete and comprehensive code. It has been submitted that allegations made by AITDF against levy of anti-dumping duty on import of truck/bus tyres (Bias) could be agitated only before the Designated Authority or the Tribunal (CESTAT) and could not be agitated before the Commission.

164. It is alleged that AITDF is guilty of *suppression very and suggestion falsi* as it has suppressed material facts from the DG and the Commission. It has been pointed out that AITDF by its representation dated 28.12.2007 suppressed the fact that the Designated Authority by Final Findings dated 29.06.2007 had imposed anti-dumping duty on trucks/bus tyres (bias) imported from China and Thailand after an extensive hearing where the AITDF had also fully participated and made their submissions and the AITDF had not filed any appeal against the Final Findings of the DA. By suppressing the above facts, it is alleged that AITDF was able to abuse and misuse the judicial process by persuading the DG (I&R) and the DG, CCI to investigate the matter notwithstanding the fact that the Final Findings are final and binding *qua* AITDF and consequently, any grievance in this regard could not be entertained. It is further alleged that AITDF also failed to point out to the DG the Final Findings dated 26.08.2010, being a Mid-Term Review, passed by the DA enhancing the anti-dumping duty and Order dated 31.03.2011 passed by the Central Exercise and Service Tax Tribunal dismissing the appeals filed against the Final Findings dated 29.06.2007 of the DA.

165. Raising the plea of *res judicata*, it is argued that the same would constitute a bar to the very entertainment of the

information filed by AITDF pending before the Commission seeking the relief of removal of anti-dumping duty. Reference has been made to the provisions contained in section 11 of the Code of Civil Procedure, 1908 which provides that no Court shall try any suit or issue in which the matter directly and substantially in issue has been directly or substantially in issue in a former suit between the same parties or between parties whom they or any of them claim, litigating under the same title, in a court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such court. It has been urged that the principle of *generaliaspecialibus non deroganti.e.* in case of a conflict between the general and special provision, the latter provision would prevail.

166. Raising the issue of retrospectivity of the provisions of the Competition Act, 2002, it has been contended that the same cannot and does not have a retrospective application. The provisions relating to anti-competitive agreements came into force with effect from 20.05.2009 whereas the representation of AITDF was dated 28.12.2007 and merely refers to price increases made by tyre companies in the year 2006. AITDF did not make any allegation during the investigation before the DG (I&R), the MRTP Commission and the cause of action, if any, arose in 2006. Subsequently, the investigation was transferred to the DG, CCI in the year 2010. At the relevant time of filing of the representation dated 28.12.2007, only the MRTP Act, 1969 was in existence. The Competition Act cannot have a retrospective application in relation to price increase in the year 2006.

167. Further, it has been submitted that the report fails to allege much less establish an 'agreement' between J K Tyre and its competitors, which is a condition precedent for a price cartel. Reference has been made to the decision of the Supreme Court in the case of *Union of India v. Hindustan Development Corporation*, (1993) 3 SCC 499 at 531 para 14 to contend that a mere offering

of a lower price by itself, though appears to be predatory, cannot be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. It has been submitted that the report fails to show that J K Tyre had entered into an agreement with its competitors to limit or control the production, distribution, sale or price of goods. It has also been pointed out that the representation of AITDF does not refer to the same.

168. The economic principles of price parallelism as relied by the DG have been disputed and denied by J K Tyre. Referring to the finding in the report at page 24 holding that there is marginal difference in the net dealer price of all companies except Apollo, it is argued that the same demolishes the case of price parallelism. It is alleged that the DG appeared to be relying on surmises and conjectures and perceptions about tyre industry rather than on facts and data furnished by J K Tyre during the course of investigation. Alternatively, it is argued that the marginal difference in the net dealer price of different tyre companies and a gap with the price of Apollo Tyres would explode the myth of cartel.

169. It has been contended that an allegation of a cartel is an allegation of improper conduct or serious misconduct which cannot be made in a vague or general manner based on an impression or perception. An allegation of improper conduct has to be laid down with material facts and material particulars. There has to be clarity and certainty and accuracy about the material facts and material particulars in the information petition to show how a charge of cartel is made out. In the absence of any material facts or particulars constituting a cartel, the same cannot be regarded as a valid and proper allegation of cartel, which needs to be answered by J K Tyre.

170. It has been strenuously contended that price parallelism by itself cannot amount to a price cartel. To support the plea,

reference has been made to the decisions of the MRTP Commission in the cases of *RRTA v. ACCI Bayer* (1993) 1 CTJ 7 *et al* where it has been held that price parallelism does not amount to cartel. Without prejudice to the above legal proposition, J K Tyre denied any allegation of price parallelism or cartel, as alleged or at all.

171. Detailed parawise comments have also given by J K Tyre.

172. Referring to the price analysis carried by the DG, which has been further subdivided into price structure and price movement, it has been stated that the same is incomplete and it has been averred that it is incorrect to suggest that the cost of natural rubber and excise duty would constitute the major component affecting price of tyres. It has been contended that the DG has wrongly held that during the investigation period excise duty has shown a downward trend. It is argued that excise duty has, in fact, increased from 8% to 10% with effect from 01.03.2010 and therefore it is incorrect to suggest that excise duty has shown a downtrend as observed by the DG. It is the case of J K Tyre that it had passed on more than the entire reduction of excise duty from March, 2008 to March, 2009. The finding of the DG that reduction in the excise duty was not passed on by J K Tyre has been denied. It has been submitted that the aforesaid finding of the DG demonstrated a complete lack of understanding of the tyre trade. The present investigation relates to the purported information filed by AITDF purporting to act on behalf of tyre dealers. J K Tyre sells its products on a principal to principal basis to tyre dealers who in turn sell the products to the truck owners or customers. There is no privity of contract between the J K Tyre and the truck owners or customers. Moreover, J K Tyre issues a Price List which *inter alia* contains the Net Dealer Price (NDP) and the maximum price which is the maximum recommended price. J K Tyre is not in a position to ensure that the tyre dealers in fact pass on the benefit of reduction in excise duty to the truck owners/consumers.

Grievance has also been made the DG has wrongly equated the tyre dealers with consumers. It has been stated that the tyre dealers are in fact resellers of tyres and do not actually use or consume the tyres. This demonstrates that the DG has failed to take into account the fact that dealings between J K Tyre and the tyre dealers are on a principal to principal basis and the tyre dealers in turn sell the products to the truck owners/ customers.

173. It has been alleged that the DG's report is riddled with inconsistencies and contradictions, which throw a serious doubt regarding the correctness of the figures mentioned in the report. Reference has been made to the analysis of natural rubber prices by the DG in this regard.

174. It has been pointed out that there are several raw materials used in the manufacture of a tyre apart from natural rubber. The approach of the DG in referring to only natural rubber out of the several raw materials *viz.* Nylon Tyre Cord, Carbon Black, Beadwire *etc.* used in the manufacture of tyres demonstrates lack of understanding of the process of manufacture of tyres. The patently erroneous approach based on a rough and ready assessment without taking into account the cost of all the raw materials used in the manufacture of the tyre has been objected to by J K Tyre. It has been, however, agreed by J K Tyre that the natural rubber cost is a major contributor to the cost of production but it is not the only factor. Thus, it is argued that the change in cost of production is never exactly same as that of change in natural rubber prices.

175. Exception has been taken to the finding in the report that no satisfactory explanation was given to the increase in cost of production despite substantial reduction in price of natural rubber. It has been argued that the weighted average price of natural rubber furnished by J K Tyre showed that there was an increase in prices from 2009-2010. Thus, the finding itself has

been described as patently wrong since the report failed to consider the data furnished by J K Tyre which demolishes the finding given in the report. Further, it has been submitted that the DG has not asked for any explanation from J K Tyre in the probe letters sent in this regard.

176. With regard to the finding that tyre companies have been inflating some miscellaneous expenses into the cost of production to reduce their net profit margins, the same has been strongly disputed by J K Tyre. It has been pointed out that J K Tyre is a listed public limited company and its accounts are audited by Statutory Auditors who are appointed by the shareholders. The audited results are circulated to around 30,000 shareholders of J K Tyre and the same are approved in the annual general meeting.

177. It has been submitted by J K Tyre that it produces bias and radial tyres of different categories in different sizes. As the investigation was confined to only one size of truck tyre (LUG), the reference to the total production of all tyres for all categories and all sizes as a basis of comparison clearly amounted to a comparison between incomparable. The DG has deliberately tried to compare the total production of all tyres with the Net Dealer Price of one particular size of tyre of J K Tyre i.e. 1000.20 16 JTK LUG.

178. It has been contended that the chart showing the Net Dealer Price (weighted average) for 5 LUG Tyres of 5 companies does not disclose any price parallelism, as alleged or at all. The difference between the highest price and the lowest price varies considerably both in actual amount as well as in terms of percentage. It has been pointed out by J K Tyre that it was giving discounts to its dealers during the aforesaid period and the Net Dealer Price is not the effective price at which the tyres are supplied to the dealers. It has also been added that the dealer margin which is the difference between the maximum price and

the selling price in respect of the tyre under investigation continues to remain very high and ranges from 10.2% to 16.2% from 01.04.2002 till date. Based on this, it is contended that it demolishes the case for any alleged grievance made by AITDF purportedly on behalf of tyre dealers relating to price increases affected by J K Tyre, which has no bearing or impact on the margin of the dealers whatsoever.

179. It has been reiterated that the price increases are based on market factors including changes in cost of production to leave a reasonable margin of profits and return on investment.

180. It has been argued that the chart in the report showing capacity utilization movement related to all tyres whereas the present investigation was confined to one particular truck tyre. It has been pointed out that the said chart fails to take into account that the domestic availability of truck tyres of J K Tyre had, in fact, increased during the period.

181. Similarly, objection has been taken to the fact that cost of sales, sales realization and the difference between the two have been taken from all truck tyres of different sizes both bias and radial whereas the investigation was confined to only one truck tyre (bias) *i.e.* 1000.20 16 JTK LUG Tyre.

182. The approach of the DG in drawing a conclusion based on the profit of a single year *i.e.* 2009-2010 insofar as J K Tyre is concerned has also been faulted. It has been alleged that the DG failed to take into account the profit for the previous years which was less than 1% except in 2006-2007.

183. With reference to market share analysis, it has been pointed out that the said data is based on total production figures of truck tyres. The said data fails to take into account export figures

which have to be deducted from the total production figures to show the actual domestic tyre availability and the consequent market share. It is sought to be clarified that for the year 2009-2010, there was an illegal strike in the factory of J K Tyre. It is stated that the changes in the market share figures from 2005-2010 show that there is intense competition in the tyre market.

184. It has been conceded share of production of top 5 companies is over 95% but it is sought to be explained by arguing that the same is the scenario globally where top 10 companies command over 80% of the market supplies.

185. It has been submitted that there is no restriction on the entries of new players from the domestic as well as international markets but industry has not remained very attractive due to very low return on investments.

186. Lastly, it is urged that J K Tyre is a member of ATMA and does in fact attend meetings of ATMA held on different dates to discuss common issues faced by the tyre industry. With regard to the allegation of 'Low Cost Tyres Strategy' in the report, it is denied that J K Tyre as a member of ATMA adopted the alleged strategy of launching low price tyres. It has been averred that J K Tyre is following its unique marketing strategies to sell its products in a highly competitive market. Similarly, allegation of 'collectively blacklisting the importers' has been denied as wholly misconceived and incorrect.

187. In view of the above submissions, J K Tyre has prayed to the Commission to reject the report of the DG and to close the proceedings.

Reply of Kesoram Industries Limited (Birla Tyres)

188. Birla Tyres has filed its reply/ objection to the report of the DG and written submissions/ additional affidavit in reply/ objections. At the outset, it has been pointed out there is a serious jurisdictional error committed by the DG to proceed with the investigation in a transferred case under section 66(6) of the Act by applying new standard in respect of conduct and practices which happened prior to coming into effect of the Act *i.e.* on or before 20.05.2009, the date when the Act came on the statute book and more particularly, when there is no specific assertion/allegation in the complaint or in the term of reference order of Commission dated 22.06.2010 that there is a continuance of practice by the noticee as forbidden under the Act. Thus, the entire assumption of jurisdiction by the DG to test the conduct and/or practices of the noticee companies on the basis of the standards set by the new law for a period prior to its date of implementation is faulty and erroneous.

189. It has been further contended that the DG's report has proceeded on wrong, erroneous and faulty premise by limiting and restricting investigation to truck and bus tyres (bias lug tyres) of different make and specifications without clearly setting out the reasons and/or justification for doing so.

190. It has been submitted that in order to arrive at a conclusion as to whether there is any formation of 'cartel' as defined under section 2(c) of the Act, there has to be a clear finding on the existence of the 'agreement' as defined section 2(b) of the Act. Although, the 'agreement' as defined under section 2(b) is a wide and inclusive definition which not only includes formal written agreement which is enforceable in law but also informal 'understanding' and 'arrangement' in the widest possible meaning, yet no material evidence was cited by the DG in its report about the existence of any agreement as defined. Thus, it is argued that based on the material available on record, the DG has not been able to come to a conclusion or recorded any finding of the existence of any 'agreement' as understood under section

2(b) of the Act. It is further submitted that when the direct proof is not available about the existence of the 'agreement', the circumstantial evidence may form a basis of a reasonable inference about the existence of such agreement but the DG has also failed to produce any conclusive proof or establish the existence of the circumstantial factors from where the easy inference can be drawn as to existence of the agreement. It is alleged that in the present case, no evidence was produced or relied upon by the DG which points to the collusive meeting of minds of the domestic tyre manufacturers or which indicates conspiracy of any sort to restrict free flow of goods or jacking up the prices by creating artificial demands in the market to ward off competition. The entire approach of the DG on the formation of the opinion about the existence of cartelization has been described as based on mere conjectures or surmises.

191. It has been pointed out that the DG in its report has referred to the minutes of the meetings of ATMA to hold that it acted as a platform for exchange and sharing of information related to price, export and other related issues and therefore, concluded that five major tyre manufacturing companies have 'acted in concert' in violation of the provisions of sections 3(3)(a) and 3(3)(b) of the Act. This conclusion has been challenged as totally faulty and erroneous because there is no minutes of ATMA produced or brought on record to support the conclusion that there is a meeting of minds of the different tyre manufacturers determining the prices of the products to be sold in the market. It has been submitted that the strategy to determine the prices of the product is all guided and governed by market forces as there is an intense competition amongst the tyre manufacturers. Mere exchange of views and opinions and share of information relating to common issues to the tyre industry cannot be termed as an anti-competitive behavior until and unless a tacit understanding or concerted action is proved to be found restricting competition. In this connection, reliance was placed on the judgment of US Supreme Court in *Maple Floor Manufacturers' Association*

v. *United States of America* 268 US 563. The following passage has been quoted in this regard:

“It is not, we think open to question that the dissemination of pertinent information concerning any trade or business tends to stabilize that trade or business and to produce uniformity of price and trade practice. Exchange of price quotations of market commodities tends to produce uniformity of prices in the markets of the world. Knowledge of the supplies of available merchandise tends to prevent over production and to avoid economic disturbances produced by business crisis resulting from over production. But the natural effect of acquisition of wider and more scientific knowledge of business conditions, on the minds of the individuals engaged in commerce, and its consequent effect in stabilizing production and price, can hardly be deemed as restraint of commerce, or, if so, it cannot, we think, be said to be an unreasonable restraint, or in any respect unlawful”

(Emphasis added)

192. Further, it is averred that because of the wrong and incorrect data selection and adoption of incorrect methodology in comparing the prices of the products of different tyre manufacturers, the result arrived at by DG on price parallelism is faulty. It is stated that there is no lowest common denominator based on which the price movement was examined or changes in the price was recorded. No common platform was formulated to measure the price movement of tyre or any specific time frame was selected in comparing the price movement. Prices of the raw materials as well as the finished products rise and fall either on daily basis, monthly basis or yearly basis. In such a price movement scenario, the movement of the price cannot be examined and compared between the different manufacturers of tyres without first bringing the data under one common platform. Without doing so, it always runs the risk of doing a comparison between non-comparable. There are no clear-cut measures adopted to arrive at-i) Net dealer price; and ii) Net weightage

average. Each manufacturing unit has its own method of adopting the net dealer price or net weightage average. No common identifiable measure to compare the price was selected. Pattern of price changes by the domestic tyre manufacturers with respect to time was not examined properly. Finding recorded to the effect that drop in the prices of rubber or the excise duty reduction, benefit of which are stated to have not been passed on to the consumers are also faulty as it has not analyzed properly taking into account the time factor, rise and fall of prices of procured prices of natural rubber both in domestic and international markets, interface between manufacturer and dealers and also the rise of input costs of other raw materials required for tyre productions as indicated by the various tyre manufacturers. All this has been done on the basis of 'pick and choose approach' and in perfunctory manner which only behooves of the nature of comparing oranges with apples. The entire basis of the finding on price parallelism has been described as faulty and erroneous.

193. Refuting charges of price parallelism, it has been contended that assuming price parallelism exists then also adoption of parallel business behavior in a highly competitive market scenario does not mean anything. It may only give an indication of price stabilization in the market. Reference has been made to *Alkali Manufacturers' Association of India, In re RTPE No. 26 of 1984 Order dated 29.05.1985*; *Bell Atlantic Corporation v. Twombly* 550 US 544 (2207); and *Wood Pulp case of EU Commission*. It has been submitted that it can, at best, be considered as one of the price stabilization factor but cannot be taken to have established as an arrangement which would require something more to justify that the anti-competitive practice exists in the market. Reference has been made to *American Tobacco Co. v. US* 1946 (328) USS 781. It is argued that an anti-competitive practice is a course of conduct which has or is intended to have, or is likely to have the effect of restricting, distorting or preventing competition in any market. In the present case, it is argued that the DG in its report merely indicated price parallelism as one

form of business behavior to show that there is a conspiracy at work between the five domestic tyre manufacturers to fix the price at a level which is independent of market forces. The effect of price parallelism has been projected in a manner as an entry barrier from the fact of anti-dumping investigation initiated at the instance of the domestic tyre companies against foreign tyre majors which has its origin in- China and Thailand. The DG did not consider it necessary to investigate as to whether there is any entry barrier or not. In fact, Michelin and Bridgestone which are internationally renowned tyre manufactures are setting up their production plants in India with a high investment cost which was not even noticed by the DG in its investigation. Thus, 'working in concert' was made the only available option to attack the domestic tyre manufacturers in formation of an association to lodge an anti-dumping case against the Chinese and Thailand tyre importers. Any law which statutorily required forming an association in order to lodge a complaint under anti-dumping proceeding cannot be considered to be anti-competitive behavior.

194. It has been submitted that the DG in its report referred to price parallelism as a good measure of indicator that information sharing has taken place between five domestic tyre manufacturers. This reasoning has been impugned as faulty by arguing that mere sharing of information cannot be considered to be anti-competitive behavior as it would be then going against the freedom to form association, in the instant case-ATMA, which is a constitutionally guaranteed right to form association under Article 19(1)(c). Until and unless, it is proved with reasonable certainty with material evidence that there is a conspiracy or collusive design amongst the members of the association which can be reflected in any form of agreement, as known in competition law, to ward off competition, it cannot be said that mere sharing of information is an anti-competitive practice.

195. Objection is also taken to the report of the DG by pointing out various inconsistencies therein in so far as when it records

that the companies are not utilizing capacity in full thereby limiting supply. It has been pointed out that in the case of Birla Tyres capacity utilization has been always at its peak amongst all domestic tyre manufacturers, which the DG itself has recorded in its report which shows that capacity utilization is 97.67% in 2007-08 and 104.57% in 2009-10. The DG has failed to take note of the production cost including various other elements/factors. One of the main factors which the DG has identified for anti-competitive activities by five domestic tyre manufacturers is that the consumers are not benefited by the reduction in the prices of the natural rubbers and excise duty. It is alleged that it was not considered necessary and/ or essential to note and record that there are other important input costs, increase of which has the effect of cost increase of the products.

196. It has been further pointed out that the effect of increase in price of petro based products has got an adverse effect on the procurement prices of synthetic Rubber, Nylon Fibers, Carbon Black *etc.* which are directly linked to crude oil prices.

Reply of M/s Ceat Limited

197. Ceat in its reply stated that the investigation report dated 25.05.2011 has failed to make out even a semblance of a case of cartel against it. It has been pointed out that the report itself has clearly and categorically held that there is a gap between the net dealer price (weighted average) and the price of market leader Apollo and that of other companies thereby rebutting the charge of the cartel against the five tyre manufacturers. For this reason, it is contended that the report is liable to be rejected and the proceedings ought to be closed.

198. Objection is also taken on the ground that the provisions of the Act cannot and does not have a retrospective application.

199. Further, it has been submitted that an 'agreement' between competitors is a condition precedent to establish an allegation of cartel. Reference has been made to the decision of the Supreme Court in the case of *Union of India v Hindustan Development Corporation*, (1993) 3 SCC 499 at 531 para 14 to contend that a mere offering of a lower price itself, though appears to be predatory, cannot be a factor for inferring formation of a cartel unless an agreement amounting to conspiracy is also proved. The investigation report fails to show that there was an 'agreement' between the tyre manufacturers. Thus, it is urged that the proceedings ought to be disclosed.

200. It is the case of Ceat that once an 'agreement' is found amongst players in the same business thereafter the investigation shall follow to ascertain causation of appreciable adverse effect on competition in India in terms of the statutory factors laid down under section 19(3) of the Act. It is alleged that this has not been done in the report.

201. It is contended that the findings based on 'price parallelism', appear to be in an effort to somehow pin down Ceat when no action in concert was established. It has been pointed out that the DG has held that the net dealer price (weighted average) of Apollo, being the price and market leader for truck/bus tyres, was much higher than the net dealer price (weighted average) of the other four tyre companies including Ceat. Further, while disputing the methodology adopted by the DG and while affirming that even the net dealer prices (weighted average) of the other four tyre manufacturers were different and distinct from each other, the question of price parallelism much less cartel cannot and does not arise. The participation by tyre companies in meetings of ATMA is not indicative of cartel because unless the meetings and/or concerted action categorically indicates that the participating companies have decided price fixation of tyres and implemented the same in letter and spirit, the minutes of the

meeting of ATMA cannot conclude triggering sections 3(3)(a) and 3(3)(b) of the Act.

202. It is averred that the so called 'Price Parallelism' as highlighted by the DG in its investigation report (which is not made out) does not substantiate existence of an agreement between Ceat and other tyre manufacturers.

203. Giving background of the present investigation which was commenced on the basis of the letter/representation dated 28.12.2007 from AIDTF to the Ministry of Corporate Affairs, it has been contended that the main grievances of AIDTF relate to (i) levy of anti-dumping duties on imported truck/bus tyres both bias and radial, from China and (ii) tyre manufacturers not passing the benefit of excise duty reduction to tyre users.

204. It has been pointed out that the report has failed to consider that both the above grievances raised by AIDTF fall outside the ambit and scope of the MRTP Act and the Competition Act and on this ground alone, the investigation ought to be closed. It has been further submitted that in the absence of any particulars of facts or period for the alleged cartel in the representation, the investigation report has erroneously proceeded in the absence of a valid allegation of cartel supported by particulars and the findings contained therein are clearly contrary to law and the report ought not be entertained and the proceedings ought to be closed.

205. Reference has been made to the contentions raised by AITDF before the DA, which include the contention that there is cut-throat competition between the domestic producers. This submission made by AITDF before the DA would demolish any allegation of cartel inferred from the representation and the

question of entertaining the investigation report cannot and does not arise.

206. Ceat has also accused AITDF guilty of suppression of facts and forum shopping. It is averred that the information is made by AITDF whose credentials of having any *locus standi* as an apex body representing the manufacturers and consumers is a questionable one.

207. It has been asserted that on a plain reading of the information, it is evident that the angst of AITDF is directed against the application filed by tyre companies through their association seeking imposition of anti-dumping duty by the DA.

208. It has been further submitted that the application of the tyre companies represented by ATMA merely petitioned the DA, duly constituted under the law alleging dumping of tyres by foreign exporters against the norms spelt out under the relevant statute and the rules framed thereunder.

209. It has been argued that the action taken by Ceatis in due process of law and the orders passed are by an authority constituted under the law.

210. Further, challenge is made to the findings of the report by arguing that the DG has failed to disclose in the report the basis on which he has decided to compare the tyres under investigation of the tyre manufacturers including Ceat. It has been submitted that there are a number of tyre sizes which are substitutable for and comparable with the tyres under investigation. It is alleged that the DG has proceeded to investigate a few selected tyre sizes without investigating the comparable tyre sizes of all tyre manufacturers.

211. It is the case of Ceat that it has, in fact, passed on the benefit of excise duty reduction to the dealers. This is stated to be evident from the price list issued by it. Without prejudice, it is also argued that no notification or statutory directive was issued to pass on such benefits to the consumers. Grievance has also made to the reliance of the reports of the Tariff Commission of the years 1985 and 1988 by the DG which do not relate to or have nexus to the period of investigation from the years 2005-2010.

212. It has been further averred that the DG has wrongly concluded that the price of natural rubber has increased in 2008 but has fallen in 2009 and again increased in 2010. In fact, it has been submitted that the price has increased from 2005 to 2008 and again risen sharply in 2010. It has been alleged that there are contradictory figures for prices of natural rubber (weighted average) in the investigation report. Further, the DG has failed to disclose on what basis he has arrived at the figures relating to natural rubber prices (weighted average). It is further stated that the conclusion arrived at by the DG is totally flawed as he has failed to consider the wide range of variation in the prices of natural rubber during the investigation period.

213. Alluding to the finding of the DG that the net dealer prices (weighted average) of the tyres under comparison of the five tyre companies were more or less the same with marginal difference except Apollo tyre, it has been vehemently contended that the same is clearly erroneous. The net dealer price was arrived at on a simple average basis. Further, the net dealer price of the four tyre manufacturers is not more or less the same. It has been contended that the net dealer price of Ceat is distinct from the net dealer price of other tyre companies and consequently the finding by the DG of price parallelism is not established.

214. Referring to the findings relating to price parallelism, it has been contended that the same were based on the basis of

the economic analysis that price parallelism existed amongst tyre companies which is a good measure/ indicator to show that some kind of information sharing in price had taken place amongst them. It has been submitted that this finding is patently wrong and strongly denied. The very basis for the economic analysis by the DG is faulty and illogical and consequently no such inference of price parallelism or information sharing in price can be drawn therefrom. Any allegation of price cartelization cannot be viewed theoretically but has to necessarily be seen in the constellation of economic facts relating to the tyre industry. The tyre dealers are not only dealing with Ceat but also with other tyre companies. Fierce and intense competition is a feature of the tyre trade. This has been admitted by AITDF in submissions made before the DA. The fierce and intense competition between Ceat and other tyre manufacturers can be demonstrated from the discounts given to the tyre dealers both on the invoice as well as subsequently by way of credit notes. This shows the net sales realization made by the tyre companies including Ceat from the tyre dealers. Ceat has given discounts to tyre dealers in the range of 5% to 7% during the period of investigation. Ceat decides on the discounts based on several factors including overall demand-supply situation, the desired product positioning, market share, business carried out by dealer *etc.* The giving of product discounts by Ceat and other manufacturers is clearly a weapon of competition which results in promotion of inter-brand competition in the tyre trade.

215. It has been submitted that in an allegation of cartel, the condition precedent to pin down Ceat shall have to be existence of 'agreement including an action in concert'. In the absence of existence of an agreement among the tyre manufacturers, the other issues as highlighted by the DG in investigation report seem an academic exercise not relatable to the facts in issue. It has been submitted that the investigation report indicated discussions by Ceat and other tyre manufacturers at ATMA about OEM prices being un-remunerative. It has been further submitted that OEM market is a monopsony and is dominated by

two major companies *i.e.* M/s Tata Motors Ltd. and M/s Ashok Leyland Ltd. In the OEM market, which is distinct and different from the replacement market, the two OEM bulk buyers are in a position to dictate the prices to the tyre manufacturers including Ceat after floating of tender, submission of price quotations, period of price negotiations and entering into contracts. It has been pointed out that the prices in the OEM market dictated by OEM buyers are much lower than the prices prevailing in the replacement market. In the replacement market, Ceat sells the product to the tyre dealers at the net dealer price and may also offer product discounts. Since the dealers are also dealing in competing products of other tyre manufacturers, Ceat in order to meet the inter-brand competition in the tyre industry gives product discounts to the tyre dealers.

216. Ceat has referred to the findings of the DG to the effect that the actual production of domestic tyre companies has increased except during the year 2008-09 when there was a decline of 3% - 20% in actual production of domestic tyre companies and that corresponding decline in net dealer price was only 3-5% which implied that companies have not reduced the net dealer price in proportion to actual production. Challenging the finding, Ceat has submitted that the rationale advanced by the DG of production *vis-à-vis* net dealer price was not understood. It is stated that when production is reduced owing to diverse reasons, the cost of production will go up owing to the fixed cost and expenses. Hence, it is argued that lower production translates to higher cost.

217. It has been further submitted that the net dealer price is determined by cost of production, economic factors of demand and supply, the product under consideration, the competition *vis-a-vis* the particular brand and acceptability in the market, tariff increases *etc.* Hence, the co-relation between the production capacity and net dealer price is misplaced.

218. It has been clarified that the reduction in the production for the years 2008-2009 of Ceat was on account of losses incurred and recessionary trend, which was a global phenomenon and not limited to India. Ceat was constrained to stop production at its manufacturing units accounting for a loss of 5% in production. The increase in raw material cost with low sales resulted in negative results. In any event, it has been submitted that the production of truck tyres of Ceat had gone down in 2007-08 by 4% and in 2008-09 by 9.4% and consequently, the conclusion arrived at by the DG that the production of domestic tyre companies had increased except in 2009, would not hold good for the Ceat.

219. Referring to the capacity utilization analysis, it has been submitted that the concept of full capacity is an idealistic notion. The capacity utilization is determined by the market trends of demand supply and movement of the product. The products manufactured by the tyre manufacturers are easily available off the shelf. Hence, the lower capacity realization is not with the intent to lower supplies as alleged. It has been pointed out that the report categorically states that the actual production of the tyre companies had increased (except for the year 2008-09) and hence the allegation of limiting supplies is in total contradiction to the assumption of limiting supplies.

220. Alternatively, it has been submitted that there are a number of factors which govern the capacity utilization by the tyre companies such as expansion of capacity, demand supply gap, preventive and breakdown maintenance; change of mould on account of number of SKUs (Stock Keeping Unit) produced by a tyre manufacturer *etc.*

221. Pointing to the findings of the DG as regards CEAT that it has been able to reduce the negative margin from Rs 802 to Rs 216 in the year 2009-10, and that the cost of sales shows

increasing trend year after year and there has been sharp increase during 2008-09 in almost all companies which could be due to increase in the price of natural rubber. The conclusion arrived at is that it implied that the companies have the motive of making profit and hence have been able to earn positive margins in most of the period in 5 years.

222. It has been argued that the reasoning of the DG is misplaced. It has been submitted CEAT is concerned for its stakeholders and therefore, is in the tyre business to earn reasonable profits. This cannot by any stretch of imagination be construed as anything but healthy business practice. It is argued that the net profits/ net sales ratio of Ceat cannot be said to be 'unreasonable'.

223. It has been further alleged that the DG has conducted the present investigation in an incomplete manner without taking into account all aspects of cost which includes the cost of other raw materials and overheads, which have to necessarily be taken into account for arriving at the cost of production. It has been stated that while natural rubber is one of the important components of a tyre manufacturing process, it accounts for around 40% to 43% only of the total cost of the tyre. The balance of 57% to 60% of the raw materials consists of synthetic rubber, carbon black, nylon fabrics, chemicals and other raw material. It has been pointed out that the base material of these raw materials is crude oil. It is averred that the cost of petro based raw materials such as synthetic rubber, carbon black, Nylon Fabrics *etc.* is impacted by rise in crude costs, and also the exchange rate which in turn has a direct impact on the cost of production of Ceat. It has been specifically pointed out that the additional impact which Ceat has to bear and which no other tyre company bears, is the levy of octroi duty of 2.5% to 5% on all raw material/ consumables/ semi-finished product in the State of Maharashtra. This puts Ceat at a disadvantage in terms of its competitors.

224. It has been submitted that the wages cost of Ceat has always been high due to location of its both the plants in the State of Maharashtra. Additionally, it has been pointed out that the Dearness Allowance Index on an average has gone up from 3122 in 2005 to 4558 in 2010 *i.e.* increase of 46% over the period under investigation. The increase in dearness allowance along with the impact of long term settlement done by Ceat during 2009-10 has significantly increased the overall wages cost during the investigation period.

225. It is the case of Ceat that it has to incur heavy repairs and maintenance cost because of the age of its two plants which are 30-35 years old. Consequently, it also has heavy burden of fixed cost on the cost of production on account of lower productivity of its said two aging plants.

226. CEAT denied in its reply that there was any significant increase in margins from 2006 to 2010.

227. It has been pointed out that the DG proceeded to observe and conclude that all companies have been operating on high margins barring some exceptions. This statement of the DG has been described as inherently contradictory as far as Ceat is concerned.

228. It has been submitted that the DG wrongly presumed that Ceat has direct dealings with the end consumers and is in a position to pass on the benefit to the end consumers. During investigation period, Ceat had clearly stated that it deals with tyre dealers on a principal to principal basis and the tyre dealers in turn sell the products to the end consumers. The margin of the dealers is not known to Ceat although the dealer is at liberty to sell at a price below the MRP. The only customers that

Ceat directly deals with are the OEMs and Fleet owners including the State Transport Undertakings.

229. Referring to market share analysis, Ceat has pointed out that the DG found no major change in the market share during 2005-2010 (reduced by 1% in 2009-2010), it found five manufacturers accounting for 95% of market share showing high concentration and implying high dependence of OEMs/ replacement market on five tyre manufacturers. These conclusions have been described as incorrect by Ceat.

230. It has been pointed out that the tyre industry is a capital intensive industry. However, it has been stated that there are no barriers to the entry of new players in the market other than the investment cost. The industry has seen international companies such as Bridgestone and Michelin which have entered the market. Bridgestone has a factory in the state of Madhya Pradesh which produces passenger car radials. Michelin is importing approximately 15-20000 TBR every month for sale. They have also announced their plans to set up a production facility in Tamil Nadu. Apart from these two global tyre majors, other leading players like Yokohama (in advanced stage of purchasing the land in the State of Gujarat for setting up a new plant), Kumho and Hankooj, among others, are also selling PCR in the Indian market through distributors. They have been present in the Indian market for many years. Recently even Continental Tyres has announced its entry into the Indian market.

231. It has been highlighted that the report of the Centre for International Trade (JNU report) itself categorically states that the data base was too small to form any conclusions. Similarly, it is contended that the data used in Tariff Commission reports merely indicated a possible collusive price behavior but did not conclude that there was one and rightly so, as there exists no

cartel. Mere presumption on the basis of figures cannot form the basis for impugning an allegation of cartel, asserts Ceat.

232. Summing up, Ceat has pointed out that the domestic tyre manufacturers have never adopted a collective strategy to produce low price tyres. Ceat has not launched any low cost truck/ bus tyres. Nevertheless, it is asserted that had it been technically possible, Ceat would have been most interested to do for its business interest. Ceat filed anti-dumping petition before the DA for the protective benefit it is entitled to under the relevant laws of the country. Ceat has not black listed any of the importer of Chinese tyres and it has never shared its cost data with its competitors, neither for anti-dumping petition as the same are confidential in nature and very sensitive in nature for its business. It has been clarified that the same were submitted to lawyer directly and not through ATMA.

233. Referring to the role played by ATMA, Ceat has submitted that ATMA does not have any role to play in managing its affairs as it has its independent marketing strategy, and is independently competing with other tyre manufacturers and takes its decisions independently including the fixation of prices. Certain common issues faced by the tyre industry are discussed at ATMA meetings, which are within the realm of the law, submits Ceat. It has been fervently submitted that the allegation of 'close knit family' is farfetched and is not borne by the facts adduced.

234. In view of the submissions made above, it has been prayed that Ceat has not indulged in any activity that falls within the purview of section 3(a) and/or (b) of the Act and therefore the present investigation report dated 25.05.2011 of the DG be rejected and the proceedings closed with costs on AITDF and name of Ceat be deleted from the cause title of the inquiry.

Reply of M/s Michelin India Tyres Pvt. Ltd.

235. At the outset, Michelin has pointed out that the DG has investigated only the relevant market of Truck-Bus (TB) tyres and concluded that there exists a cartel amongst the top five domestic tyre manufacturers, who are members of ATMA. The DG has limited his findings only to the criteria of pricing factor in terms of cost inputs and the fluctuation in prices of natural rubber. It has been further stated that the data relied upon by the DG clearly indicate that the five domestic manufactures have been fixing output to retain their respective market shares. It has been averred that in a period of five years from 2005-2010, the production data of the five domestic manufacturers exhibit the following trends:

- (a) The five domestic manufacturers have increased installed capacities during the period.
- (b) The percentage of capacity utilization has decreased in spite of large increase in capacity by two of the manufacturers during the period.
- (c) Each manufacturer's production as a percentage of the total production by these five domestic tyre manufacturers has remained almost constant during this period.

236. Based on the above trends, it has been contended that there can be no economic justification for such behavior. No profit-maximizing firm will invest in increasing capacity which is not be fully exploited over a period of five years. This behavior is against the self-interest of the five domestic tyre manufacturers. The rationale for this behavior can only be cartelization.

237. Michelin has given the details of the installed capacity of each of the top five domestic tyre manufacturers over a period of five years as follows:

Installed Capacity (In lakhs)

	2005-06	2006-07	2007-08	2008-09	2009-10
Apollo	79	88	97	99	132
JK Tyre	63	76	87	88	91
MRF	32	34	33	34	36
Birla	12	13	15	14	14
Ceat	43	43	45	45	47

238. From the above, it is sought to be contended that in terms of installed capacity, the growth for each of the players has been uniform, barring one year 2009-10, when Apollo made a huge increase (its installed capacity increased from 99 lakhs to 130 lakhs). It has also been pointed out that JK Tyre has also been steadily increasing its capacity. Rest of them *i.e.* MRF, Birla and Ceat showed gradual increase in their installed capacities as well.

239. Michelin has also given the production details of TB tyres by the five domestic manufacturers as follows:

Production (In lakhs)

	2005-06	2006-07	2007-08	2008-09	2009-10
Apollo	71	79	89	86	105
JK Tyre	64	70	75	75	79
MRF	24	27	27	27	32
Birla	11	12	14	11	14
Ceat	39	39	38	34	38
Total Production	208	226	243	233	269

240. From the details, it has been pointed out that in terms of market share the said players have captured almost 96% - 97% of the market over the period of 2005-10.

241. Michelin has also given a table below exhibiting the production of each of the five major players (ignoring smaller producers) as a percentage of the total production in the market, which is a close proxy for their market shares. It has been stated that in spite of a massive increase in installed capacity, Apollo

continued with about the same level of production *vis-à-vis* its four competitors. The same holds true for all the other four major domestic manufacturers, submits Michelin.

Production in Percentage

	2005-06	2006-07	2007-08	2008-09	2009-10
Apollo	34	35	37	37	39
JK Tyre	31	31	31	32	29
MRF	12	12	11	12	12
Birla	5	5	6	5	5
Ceat	19	17	16	15	14

242. From the above, it is sought to be evidenced that the five major domestic manufacturers have maintained their relative production levels during this five-year period.

243. It has also been submitted that even CESTAT in its order has noted Designated Authority's finding that despite growth in demand, growth in production has declined. The relevant extract has been reproduced to the following effect:

.....The capacity has increased from 26270 MTs to 37636 MTs and the production has increased from 18622 MTs to 27364 MTs and therefore the capacity utilization has also increased from 70.89% to 72.71%. However, the DA has noted that despite growth in demand growth in production has declined.

244. From the above submissions, it is sought to be deduced by Michelin that (a) All the five major domestic TB tyre manufacturers have added to their installed capacities over a period of five years (2005-2010) and (b) There exists a parallelism in terms of output amongst the players in question as is evident from their production numbers as well as their respective shares as against total production amongst themselves.

245. It is urged that the maintenance of the relative position in terms of production cannot be explained by interdependence in view of the difference in the installed capacities together with the difference in increase in their installed capacities. This is a clear pointer of an agreement between the manufacturers since without such a consensus, it is impossible for players to reach production parallelism, especially when all of them have increased their capacity every year.

246. It has been submitted that explicit collusion occurs where undertakings agree, collectively, to exploit their joint economic power and to improve their profitability by raising prices, restricting output, sharing markets or rigging bids. Successful cartels raise the joint profits of all the firms in the industry, maintain the parties' respective position on the market and achieve pricing stability or an increase in prices. They, thus, enable the member firms to enjoy market power and profits over and beyond what would otherwise result and to reproduce artificially the market outcomes and welfare loss arising on a monopolized market. Hardcore cartel activity is most likely to be successful in oligopolistic markets *i.e.* markets having only a small number of producers or sellers.

247. Michelin has also referred to the various economic principles underlying the behavior of members of the cartel. Reference has also been made to the proceedings before DA and CESTAT. As a detailed reference has already been made to these proceedings, it is not necessary to reproduce the same herein again.

248. Referring to a study carried by OECD, it is sought to be contended that anti-dumping measures can be abused for protectionist purposes. It is the case of Michelin that the way anti-dumping laws are structured, domestic producers can enlist the help of the Government to prevent foreign competition even when there has been no dumping. Michelin submits that the law

allows producers to unethically use anti-dumping measures to batter the competition.

249. In view of the foregoing, Michelin contends that it can be safely assumed that domestic tyre manufacturers have not only tried to limit the quantity by fixing outputs but also by creating hurdles on the path of tyre importers through concerted action in initiating anti-dumping proceedings.

Reply of other parties

250. As noted earlier, on the request of counsel for M/s Modi Tyres Company Pvt. Ltd. and M/s Bridgestone India Pvt. Ltd., the Commission *vide* its order dated 03.11.2011 struck off their names from the array of parties and as such it is not necessary to record their submissions in the order.

251. M/s Goodyear India Limited also filed its brief reply stating that the report of the DG did not name it as a contravening party and as such its name should be deleted from the proceedings and the array of parties. It has been submitted that no finding has been recorded against Goodyear by the DG in the report. It has also been pointed out that no investigation was conducted against it by the DG (I&R), MRTP Commission on the basis of information supplied by AITDF in the year 2008. It has also been highlighted that even the informant AITDF did not refer Goodyear in the information. It is however admitted that Goodyear is member of ATMA and does, in fact, attend meetings of ATMA held on different dates to discuss common issue faced by the tyre industry. In the result, it has been prayed that the name of Goodyear be deleted and removed from the present proceedings.

252. M/s TVS Srichakra has filed a letter stating that it is not manufacturing any truck or car tyre from the beginning and it is

involved in manufacturing 2-wheeler tyres and tubes and off-the-road tyres mainly for exports.

253. None appeared on behalf of M/s Falcon Tyres Ltd. and M/s Dunlop India Ltd. No appearance was also entered on behalf of Directorate General of Anti-Dumping & Allied Duties.

254. In view of the foregoing and in the light of findings recorded by the DG of contravention against J K Tyres, CEAT, MRF, Apollo, Birla Tyres and ATMA, the Commission deems it appropriate to examine the conduct of these parties.

255. The Commission has also heard the oral submissions of the parties. Shri S P Singh, Convenor, AITDF made submissions on behalf of AITDF. Shri K. Venugopal, Shri A N Haskar, Sr. Advocates; Shri Aditya Narain, Shri Manas Chaudhuri, Ms. Pallavi Shroff, Shri Harman Singh Sandhu, Shri Pinaki Addy, Shri Amitabh Kumar, Shri Gautam Shahi, Shri Ravi Sekhar Nair and Ms. Nidhi Singh, Advocates made oral submissions for the appearing parties.

Issues for determination

256. In view of the contentions raised by the parties and the findings recorded by the DG, following issues arise for determination:

- (i) Whether the Commission has the jurisdiction to proceed with the matter under the provisions of the Competition Act, 2002?
- (ii) Whether the tyre manufacturers have contravened the provisions of section 3 of the Act?

Determination of Issue No.1

Whether the Commission has the jurisdiction to proceed with the matter under the provisions of the Competition Act, 2002?

257. The opposite parties have contended that present case arose before the MRTP Commission from the complaint of the AITDF dated 28.12.2007 referring to the alleged anti-competitive practices of the tyre manufacturing companies, the DG had no jurisdiction to extend the period of investigation beyond year 2007 and his report is liable to be rejected on this ground only. It is also contended that the Act has no retrospective operation and as such, the Commission does not have the jurisdiction to look into the present matter.

258. It is true that the present inquiry was instituted with reference to the allegations made in the year 2007. However, the DG has examined the conduct of the Opposite Parties from year 2005-06 to 2009-10 and has found that alleged anticompetitive conduct of the parties which started prior to coming into force the relevant provisions of the Competition Act continued even after the date when these provisions were notified i.e., May 20, 2009. No doubt the period of contravention of the provisions of the Competition Act, 2002 has to be reckoned only from the date of its enforcement but this does not imply that either the DG or the Commission cannot examine the conduct of parties post notification where the information/complaint was filed before the MRTP Commission. The Commission, while passing order under section 26(1) of the Act, did not specify any period for the reason that at that stage it would not be desirable to curtail the period of examination by the DG. As the proceedings before the Commission are inquisitorial in nature, it would not be appropriate to restrain the DG from fully examining the allegations of cartelization in the tyre industry. As such, it is difficult to agree with the submissions made by the opposite parties that the proceedings are vitiated on any of the grounds so urged.

259. Given this fact, the plea of the opposite parties that the DG had no authority to examine their conduct for a period subsequent to the alleged period of contravention has no force and is liable to be rejected.

260. Further, the Commission is of opinion that the preliminary objections taken by the opposite parties regarding jurisdiction of the DG and/or the Commission are contrary to the scheme of the Act and the legal position on this aspect is quite clear. In this regard, it is also noted that Hon'ble High Court of Delhi in W.P. (C) 6805/ 2010, *Interglobe Aviation Ltd. v. Competition Commission of India* decided on 06.10.2010 has held on similar issue that where the investigation by the DGIR, MRTPC remained incomplete and the matter did not crystallize into a 'case' before the MRTPC, it was not incumbent on the DGIR, MRTPC to transfer the case to the Competition Appellate Tribunal and not to the Commission. This view was reiterated by the Hon'ble High Court of Delhi in W.P. (C) 7766 / 2010, *Gujarat Guardian Ltd. v. Competition Commission of India* decided on 23.11.2010. In this case, the petitioner advanced the argument that as the matter was pending before DGIR, MRTPC the case ought to have been transferred to Competition Appellate Tribunal and not to the Commission. It was also contended that the Commission had no power to pass order under section 26(1) of the Act in such matter and that the Commission had to proceed under the provisions of the MRTP Act. The Delhi High Court rejected the arguments raised by the petitioner and held that "This Court finds that since the investigation was incomplete the matter was rightly transferred to the CCI. On further consideration of the material on record the CCI formed a prima facie opinion to proceed under Section 26(1) of the CA. This was not contrary to Section 66(6) of the Competition Act, 2002. It is possible in the course of investigation that the DG, CCI forms a prima facie opinion to proceed under the provisions of the CA, 2002 itself. There is no illegality per se in such action of the DG, CCI."

261. The Commission notes that in the present matter the DGIR, MRTP Commission undertook the investigation which was still pending when the MRTP Act, 1969 was repealed *vide* ordinance dated 14.10.2009. As the investigation had not culminated into a 'case' the matter was rightly transferred to the Commission by the DGIR, MRTPC invoking the provisions of section 66(6) of the Act as the allegations involved were related to restrictive trade practices. Even a plain reading of section 66(6) of the Act clearly demonstrates that on receiving the matters where investigation was pending, the Commission may order for conduct of the investigation in the manner as it deems fit.

262. Furthermore, the Commission has not been conferred with any power to adjudicate any matter invoking the provisions of repealed MRTP, Act. This premise becomes clear when the provisions of section 66(6) are contrasted with the provisions of section 66(3) of the Act. Whereas the Competition Appellate Tribunal has been specifically conferred power to adjudicate cases pertaining to monopolistic and restrictive trade practices pending before MRTP Commission in accordance with the provisions of repealed MRTP Act under section 66(3) of the Act, no such power has been given to the Commission under section 66(6) of the Act. In the backdrop of the provisions of the Act as analysed above, the Commission finds that there is no illegality in entertaining and examining the present case under the Competition Act, 2002 in which the investigation was pending before the DGIR, MRTPC before the MRTP Act was repealed.

263. In this connection, a reference may be made to the decision of the Hon'ble High Court of Bombay in W.P. No. 1785/ 200, *Kingfisher Airlines Ltd. v. Competition Commission of India* decided on 31.03.2010 where it was held that though the Act is not retrospective, it would cover all agreements covered by the Act though entered into prior to the commencement of the Act but sought to be acted upon now *i.e.* if the effect of the agreement continues even after 20.5.2009. Thus, even in cases where the alleged anti-competitive conduct was started before coming into

force of sections 3 and 4, the Commission has the jurisdiction to look into such conduct if it continues even after the enforcement of relevant provisions of the Act.

264. In the present case, practices of the parties alleged to be anti-competitive have been found by the DG to be still continuing and there is nothing on record to contradict the same. Accordingly, the Commission is of the considered view that in the light of legal position as discussed above there is absolutely no illegality in the proceedings in the present case and the arguments and the contentions of the parties on this aspect have no force.

265. The Commission notes that in the present case, the investigations were initiated on the basis of complaint of AITDF dated 28.12. 2007. As the investigations under the MRTP Act could not be completed, the matter was transferred to the Commission in terms of the provisions of section 66 of the Act. In the meantime, the provisions relating to anti-competitive agreements and abuse of dominant position of the Act were notified, the conduct of the parties has been examined by the Commission post such notification of the provisions.

266. It may also be noted that though ATMA was not specifically mentioned in the order passed by the Commission under section 26(1) of the Act, the DG while investigating the matter has also taken into consideration the role and conduct of ATMA. The DG and the Commission have given ample opportunity to the ATMA to explain its conduct. Therefore, no prejudice can be said to have been caused to ATMA on this count.

267. It is also pertinent to note that the DG examined the conduct of the parties in the present case spanning from year 2005 to 2010 for delineating the market construct and conducting competitive analysis of tyre industry in a holistic perspective, though as noted above for the purpose of determining the period of contravention the conduct of the parties

can only be taken for a period starting from 20.05.2009 *i.e.* the date on which the relevant provision of the Competition Act, 2002 were notified. As has been seen above, the Commission does not have power to adjudicate any matter invoking the provisions of the repealed MRTP Act, therefore, in the present matter the relevant period for the purposes of determining the contravention of the parties under inquiry will commence only from the date of enforcement of section 3 of the Act.

268. In view of the aforesaid and after dealing with the jurisdictional issues, the Commission proceeds to deal with the substantive issue arising for determination in the present case.

Issue No.2

Whether the tyre manufacturers have contravened the provisions of section 3 of the Act?

269. Before examining the issue, it would be appropriate to delve briefly on the evolution and background to understand market construct and structure of tyre industry.

Evolution and Background

A brief glimpse of the evolution of the tyre industry presents interesting insights into the sector which has grown from a purely importing industry to domestic manufacturing capability over a century shaped by the policy regimes prevalent at different times in the country, pre and post-independent India. The form of development which evolved from foreign dominated companies to Indian companies displayed characteristics of limited players where technological and high fixed capital cost tended to restrict the number of players reflected in the prevailing structure of the industry. The evolution also shows the close links of this industry with foreign players while continuous threat of imports that have been reckoned by domestic companies reflective of the competitive constraints of a tradable commodity.

Structure of Tyre Industry

270. The Indian tyre manufacturers have grown to produce the complete range of tyres used in automotive industry for trucks, buses, passenger cars, jeeps, light trucks, tractors, two and three wheeler vehicles in tandem with growth in and diversity of the automotive/transport sector.

271. There are two categories of tyres *viz.* radial and non-radial. The non-radial category is known as bias or diagonal or cross ply tyres. The categorization is based on the load-inflation pressure relationship prescribed by the Indian Standards.

272. Bias tyres are nowadays mostly used in buses and trucks and the passenger cars have factory fitted radial tyre. Indian tyre industry is predominantly a cross ply (or bias) segment which is now moving towards radialization.

273. Growth of radial tyres in the car segment is enormous owing to their direct use by the Original Equipment Manufacturers (OEMs). However, in the bus and truck segment radialization is limited and is still dependent on cross ply (bias) segment. Tyre manufactures have a vast network of dealers, marketing agents *etc.* which enables the consumers to have easy access even at far flung areas. Tyre is used along with the tube which is then fitted over the wheel rim. A rubber flap is used between the tube and the wheel rim to prevent tube burst on account of friction. Tyre, tube and flap are sold together as well as individually. With technological advancement nowadays tubeless tyres are being increasingly used by the automobile industry. The tyre manufactures cater to the following major customer segments either directly or indirectly through dealers/ marketing agents:

- (i) Original Equipment Manufacturers (OEMs)
- (ii) Replacement Market (aftermarket)

(iii) Export Segment

(iv) StateTransportUndertakings (STUs)

274. The OEMs comprise of automobile manufacturers who source their tyre requirement directly from the tyre manufactures in huge volume and hence are being dealt directly by the tyre manufacturers through negotiations. In the replacement market, tyre manufacturers sell the tyres through widespread dealer distribution network either through exclusive dealers of the companies or through multi company dealers. The tyre companies are directly supplying to Government institutions and to State Transport Undertakings (STUs) through the tender system. The demand in the replacement market depends on the level of economic activity, usage, age of the vehicle, quality of the existing road infrastructure, overloading *etc.*

275. The tyre manufactures are also exporting tyres to different countries through dealers in exporting countries. Some tyre companies import tyres from foreign manufacturers or collaborators for domestic sale in Indian market. These imported tyres are then sold in Indian market along with the Indian tyres through the dealers.

276. Having taken note of the way tyre industry has evolved and its structure, the next step is to examine the present allegations of cartelization in tyre industry. The first step is to understand and bring out the structural factors which may be conducive for cartelization and thereafter circumstantial/direct evidences can be considered for arriving at a conclusion on the allegations.

Structural Factors

277. It is commonly known that even though cartelization can occur in any industry, there are some industries in which it is more likely, due to particular features of the industry or of the

product involved. Such characteristics make it easy for the firms of the industry to control the market. The Commission is of the view that the probability of cartelization gets higher if the following structural factors are present in any product market:

Highly Concentrated Market

278. It appears from the report of the DG that the five domestic tyre companies have consistently accounted for around 95% of the market share of the total production implying a very high concentration in the industry. This fact is also corroborated from the information available on the website of ATMA. As few large players control majority of the market in India, the market becomes oligopolistic in nature. In an oligopoly (since there are not many firms), there is a high degree of interdependence among firms. Each firm's price and output decision anticipate the probable actions of other firms at any given time. Each of the firm has to concern itself with the strategic choices of its competitor. These strategic choices can be price, quantity or quality.

In a market which is oligopolistic in nature, it is more likely that each market player is aware of the actions of the other and influences each others' decisions. No doubt, interdependence between firms is an important characteristic of such a market which would mean that each firm in such a market takes into account the likely reactions of other firms while making independent decisions particularly as regards prices and output. Though oligopolistic markets can lead to competitive outcomes, the outcomes may not always be market driven but rather the result of concerted effort or collusion. The interdependence between firms can lead to collusion-both implicit as well as explicit. Knowing that overt collusion is easily detected, firms often collude in a manner which leads to non-competitive outcomes resulting in higher prices than warranted by pure interplay of market forces.

279. Thus, high concentration may provide a structural reasoning for collusive action resulting in parallelism (price or output), yet it is very important to differentiate between “rational” conscious parallelism arising out of the interdependence of the firms’ strategic choices and parallelism stemming from purely concerted action. Thus, inferring of cartels would require further evidences. Economic theory has demonstrated convincingly that “conscious parallelism”, is not uncommon in homogeneous oligopolistic markets. Competing firms are bound to be conscious of one another's activities in all phases, including marketing and pricing. Aware of such outcomes especially where there is little real difference in product the Commission is of the opinion that it is quite probable that in many such instances, conscious parallelism may be dictated solely by economic necessity. Avoidance of price wars is a common instance where this takes place.

Demand & Supply Conditions

280. A constant, predictable flow of demand from the customers also tends to increase the risk of collusion. The tyre industry is cyclical and seasonal in nature. According to an ICRA Report,¹ nearly 42% of tyre demand is dependent on automotive production, which due to its cyclical and seasonal character is quite predictable. In the present case, the tyre manufacturers must have been aware of the fact that there would be a steady flow of demand due to the rapid growth in automobile industry particularly in the year 2009-2010 as well as in replacement market leading to some sort of predictability of demand. However, on the other hand there is a persistent threat to demand from retreaded tyres which are viewed as an important substitute for new tyres. As per ICRA Report, the price of retreaded tyres is between 30-80% lower than the price of new tyre. Around 40-50% of discarded car tyre and 60-80% of

¹ICRA Limited, was established in 1991, and was originally named Investment Information and Credit Rating Agency of India Limited (IICRA India), is an Indian credit ratings agency

discarded truck tyres are suitable for retreading. The annual retreading market is estimated at around 14-15 million. The truck and bus segment accounts for around 58% of retreading market. Thus, a flourishing retreading tyre market, in the replacement segment brings some element of unpredictability in demand.

281. On the supply side, the Commission notes that the industry players lobbied hard for imposition of anti dumping duty to restrict supply from imports and increase their market power, by removing any threat from imports. However, what is important in this context is to see how successful have the industry players been to achieve the desired outcomes from such lobbying practices in restricting the supply of imported tyres. As per CMIE² data, the imports in terms of³ volumes have shown an increasing trend right from 2005-06 to 2010-11. The percentage of imports to total tyre production has also been increasing throughout the period except 2009-10, when there was a marginal fall and that was also primarily due to sharp increase in tyre production. Thus, it seems that imports remained a competitive threat even with anti-dumping duty prevailing and the threat increased with removal of duty leading to jump in imports in 2010-11. The trends as obtained from CMIE database are as under:

	Units	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
Total Tyre Production	In 000's	66031.59	74033.70	81103.03	82106.68	97607.71	119195.59
Total Tyre imports from the world (Volume)	In 000's	1466.06	2587.19	3333.76	4064.18	4767.01	8844.60
Total Tyre imports as % of Total Production	In %age	2.22	3.49	4.11	4.95	4.88	7.42

²Centre for Monitoring Indian Economy

Thus, the above analysis shows how the apparent concerted efforts of the tyre manufacturers to restrict imports have not been successful as imports have shown a secular upward trend and imposed competitive constraints.

Homogeneous Product

282. The products manufactured by these companies are homogenous in nature and hence substitutable. This structural factor may help the manufacturers to collude than compete.

283. *No significant Technological changes.*

284. Over the years leading to the period under investigation there has been no significant technological change in the manufacturing of cross ply tyres used in Trucks and Buses. This factor is further reinforced from the information furnished by ATMA on its website wherein it has been shown that radialization in Truck and Bus segment is merely 15% in comparison to 98% in passenger cars.

285. However, it needs to be pointed out that the pace of radialization in the Truck and Bus Segment has been high in the recent years, albeit from a low base. The import figures of Truck and Bus Radials (TBRs) have gone up from 50 thousand tyres in FY 2004-05 to 1127 thousand tyres in FY 2009-10. The tyre manufacturers have also lined up large investments in TBR facilities which also points to increasing radialization. The ICRA Report estimates that around 60% of Industry CAPEX amounting to Rs.17,500 Crore would be made in TBR radialization segment in the period 2010-2013.

Dependence of Customers

286. OEMs procure tyres from domestic tyre manufacturers and also import from various countries based on their requirement. As the penetration of radial tyres in Truck and bus segment has

been pretty low it can be noticed that OEMs are dependent on the supply of cross ply tyres from the domestic tyre manufacturers. However, it is noted that the OEMs exert substantial countervailing buying power also because of the fact that the OEM demand constitutes around 26% for Commercial Vehicle tyres and 44% of total demand for domestic tyre industry. This fact has been reflected in submissions of various manufacturers also.

287. As far as the replacement market is concerned, it has already been noted that the retreading market provides an alternative to consumers and a competitive constraint on tyre manufacturers.

Entry Barriers

288. Indian tyre market is largely cross-ply oriented whereas global tyre market is radial oriented. It has been seen that despite market being highly concentrated and Truck and Bus segment constituting a major share of demand in terms of value, no new entry in the cross ply segment has taken place leaving the entire market to the existing players. However these, significant entry barriers arise due to the high capital requirements to setup a tyre manufacturing plant. As per ICRA Report, a plant with an annual capacity of 1 million cross ply Truck and Bus Tyres cost around Rs.6 billion.

Active Trade Association

289. Trade associations can be used as legitimate forum for members of a business to promote standards, innovation and competition. However, trade associations remain vulnerable to stepping beyond the limits placed by competition law because, by definition, they involve meetings, discussions and cooperation amongst various-often virtually all-competitors in a particular line of business. The Commission examined this aspect as trade

association can, as observed in other cases, be an active facilitator for cartel behaviour.

290. Tyre manufacturing firms have an association under the name Automotive Tyre Manufacturers' Association (ATMA) as the representative body of automotive tyre industry in India. All five large tyre companies representing over 90% of production of tyres in the country are its members. The Automotive Tyre Manufacturers' Association ("ATMA") was set up in 1975, and is registered under the Companies Act. The evidence gathered by the DG has shown that they frequently meet at the platform of ATMA to discuss and perhaps even share sensitive business information. The Association also regularly publishes data on production and export of various categories of tyres. Besides, the Association prepares status notes on various subjects which are of relevance to tyre industry, such as, Tyre Retreading Industry, Regional Trade Agreements & Rules of Origin, Anti-Dumping, *etc.* These facts are corroborated from the information available on the website of ATMA. The information available there also proclaims that with the guidance of the Managing Committee the ATMA functions through various committees set up, consisting of different disciplines, such as, Marketing, Export, Purchase (Raw Material), Taxation, Technical *etc.* Thus, it is noticed that the firms have an active trade association engaged in the above activities.

291. Thus, it is seen that there are some factors which may be conducive to cartelization but they may be diluted due to other factors as has been pointed out in the above discussion. The fact that market concentration is very high with entry barriers and the product is homogenous, support cartel formation, but high bargaining powers of OEMs due to the volumes, options to replacement consumer to retread, increasing radialization, imports effectively being cheaper even in the brief period of anti dumping duty go against sustaining a cartel structure.

A conclusive finding however, can only be made after considering other evidences including circumstantial evidences.

Whether Agreement can be inferred from circumstantial evidence?

292. A lot has been made by the opposite parties of the fact that the DG has failed to gather any direct evidence to support his findings. Reliance is also placed upon a decision of the Commission in the case of *Neeraj Malhotra v. Deutsche Post Bank*, Case No. 05 of 2009 to contend that to establish a finding of infringement under section 3(1) read with 3(3) of the Act, the agreement must be established unequivocally.

293. In view of the provisions of the Act, as highlighted below, in this respect, the Commission observes that the plea is misconceived.

294. Section 3(1) of the Act prohibits any agreement with respect to 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. Further, section 3(2) of the Act provides that any agreement in contravention of this provision shall be *void*.

295. The term 'agreement' itself is defined in section 2 (b) of the Act. For felicity of reference, the same is quoted below:

Section 2(b). "agreement" includes any arrangement or understanding or action in concert,-

(i) whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

296. It may be noticed that the definition of the term 'agreement' as given in the Act includes any arrangement or understanding or action in concert whether or not formal or in writing or is intended to be enforceable by legal proceedings. Clearly, the definition which is inclusive and not exhaustive is a wide one. The agreement does not necessarily have to be in the form of a formal document executed by the parties.

297. As is seen from the construct of the aforesaid provisions, there is no need for an explicit agreement for existence of an 'agreement' within the meaning of the Act. The same can be inferred from the intention or conduct of the parties. In the cases of conspiracy or existence of any anti-competitive agreement, proof of formal agreement may not be available and the same may be established by circumstantial evidence alone. The concurrence of parties or the consensus amongst them can, therefore, be gathered from their common motive and concerted conduct.

298. The Commission observes that existence of a written agreement is not necessary to establish common understanding, common design, common motive, common intent or commonality of approach among the parties to an anti-competitive agreement. These aspects may be established from the activities carried on by them, from the objects sought to be achieved and evidence gathered from the anterior and subsequent relevant circumstances. Circumstantial evidence concerning the market and the conduct of market participants may also establish an anti-competitive agreement and suggest concerted action. Parallel behavior in price or sales is indicative of a coordinated behavior among participants in a market.

299. No doubt the parties to such an agreement may offer their own sets of explanations behind the existence of circumstantial evidence. The firms often tend to justify the parallel behavior in prices, production, dispatch or supplies *etc.* by explaining the

fundamentals of the market forces such as demand, increasing cost of production and other economic factors.

300. However, it also remains a fact that parties to an anti-competitive agreement will not come out in open and reveal their identity to be punished by the competition agencies. This is also the reason that the legislature in its wisdom has made the definition of 'agreement' inclusive and wide enough and not restricted it only to documented and written agreement among the parties. Thus, the Commission is not impeded from using circumstantial evidences for making inquiries into act, conduct and behaviour of market participants.

301. The Commission in light of the provisions of section 2(b) of the Act as discussed above holds that in absence of any documentary evidence of existence of an agreement, it is appropriate and logical to inquire into cases of anti-competitive agreements on the basis of existence of evidences which establish that particular set of acts and conduct of the market participants cannot be explained but for some sort of anti-competitive agreement and action in concert among them.

302. The Commission observes that parallel behavior in prices, dispatch, supply accompanied with some other factors indicating coordinated behaviour among the firms may become a basis for finding contravention or otherwise of the provisions relating to anti-competitive agreement of the Act.

303. The competition agencies in other jurisdictions have also taken cognizance of circumstantial evidences while inquiring and establishing contravention in cases involving anti-competitive agreements. While noting that the legal system/framework, market structure, firm/consumer behavior *etc.* differs from jurisdiction to jurisdiction, the Commission finds that the basic

competition principles are by and large applicable across jurisdictions. Accordingly, looking at the position in other jurisdictions, it is found that circumstantial evidences have been used in the *News Paper Cartel* case (1999) of Brazil. Similarly, in case of *High Fructose Corn Syrup Antitrust Litigation* of US, *Atlantic Sugar* case of *Canada Atl., Sugar Refineries Co. v. A.G.Can.*, [1980], 2 S.C.R.644, circumstantial evidences were relied upon. In *Latvia- Hen's eggs* case also infringement was found based upon circumstantial evidence.

304. It is noteworthy that OECD in its paper '*Prosecuting Cartels without Direct Evidence of Agreement*' (February 2006) has observed as under:

“ Circumstantial evidence is of no less value than direct evidence for it is the general rule that the law makes no distinction between direct and circumstantial evidenceIn order to prove the conspiracy, it is not necessary for the government to present proof of verbal or written agreement.”

305. It is no doubt true that as held by the Commission in *NeerajMalhotra* case (*supra*), an agreement must be established unequivocally. That however is not to suggest that an agreement can be established only through direct evidence. As discussed above, circumstantial evidence is of no less value than direct evidence as the law makes no distinction between the two.

306. The Commission is not oblivious of the fact that the anti-competitive conspiracies are often hatched in secrecy. The firms engaged in anti-competitive activities are not likely to leave any trace evidencing the same. Therefore, in absence of any direct evidence of agreement among the conspirators, circumstantial evidence is required to be looked into.

307. If direct evidences are not present, but circumstantial evidences do indicate harm to the competition at a market place, the Commission will certainly take cognizance of the same.

308. The Commission also observes that among set of circumstantial evidences, evidences of communication among the participants to an anti-competitive agreement may give an important clue for establishing any contravention. Communication evidences might prove that contravening parties met and communicated with each other to determine their future or present behaviour.

309. As noted earlier, for the purposes of the present investigation, the DG, considering the commercial utility of truck and bus tyre segment in transportation and public importance at large, took into consideration the truck and bus tyres both cross (or bias) and radial. However, with regard to the specific and detailed study on cost of production, *ex-factory* price, price parallelism *etc.*, the following LUG truck tyres were taken into consideration for investigation:

Company	Tyre (LUG)
Apollo	10.00-20 16 XT-7
Birla	10.00-20 16 PR Lug BT 112
MRF	10.00-20 SL 50 Plus N 16 Lug
Ceat	1000-20/16 HCL Super Lug
J. K. Tyre	1000.20 6 JTK Lug

Price Cost Trend Analysis

310. The price data for the period of 2005-2010 of the five domestic tyre manufacturing companies *viz.* MRF, J.K. Tyre, Birla, Ceat & Apollo was analyzed.

311. It was noted by the DG that the major cost components which affect the prices of tyres are the cost of natural rubber and the excise duty. It was noted that the excise duty over the investigation period has gone down from 16% to 10%.

312. It may be useful to note the excise duty changes as reflected in the table below:

Excise Duty Movement

Year	Excise Duty
2004	16%
2005	16%
2006	16%
2007	16%
2008	14% (reduced to 10% from Dec. 2008)
2009	8%
2010	10%

313. With respect to another component *viz.* natural rubber, it was noted that the tyre Industry is highly dependent on it which accounts for 43% of the tyre production cost. Natural Rubber is procured by domestic tyre manufacturers on daily basis and the price of natural rubber fluctuates on daily basis. The weighted average price of the natural rubber during the reference period is shown below:

Weighted Average – Natural Rubber

Year	Weight per/kg
2005	₹ 60/- per kg
2006	₹ 87/- per kg
2007	₹ 90/- per kg
2008	₹ 107/- per kg
2009	₹ 97/- per kg
2010	₹ 169/- per kg

314. On a careful examination of the above data, it appears that during the investigation period, excise duty has shown a downward trend and the natural rubber has increased in 2008 but has fallen in 2009 and then again increased in 2010. It was, however, noted by the DG, as shown below, that during the

investigation period the net dealer prices of all the domestic tyre players have continuously increased except in 2009 wherein a limited decline in prices was observed.

315. Accordingly, the DG has come to a conclusion that these tyre companies have not passed on the benefit of reduction in excise duty to the consumers. To buttress the conclusion, reliance was also placed on the Tariff Commission findings on Tyre Industry.

316. A grievance is made of the fact that the DG has made general observations that tyre manufacturers have not passed on the benefits of the decreased excise duty to the customers. It is alleged that in complete contrast to the assertions/findings by the DG, the parties have been passing on the benefits of excise duty reductions in the best interests of its customers.

317. To examine the price movement for the specific Lug Tyre segment of the five domestic tyre manufacturers under investigation, the weighted average of the net dealer price, as shown below, may be analyzed.

Net dealer price (weighted average) for the 5 specific LUG segment

	2005	2006	% change	2007	% change	2008	% change	2009	% change	2010	% change
Apollo	8717	9793	12.34	10364	5.83	10701	3.25	10309	-3.66	10640	3.21
Birla	8057	8968	11.30	9506	5.99	9789	2.97	9280	-5.19	10091	8.73
MRF	8461	8992	6.27	9465	5.26	9973	5.36	9792	-1.81	10475	6.97
CEAT	7880	8720	10.65	9180	5.27	9718	5.86	9161	-5.73	10660	16.36
J.K. Tyre	7800	8904	14.15	9156	3.13	9612	4.98	9122	-5.10	10248	12.34

318. The Commission on the price – cost analysis noted that major cost components are not only Natural rubber and Excise duty, but

also NTC Fabric and Carbon black. In the absence of detailed analysis of changes in total cost and resulting changes in prices, the Commission does not agree with findings of DG that the benefit of decline in excise duty and price of natural rubber has not been passed on to the consumers. In fact, it is observed that the fall in prices of Natural Rubber was marginal in 2009 while the rise was substantial in 2010 and no proportionality in price changes can be linked to the same in 2009 or 2010.

Price Parallelism

319. On perusal of the above data, it was deduced by the DG that the net dealer price (weighted average) of lug tyre in respect of all the companies was more or less the same with marginal difference in their price except Apollo Tyre. Further, it was noticed that the movement of net dealer price (weighted average) in terms of actual quantum as also percentage change was similar. The percentage change of net dealer price whether upward or downward was found to show close correlation amongst the five tyres manufacturing companies. Based on the above analysis, it was observed by the DG that price parallelism existed amongst the five tyre manufacturing companies which area good measure/indicator to show that some kind of information sharing in price had taken place amongst them.

320. The Commission observes that differences in range of prices of different manufacturers has been more than Rs.1000 for the period 2005-2009 and the range has come down to Rs.600 in 2010. Considering that the product is homogeneous, the 6-12% range of difference in prices imply that the prices are dissimilar and there is no parallelism at least in absolute prices. As far as parallelism of price movement in percentage terms is concerned there are wide variations amongst various manufacturers. As far as directional changes are concerned, parallelism is observable.

321. The parties have sought to justify the price parallelism in the tyre industry by pointing out the peculiar features of the tyre industry. It has been highlighted that price parallelism in the tyre industry arises on account of the fact that the products sold are homogenous which makes it difficult for businesses to charge different prices to customers. It is argued that products in the tyre industry share similar sources of inputs, which means that competitors are subject to similar cost fluctuations in setting their product prices. Lastly, it has been contended that prices of products in the tyre industry are highly visible, which allows businesses to collect real time market intelligence and monitor each other's prices closely and match competitors' price movements.

322. The Commission carefully perused the submissions made by the parties on this count. It may be observed that price parallelism *per se* may not fall foul of the provisions of the Act. However, if the same is the result of a concerted and coordinated action under the aegis of trade association, then the same stands covered within the purview of the Act. In this particular case, the parallel pricing pattern is not very sound. However, now we shall analyze if there are any plus factors to suggest that this limited price parallelism is on account of concerted action.

323. The DG, has analyzed these plus factors. The DG made elaborate analysis of data relating to production; capacity utilization; cost analysis; cost of sales/sales realization/margin; cost of production and natural price movement; net dealer price & margin and market share, the Commission also considered these factors.

Capacity Utilization Analysis

324. The DG also examined the capacity utilization of all the 5 major domestic tyre manufacturing companies and the details thereof are noted below:

Capacity Utilization Movement

Company	2005-06	2006-07	2007-08	2008-09	2009-10
	Utilization %	Utilization %	Utilization %	Utilization %	Utilization %
Apollo	89%	89%	92%	87%	80%
Birla	90.74	89.83	97.67	81.59	104.57
MRF	74.7	79.27	82.13	80.85	89.04
Ceat	90%	91%	83%	75%	81%
J.K.Tyre	101%	92.6%	86.5%	85.1%	86.7%

From the above, it was deduced by the DG that the overall capacity utilization of the tyre manufacturers have been showing a downward trend and the utilized capacity has dropped down in the case of major three companies *viz.* Apollo, Ceat and J.K.Tyre except MRF & Birla from 2005 to 2010. In the case of Birla, the variations in capacity utilization were noted as very high as it dropped from around 97% to 81% in the year 2008-09 and then drastically increased from 81% to 104% in the year 2009-10. In J.K. Tyre, a drastic decline in the capacity utilization was noted during the entire investigation period which reflects under-utilization of capacity.

325. On behalf of Apollo and some other parties, the concept of capacity available for production was introduced in the arguments by the opposite parties. It was argued that capacity utilization was relatable to the available capacity and this was the correct measure and not the installed capacity. Impugning the analysis of the DG relating to capacity utilization, it was pointed

out that the DG erred in its report by focusing on capacity utilization and concluding the existence of a cartel based on perceived low capacity utilization levels, without analyzing the key variables that drive capacity utilization *viz.* capacity, demand and production *etc.* Moreover, technical constraints relating to operation of new capacity need to be factored into the calculation of capacity utilization as also widely understood in the tyre industry 100% of the installed capacity is rarely available for production from the first year a plant is commissioned and even thereafter. This is stated to be due to various issues such as lead time (ramp-up) that is required by a plant to stabilize production, maintenance (both scheduled and un-scheduled), labour unrests *etc.* It has also been alleged that the DG has further ignored the fact that there was global economic crisis in or around 2008-2009 and the tyre industry was also adversely affected by the same because of the reduced demand by original equipment manufacturers *i.e.* automotive manufacturers and reduced demand in the replacement segment. It is alleged that the DG has drawn generalized reference to capacity utilization without considering specific aspects of each company and why there are movements in relation to the capacity utilization data. It is the case of Apollo that its capacity utilization has been consistently very high except for a short period in 2008-2009. It is alleged that the DG has completely failed to take into consideration that the lock-outs took place during the investigating period, thereby grossly mischaracterizing Apollo's capacity utilization.

326. The Commission has given thoughtful consideration to the data on capacity utilization and plea raised by the parties. On a closer examination of the data, the following observations are made:

i) The trends are mixed: It is noticed that the capacity utilization for some companies increase and others decrease on a

YoY basis. The fall in 2008-09 is in line with recession. Lack of clear trend in figures suggest that variations in CU are company specific and not necessarily due to any concerted action.

ii) The capacities have increased: The decrease in CU needs to be read along with the increase in capacities. The CESTAT order cited by Michelin ⁴ observes:

.....The capacity has increased from 26270 MTs to 37636 MTs and the production has increased from 18622 MTs to 27364 MTs and therefore the capacity utilization has also increased from 70.89% to 72.71%. However, the DA has noted that despite growth in demand growth in production has declined.

This highlights the increase in production has been muted because of increase in capacity and not due to reduction of output leading to supply suppression.

iii) The ICRA Report estimated on the basis of Company announcements that the installed capacity is likely to go up by 47% from 2009-10 to 2012-13. The investments committed by the companies negate the cartel theory as it does not seem practical for companies to maintain a high ROCE when capital is continuously increased.

327. It is also relevant to point out the observations made by the Tribunal (CESTAT) in the appeal filed against the findings of DA by Bridgestone, Michelin, Tata Motors Ltd. and two Chinese companies. The Tribunal noted that during the period 2004-2008, the sales by domestic industry increased 2.5 times. It was also noted that during the same period imports increased from 1361 MTs to 28386 MTS. Thus, the demand was very high during the said period. The turnover, profits and return of capital of the domestic industry increased but the capacity utilization was 72%. This is another testimony to the fact that

⁴As submitted and annexed in DGs Report.

tyre manufacturers willful suppression of capacity does not make any economic sense as the only beneficiary of the same will be the importers unless it can be established that the tyre manufacturers increased prices to such an extent that they gained despite losing huge volumes to imports.

328. From the above analysis, the Commission concludes that the tyre companies were not in a position to profit from limiting the supply by willful underutilization of capacity.

Cost of Sales, Sales Realization and Margin

329. The DG made a detailed analysis of cost of sales, sales realization and margin. It was noted that sales include cost of production, selling and distribution cost, administrative overheads, advertisement *etc.* Sales realization is the amount received on sale of each unit. Margin indicates the profit or loss realized on sale of the product. The analysis was done to get an idea about the profitability or otherwise of sale of each product. The following information regarding cost of sales, sales realization and margin with respect to truck tyres was culled out from the cost audit report:

Tyre Company	UNIT	YEAR	Cost of Sales (₹/Unit)	Sales Realization (₹/Unit)	Difference between Cost of Sales and Sales Realization (Margin in ₹ /UNIT)
APOLLO TYRES	Truck	2009-10	6852	7979	1127
APOLLO TYRES	Truck	2008-09	7079	7826	747
APOLLO TYRES	Truck	2007-08	6119	7085	966
APOLLO TYRES	Truck	2006-07	6145	6790	645
APOLLO TYRES	Truck	2005-06	5488.48	6118.7	630.22
JK TYRE	Truck	2009-10	7208.2	7827.12	617.92

JK TYRE	Truck	2007-09 (18 MONTHS)	7486.04	7562.61	76.57
JK TYRE	Truck	2006-07	6498.41	6897.82	399.41
JK TYRE	Truck	2005-06	6281.84	6319.28	37.44
JK TYRE	Truck	2004-05	5838.03	5880.08	42.04
CEAT LTD	Truck	2009-10	7509	7620	111
CEAT LTD	Truck	2008-09	8179	7908	-270
CEAT LTD	Truck	2007-08	6571	6922	351
CEAT LTD	Truck	2006-07	6522	6645	122
CEAT LTD	Truck	2005-06	5801	5903	102
MRF LIMITED	Truck	2009-10	5379.47	5751.05	371.58
MRF LIMITED	Truck	2008-09	4035.87	4346.17	310.3
MRF LIMITED	Truck	2007-08	3678	3836.41	158.41
MRF LIMITED	Truck	2006-07	3091.77	3288.16	196.39
BIRLA TYRES*	Truck	2009-10	6891	6905	14
BIRLA TYRES*	Truck	2008-09	7872	8164	292
BIRLA TYRES	Truck	2007-08	6531	7125	594
BIRLA TYRES	Truck	2006-07	6479	6928	449
BIRLA TYRES	Truck	2005-06	5668	6039	371
* Refers to Balasore unit only					

330. Based on the analysis of the above information, it was concluded by the DG that margins for Apollo tyres have been showing a very healthy trend and it has reached the highest in year 2009-10. In the case of JK Tyres, the margin has been improving and has gone up drastically. The margin, which was ₹ 76 during 2009-10, has gone up to ₹ 617 in year 2009-10 which

is more than 8 times compared to previous year. In the case of MRF, the margins have shown significant improvement in the year 2008-09 and have further improved in 2009-10. In the case of CEAT, it may be noted that in the 2009-10 the company was able to improve its margins significantly from a negative margin of Rs. 270 in the year 2008-09 to a positive margin of Rs.111 in the year 2009-10. Birla Tyres has shown lower margin for 2009-10 compared to previous year.

331. Considering the profit margin on the sale of each tyre, it would be seen that for Apollo Tyres, the margin per tyre increased from Rs.747/- to rs.1127/- in years under consideration. Similar is the story of increase in margin of JK Tyre where the margin increased from Rs.76.56 to Rs.607.92 per tyre. However, in case of CEAT, it was selling its tyre at a loss in the year 2008-09 and in the year 2009-10, it had a margin of Rs.111/- per tyre, MRF margin in the year 2008-09 was Rs.310/- in 2009-10, it was Rs.371/-, Birla Tyre had a margin of Rs.292/- in 2008-09 and only Rs.14 in the year 2009-10. There is no uniformity in the rise of margins of different companies. Birla rather reduced its margin per tyre considerably and had been selling at the lowest margin of Rs.14/- per tyre. The cost of Birla Tyre was also lowest in the year 2009-10 being Rs.10091/-.

332. Similarly, the margin of CEAT was only Rs.111/- per tyre which cannot be considered as excessive or exorbitant. The margin of two companies was definitely higher than that of the other companies but if we look at the different margins, it would not give an impression of a concerted agreement among the enterprises of forming a cartel. It is also noteworthy that Birla had considerably reduced its margin from Rs.292/- to Rs.14/- only. While CEAT seems to have got in red in the year 2009 and started showing profit in the year 2010, JK Tyre was also working at lower margin in the years 2007-09 of Rs.76.57 per tyre. Looking at data regarding margins does not seem to suggest meeting of minds on the part of different enterprises for fixing prices.

333. In view of the above analysis, it may be noticed that the cost of sales and sales realization have shown increasing trend year after year. Different manufacturers are differently placed as far as Net Margins are concerned. The bigger the range between the margins of manufacturers, lower are the chances of sustaining a cartel. The companies with lower margins have no incentive to collude and will but deviate. It is recognized prices are a function of number of factors including but not limited to cost conditions, thus the Commission finds no merit in evaluating whether the changes in Sales Realization are proportionate to cost of sales or not. It cannot be concluded on the basis of the above data relating to cost of sales, sales realization and margins that there is any indication of concerted action.

Analysis of Net Dealer Price and Margin

NAME OF THE COMPANY	YEAR	NET DEALER PRICE (₹)	% CHANGE	MARGIN (Difference between Cost of Sales and Sales Realization) ₹ /UNIT	
APOLLO TYRES	2010	10640	3.2	1127	
APOLLO TYRES	2009	10309	-3.6	747	
APOLLO TYRES	2008	10701	3.25	966	
APOLLO TYRES	2007	10364	5.8	645	
APOLLO TYRES	2006	9793		630.22	
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JK TYRE & INDUSTRIES LTD.	2010	10248	12.3	617.92	
JK TYRE & INDUSTRIES LTD	2009	9122	5	76.57	
JK TYRE & INDUSTRIES LTD	2008	9612	4.9	399.41	

JK TYRE & INDUSTRIES LTD	2007	9156	2.8	37.44	
JK TYRE & INDUSTRIES LTD	2006	8904		42.04	
CEAT LTD	2010	10660	16	111	
CEAT LTD	2009	9161	-5.7	-270	
CEAT LTD	2008	9718	5.8	351	
CEAT LTD	2007	9180	.5	122	
CEAT LTD	2006	8720		102	
MRF LIMITED	2010	10475	6.9	371.58	
MRF LIMITED	2009	9792	-1.8	310.3	
MRF LIMITED	2008	9973	5.3	158.41	
MRF LIMITED	2007	9465	5.2	196.39	
MRF LIMITED	2006	8992			
BIRLA TYRES*	2010	10091	8.7	14	
BIRLA TYRES*	2009	9280	5.1	292	
BIRLA TYRES	2008	9789	2.9	594	
BIRLA TYRES	2007	9506	5.9	449	
BIRLA TYRES	2006	8968		371	
* Refers to Balasore unit only					

334. The DG also conducted the analysis of the Net Dealer Price (Weighted average) of Lug truck tyres *vis-à-vis* the margin of each of the five domestic companies under investigation and the same may be noted below:

335. It was noted by the DG that the analysis of the Net Dealer Price (Weighted average) of Lug truck tyres *vis-à-vis* the margin of each of the five domestic companies under investigation showed a significant increase in margins from 2006-2010. Thus, it was concluded that all the companies have been operating on high margins barring some exceptions as highlighted in the table

above. It was also noted that the margins have increased from ₹ 42.04 to ₹ 617.92 in the case of J.K. Tyre which is an increase of almost 15 times in a short span of 4 years. Similarly, in the case of Apollo Tyres the margins have almost doubled in the last four years.

336. Though the Commission believes that deciding on margins being “excessive” is an inconclusive exercise, but in this case the data anyways does not support the assertion of “excessive” margins given that the margins in some cases are less than 1% and the highest margin is around 10%, which cannot be called as ‘high’. Also, as pointed out earlier also, these substantial differences in margins negate the possibility of a cartel as the investigation in such cases need to show the benefit to cartel members operating at such low margins. In view of the above analysis, the Commission disagrees with the findings of the DG on this count that these domestic tyre manufacturers have been operating on large margins which did not appear to be passed on to the consumers.

Higher Operating Profits and Return on Capital Employed (RoCE)

337. The Commission also considered the financials of the opposite parties on all parameters during the period 2008-09 to 2009-10. The best indicators of profitability are the EBDITA Margin as % of Sales and Cash Flows from Operating Activities.

PBDITA net of Prior period & Extraordinary Items & Other Income & Financial Income as % of sales						
Name of the company	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
CEAT	4.40	6.30	7.90	1.50	10.50	3.60
MRF	6.10	9.00	7.70	11.50	10.30	7.60
Apollo	7.50	8.30	10.90	7.70	14.50	8.80
JK Tyres	5.00	5.30	7.90	5.30	10.20	4.90

Source: CMIE

338. As may be noted from the above table, EBDITA Margins have ranged from a low of 1.50% of Sales to a high of 11.50% of

Sales. Though, there is a definite increase in operating profitability in 2009-10 for all the companies (MRF follows the October – September year for accounting and hence the trend is blurred) which suggests more than proportionate increase in prices as compared to cost of operations.

339. Similar observations can be made from Cash flow from Operating Activities analysis. It is noticed that all the companies (except MRF) almost doubled their cash inflows in 2009-10 over 2008-09. For MRF, the trend is reflected in 2008-09 because of difference in accounting year. These cash flows again came down to their normal levels in 2010-11. The Commission noted that there is a definite blip in profitability and cash inflows which can be read with other factors to reach some conclusions. But it is equally important to note that the blip has been very short lived, almost consistent with the period of ADD.

Net Cash Flows from Operating Activities (Rs. In Millions)						
Name of the company	2005-06	2006-07	2007-08	2008-09	2009-10	2010-11
CEAT	554.00	1067.60	1392.00	1312.20	2326.80	1363.10
MRF	2748.60	3061.40	3290.90	9372.70	1860.50	6328.70
Apollo	794.00	3574.70	4277.70	3245.80	7026.60	1523.50
JK Tyres	859.00	466.40	1950.10	2663.50	5442.20	-212.60

Source: CMIE

Market Share

340. A comparative study of the market share was undertaken for domestic tyre manufacturers. It is clear from the data that Apollo, CEAT, Goodyear and JK have lost their market share which has been gained by Birla. Birla's market share is shown as 8.9% in 2005-06 and it has grown in 4 years to reach 19.74% in 2009-10. This is inconsistent with general cartel behavior where market shares remain consistent through the years. Also, it is against the rational business behavior to lose market share to a rival in a cartel set up. Such trend in market share movement is possible only in case of competitive environment.

Conduct of ATMA

341. As noted earlier, the tyre manufacturing firms have an association under the name Automotive Tyre Manufacturers' Association (ATMA) as the representative body of automotive tyre industry in India. Eight large tyre companies including MRF, J K Tyre, Birla, CEAT and Apollo representing over 90% of production of tyres in the country are its members. The Association regularly publishes data on production and export of various categories of tyres. Besides, the Association prepares Status notes on various subjects which are of relevance to tyre industry, such as, Tyre Retreading Industry, Regional Trade Agreements & Rules of Origin, Anti-Dumping, *etc.* Thus, it may be noticed that the firms have an active trade association engaged in the above activities.

342. It was noted by the DG that ATMA which is an association of domestic tyre manufactures acted as a close knit family. On examination of the various minutes of the meetings held from 2005-2010, it was noted by the DG that the domestic tyre manufactures were facing stiff competition from the imports under the different tyre segments. On examination of the ATMA circulars and minutes of the meeting, it was noted that ATMA members have collectively adopted the various courses of action which included: *i)* anti-dumping petitions; *ii)* low cost tyres; *iii)* blacklisting of importers; *iv)* export realization and *v)* unremunerative prices from the supplies made to OEMs.

Anti-Dumping Action

343. DG noted that tyre manufacturers under ATMA took various actions by agreeing to support and cooperate in filing various anti-dumping applications before the competent authority to neutralize the competition faced by them from exporters based at

China and other countries. In this connection, the DG noted from the minutes of ATMA that the ATMA Committee took serious note of the rising trend in import of passenger car tyres into India, particularly large scale import of cheaper tyres and dumping of radial passenger car tyres, and advised ATMA Secretariat to proceed with the filing of an anti-dumping petition against such imports. It was brought to the attention of the Committee that full cooperation of all ATMA member companies, which manufacture passenger car tyres, was imperative for the success of the case. All the members present assured support and cooperation in filing anti-dumping application as petitioners and by providing necessary inputs and cooperation in the said proceedings.

344. Similarly, to thwart competition from import of Truck & Bus Bias tyres, the domestic tyre manufactures filed Anti-Dumping petition. It was noted by the DG from the reply of ATMA that it retained the services of a common advocate to file an Anti-Dumping petition against import of Bias Truck & Bus tyres from China. Members were informed that one round of discussions has taken place between Cost Managers of select tyre companies and the advocate. The advocate had desired Marketing, Cost and Financial data, as per format circulated through ATMA, to be completed by three member companies *viz.* Apollo, Ceat and JK to be forwarded directly to the advocate so that the application could be processed.

345. In this connection, it is significant to note that the advocate *inter alia* advised a meeting of Cost Managers of ATMA member companies with him to ensure uniformity of data and format in which it is to be presented. Subsequently, the domestic tyre manufacturers filed an anti-dumping petition under the Bias segment.

346. With the increase in radialization of tyres under the car and trucks/ bus segment, domestic tyre manufactures again felt the

heat on account of imports of radial tyres from the global market. Accordingly, in order to evade competition and protect themselves, the domestic tyre manufactures again filed anti-dumping petition under the radial category also so as to increase the import cost to consumers as well as OEMs.

347. ATMA sought to clarify the above conduct by submitting that the Anti-Dumping petition involved furnishing extensive information/data in a prescribed format as per the anti-dumping rules and provisions. It was also stated that even the anti-dumping application performa required the petitioner to compile the information to the extent possible. It was also clarified that cost data being highly confidential in nature, were directly submitted by the concerned tyre companies to the advocate for onward submission to directorate of anti-dumping after aggregation, analysis *etc.* None of the tyre companies was privy to the confidential costing data submitted by the other tyre companies in such proceedings, submitted ATMA. The Commission considered the findings of DG and submissions of ATMA and concluded that the lobbying for welfare of tyre industry is the prime objective of ATMA and the same cannot be viewed as anti-competitive. The discussion and joint application for levy of anti-dumping duty also seem necessitated, given the procedure specified. Moreover since the costing data was confidential to each company the possibility of sharing such sensitive information is most unlikely.

Low Cost tyre strategy

348. As members of ATMA domestic tyre manufacturers adopted the collective strategy of launching the lower priced tyres to effectively compete with the Chinese truck tyre imports.

349. In this connection, ATMA stated that in view of the rising volume of dumped/low priced truck and bus tyres from China, the Indian tyre manufacturers had considered the option

of introducing lower weight and hence low priced truck and bus tyres as a pro- competitive measure to meet Chinese competition on account of the ‘tyres with lower weight’ being dumped into the country.

350. The Commission noted that the strategy of introducing low weight low cost tyres to meet the competition and agrees with submissions of OP’s to that effect. The fact that the strategy was collective may again be used to infer meeting of minds but there is nothing anti-competitive in it.

Collectively black-listing the Importers

351. Based on the analysis conducted by the DG, it may be observed that the tyre companies under the aegis of ATMA also decided to take measures resulting in collective black-listing of the importers. It may be noted that the Committee members of ATMA took note of the discussions that had earlier taken place in a meeting of Marketing Group regarding under-valued/under invoiced import of tyres, particularly in the Truck Bias, Truck Radial and Passenger Car Radial segments. The Committee advised that, as in the past, ATMA Secretariat should take up the issue with Customs Authority for Redressal. It was also stated that the angle of revenue loss to the Government should be adequately projected.

352. It may further be noted that the Committee also advised the Marketing Group to evolve appropriate strategy so that sale of under-valued/under-invoiced tyres could be checked at the retail level with the involvement of local State sales tax authorities. It was decided at the meeting that all the tyre companies should collectively co-ordinate for initiating the line of action and the following four geographical areas and tyre companies which could take lead in this direction were notified as follows:

- a) Delhi (Apollo)
- b) Mumbai (Ceat)
- c) Vijaywada (tyre company name to be confirmed)
- d) Indore (JK Tyre)

353. The four locations were short-listed since these were understood to be focal points where sale of under-invoiced/under-valued truck & bus tyres-bias and radial-was rampant. Based on the effectiveness of action plan in these areas, it was decided that the same could be replicated at an all India level. Moreover, it was also decided that similar strategy could be adopted in the case of grey market imports of MNC brands in the passenger car tyre segment. Convener, Marketing Group was advised to have a meeting of Marketing representatives, immediately following the Managing Committee meeting, to evolve an appropriate strategy to check the malpractices, including black listing, by tyre companies, of importers indulging in such imports, particularly if they were having dealings with Indian tyre companies also.

354. ATMA sought to clarify that the whole intent was to assist the concerned custom authority to track such undervalued/under invoiced imports at major trucking centres and at ports. The intent was to ensure that importers do not find ways and means of circumventing the duty imposed and to check for undervalued and under invoiced imports.

355. The Commission noted the findings of DG and submissions of OPs. The Association's concern for undervalued/under invoiced imports is genuine and their collective decision to assist the authorities is in the direction of ensuring fair play in markets.

Export Realizations

356. ATMA member companies have undertaken discussion on the issue of export realization. The members of ATMA collectively discussed the issue about the feasibility of increasing the average realization on exports from minimum Freight on Board (FoB) value of US \$2.25/kg to a higher level. It may be noted that ATMA Export Forum has discussed the issue of export realization. However, considering the current market conditions and intense competition from China particularly in the Radial/Bias T&B tyre category, any major increase in average export realization in some categories, especially Bias T&B tyres, was not found feasible.

Unremunerative prices from the supplies made to OEMs

357. The issue of unremunerative prices realized from the supplies made to OEMs is noted as also another area of discussion among the member companies. The domestic tyre companies have discussed the issue of OEM prices *vis-à-vis* input cost. Consistent rise in input costs in recent months was a major concerns for tyre companies.

358. Thus it may be noted that the discussions centered on unremunerative prices realized from OEMs due to absence of corresponding increase in price of end product. There was a general consensus that truck and bus tyres supplied to vehicle manufacturers were at unsustainable prices, particularly in view of hike in inputs costs.

359. ATMA sought to justify the aforesaid discussion by arguing that the remarks in the meetings under reference were general observations made in the context of the increase in input costs and price for OEMs supplies. ATMA also pointed out that the DG in its report has failed to appreciate the critical fact that none of the actions *viz.* Anti-Dumping Petition; Low Cost Tyres Strategy; Blacklisting Importers; Export Realization; Supply of Tyres to

OEMs undertaken by ATMA was aimed at determining the individual conduct of any of its members. It has been further submitted that the abovementioned steps/ activities are in line with the roles and responsibilities of an association such as ATMA *i.e.* representing an industry group. It is argued that if the logic adopted by the DG in its report is accepted by the Commission, it would lead to an untenable situation where trade associations representing the interests of an industry group, will be barred from adopting any measure necessary to protect the interests of the concerned industry. Lastly, it is asserted that forming a trade association *per se* is not anti-competitive in any manner.

The Commission carefully examined the submissions made by ATMA. The Commission agrees with ATMA that the trade associations may adopt the measures, which are necessary to protect the interests of the members. However, the decisions should not be in contravention of the Competition Act. The Commission noted that the activities of ATMA may thus be described as lobbying as far as anti-dumping duty issue is concerned. The discussions and conduct on other allegations is general and is not in contravention of the Act. This conclusion is based after a careful perusal of the minutes of the ATMA meetings. A few of the minutes are given below.

360. The minutes of MC meeting of ATMA held in April, 2005 recorded the following items:

Item 4.2: There was a general consensus that truck and bus tyres supplied to OE's (vehicle manufacturers) were at unsustainable prices, particularly in view of hike in input costs. Marketing group was advised to address this issue in its next meeting.

Item 5: Chairman ATMA suggested that in view of the fact that since the volume of such imports had stabilized, tyre companies may like to review their earlier strategy of bringing out lower

priced tyres to effectively compete with Chinese truck tyre imports.

361. The draft minutes of MC meeting of ATMA held in July, 2005 recorded the following items:

Item 5: Members were informed that one round of discussions has taken place between cost managers of select tyre companies and the advocate. The advocate had desired marketing, cost and financial data, as per the format circulated through ATMA to be completed by three member companies (Apollo, CEAT and JK) to be forwarded..

362. The draft minutes of MC meeting of ATMA held in May, 2006 recorded as follows:

Item 3: ...MC decided that ATMA members would import 52,000 MT of natural rubber which is 12% of consumption of tyre industry between Jan and Dec 06.

.....It was felt that in view of the steep increase in the price of natural rubber and further increase anticipated, tyre companies should intensely look into the feasibility of increasing consumption of synthetic rubbers in place of natural rubbers.

Item No. 4: Tyre Export: The need to increase export realization was stressed by members of the MC. A view was expressed that tyre companies should look for minimum FOB value of US \$2.25/KG in export.

363. Action Taken Statement in the MC meeting of ATMA held in August, 2006 recorded the following issues:

Issue 1: monthly import level of NR by each tyre company be collected by ATMA secretariat and circulated to MDS.

Action taken: Latest information on NR imports compiled and circulated to MDs for information.

Issue 9: ATMA to constitute a core group to work out demand projections of tyres for the next 5 years.

Action taken: core group constituted by ATMA. Two meetings of the core group held....preliminary work has been initiated and findings brought to the attention of marketing group.

364. Action Taken Statement in the MC meeting of ATMA held in January, 2010 recorded the following issues:

Item 7: Tyre Demand Projection.....As per the decision of the ATMA marketing group, ATMA has initiated a detailed study on tyre demand projection, for major tyre categories for the next 5-6 years....

Item 9: ETRMA has suggested to ATMA to share on a reciprocal basis tyre production data of their respective member companies at the level of ETRMA and ATMA.

For consideration and decision by the committee.

365. In view of the above and taking into consideration the act and conduct of the tyre companies/ ATMA, it is safe to conclude that on a superficial basis the industry displays some characteristics of a cartel there has been no substantiative evidence of the existence of a cartel. As a tradable the industry has always been open to competitive threats from imports. The Commission holds that the available evidence does not give enough proof that tyre companies/ ATMA acting together have limited and controlled the production and price of tyres in the market in India.

Order

366. The Commission has found that there is not sufficient evidence to hold a violation by the tyre companies Apollo, MRF, J.K. Tyre, Birla, Ceat and ATMA of the provisions of section 3(3) (a) and 3(3)(b) read with section 3(1) of the Act.

367. The Secretary is directed to communicate this order as per regulations to all the parties.

sd/-
(H.C Gupta)
(Member)

sd/-
(Geeta Gouri)
(Member)

sd/-
(M. L. Tayal)
(Member)

sd/-
(S.N.Dhingra)
(Member)

sd/-
Ashok Chawla
(Chairperson)