PAINEL II - CARTÉIS - CARACTERIZAÇÃO E REQUISITOS PARA A SANÇÃO ADMINISTRATIVA E CRIMINAL - *CARTELS, ADMINISTRATIVE AND CRIMINAL PENALTIES*

MAURO GRINBERG

Senhoras e Senhores, muito boa tarde. Vamos dar início a mais esta seção do Seminário Internacional do IBRAC. Antes de fazer a apresentação inicial, quero transmitir aos senhores alguns avisos que me pede a coordenação do seminário.

Em primeiro lugar, quero agradecer em nome do IBRAC, o esforço enorme do Sr. Julian Peña, da Argentina, que face ao fechamento da fronteira, não pode passar pelos meios normais e teve que fazer uma longa viagem de barco, inclusive com família, um filho pequeno, para conseguir chegar aqui. Eu queria louvar seu esforço para o fazê-lo. Também, após esta seção, haverá a outorga dos prêmios Esso. Feito isso, vocês tem isso no programa, haverá o pré-lançamento do livro da Dra. Alejandra Herrera, "Introdução ao Estudo da Lei Geral de Telecomunicações no Brasil", que ocorrerá ali no saguão. Ainda, o IBRAC estará oferecendo a todos a Noite da Caipirinha. Obviamente, depois da seção, não confundam com Tarde da Caipirinha.

Senhores Membros da Mesa, Senhores Membros deste Seminário, Senhoras e Senhores. Este evento é muito agradável para mim e nesta mesa eu me considero sentado entre amigos. A origem desta composição de expositores estrangeiros está em alguns encontros internacionais a que comparecemos que contaram com as participações efetivas, tanto do Gary Spratling quanto do Martin Low, que posteriormente me apresentaram ao Gerwin Van Gerven. Daí os convites que foram feitos e eles gentilmente aceitaram, para nossa satisfação.

Sempre que eu ouço falar em julgamentos, e note que falo aqui em julgamentos e não em condenações referentes a cartéis, nu único e bem conhecido caso de 1999 vem à mente. Claro que penso em cartéis envolvendo grandes empresas e não empresários de pequeno porte, menos sofisticados. Evidente que nós não podemos de pronto imaginar que o que é bom para o hemisfério norte é necessariamente bom para nós, mas certamente há exemplos que podem servir de base para as nossas discussões. Até porque, os grandes cartéis internacionais afetam o mundo todo, inclusive o Brasil. Bem, isso já faz parte da exposição do Gary, que estou adiantando um pouquinho.

Aqui sou apenas o coordenador desta mesa e portanto, não é a mim que vocês devem ouvir. Apenas quero dar uma explicação rápida a respeito da

nossa programação. Primeiro, será exibido um filme que relata tudo o que foi feito para investigar o cartel da lysina. É um *leading case*, que deu origem à grande investigação que depois será explicado a vocês no curso do fato. É um fato real, trata-se de um filme feito pelo FBI e talvez, até por isso, não tenha uma perfeição técnica tão grande quanto seria ideal. Em seguida, terão lugar as apresentações individuais dos três expositores estrangeiros e também um pequeno debate entre eles. Isso intermediado pelo nosso intervalo para o café. Depois será aberto o debate.

Quero fazer a apresentação dos expositores estrangeiros. À minha esquerda, Martin Low. Ingressou no Department of Justice do Canadá em 1974 e durante 10 anos trabalhou na Human Rights Law Section; de 1995 a 1999, ele foi Senior General Counselor no Competition Bureau do Canadá; hoje é sócio do escritório McMillan Binch, de Toronto. Quero deixar claro para vocês que essa contagiante simpatia e esse sorriso cativante não revelam o que ele foi como perseguidor de cartéis, cujos integrantes tiveram que pagar somas altíssimas, como multas. Enfim, ele prestou um grande serviço ao país dele.

O Gary Spratling é sócio do Gibson, Dunn & Crutcher, sediado em San Francisco, na Califórnia. Foi promotor durante 20 anos no Departamento de Justiça, até janeiro de 2000, foi Deputy Assistant Attorney General, o cargo mais alto de carreira na Antitrust Division Ele foi o responsável pela supervisão de todas as investigações criminais e processamentos, inclusive, tudo que se referia a cartéis internacionais. Recebeu o Presidential Rank Award, a mais alta condecoração dada a funcionários do governo nos Estados Unidos, e o fez duas vezes, a primeira recebeu do Presidente Bush (antigo), a segunda do Presidente Clinton, o que revela que ele é muito eclético. Outra coisa quero esclarecer, tenho escrito aqui o número de condenações e de multas que eles aplicaram, mas eu me recuso solenemente a dizer aqui quais são porque isso seria muito provocativo para nós. Vou apenas dizer quantas multas e condenações eles obtiveram.

O Gerwin Van Gerven é sócio do Linklaters & Alliance, em Bruxelas. Estudou direito e economia em Louvain, na Bélgica e em Harvard, nos Estados Unidos. É o sócio encarregado do antitruste há 15 anos, tanto no que diz respeito a controle de atos de concentração, quanto em matéria de cartéis.

Creio que para esta platéia não preciso fazer a apresentação específica dos debatedores. O Dr. Considera e o Dr. Paulo, de qualquer maneira, já foram apresentados hoje de manhã. O Dr. Laércio Farina e o Dr. Franceschini são figuras conhecidas nossas, membros da Diretoria do IBRAC e advogados muito conhecidos. Então, a primeira parte desta nossa seção mostrará o filme que falei anteriormente. Os membros da mesa caso queiram, podem sentar-se

aqui para não atrapalhar a exposição do filme. Eu deixo a palavra com Gary Spratling, para a exposição do filme.

GARY SPRATLING

Good-afternoon., Thank you, Mauro, for that very nice introduction. It's a pleasure to be here. Thank you very, very much for the invitation. As Mauro said, we thought we'd start this afternoon by giving you, a courtesy of the United States Department of Justice: a insider's look at an international cartel. Specifically cartel meetings and cartel operations.

Some of you in this room are prosecutors and have heard about the meetings and the operations of a cartel from informants and cooperative witnesses. Others here, are in corporate counsel and private practitioners, who have heard about cartel meetings and cartel operations from the firms and executives that you represent. Some of us have heard about cartels and their operations in both settings, but I dare say that no one in this room has ever attended a cartel meeting, or at least, I hope not.

Today, we are going to give you an inside look at several cartel meetings, and these are meetings of the same cartel mentioned at the moment And you're going to see this, through the lens that was mounted in a camera inside of a table lamp and videotape and in the case of audio tape you will see transcriptions of the tape. Recorded by FBI agents, with the help of a cooperating witness, the tape captures members of an international cartel fixing prices and allocating territories among themselves, in a product called lysine which more Mauro mentioned, but what he didn't tell you is that, lysine is a feed addictive, that is used by farmers around the world who raise poultry and swine. This cartel is commonly referred to as the ADM case, standing for Archer Daniels Midland, one of the primary actors in the cartel. And you will see the executives from the United States, European and Asian countries, conspiring the fixed prices to their customers, using a slogan "our competitors are friends, our customers are the enemy" and operating a cartel so powerful, that was able to fix the price of lysine in every country of the world, effective the next day in their meetings, and every country in the world obviously includes Brazil. There are a total of 8 tape segments. These segments run from one minute in length to four minutes in length. And each segment selected, demonstrates a particular common characteristic of a cartel. We've limited the number of characteristics we're going to point out to you, to a total of 8.

Let's look at, let's jump into those, what the first of those is: United States Department of Justice officials say that the one of the most common characteristics of international cartel is - and these are their words – the bra-

zen nature of the conspiracies and the – again, their words – contempt that cartel participants typically show for any trust enforcement. Now I confess that when I was with the Department of Justice I may have used those same words. In fact, I may have started using those words. But now that I'm in private practice, representing participants in cartels, I find those words unusually harsh and condemning. So whether, you find them harsh, or whether you find them brazen and contemptible, the facts remain the same. And the facts are, that executives involved in cartels, believe that they are above the law and that they will not get caught. The Department of Justice reports that in every international cartel that they've prosecuted, everyone single one, the executives from foreign countries engaged in those cartels knew that they were violating the law of the United States and the laws of other countries that prohibit cartels. They try to conceal their actions with such tactics as, using code when they were talking to one another, making telephone calls from one home to the other home, instead of using the business telephones. Meeting in secret locations. Giving explicit instructions after meetings, to destroy all of the evidence of the meeting, or in the event of an investigation, a pact among themselves that they would destroy all the evidences. Another characteristic of a cartel that ducktails with this you will see in this first segment. It is that typically, very high level executive, sometimes the highest level executives of the companies are involved. They almost always have had antitrust or competition compliance training and in many of the cases prosecuted by the United States Department of Justice, the person who was responsible for the cartel, was the same person in the organization that had responsibility for compliance with the antitrust laws of that firm. Let's turn to the tape.

As I said, this is a courtesy of the Department of Justice, so you would expect an advertisement. All of the tapes segments that you will see today, will be recorded as I mentioned, as a part of the lysine cartel and the first segment shows a meeting, where all the members of the cartel are getting together. Representatives of the 5 dominant producers of the cartel in the world are all meeting in a hotel room in Atlanta, Georgia, in 1995. You will see that they took steps to conceal the fact that they were meeting, by staggering one after the other their arrival and departure times. So no one would see them all going into a room together, or leaving the room together. You'll even, I'm not sure that if it's in this tape, but in one of the tapes, they talk about wearing hats coming in, and wearing dark glasses, so they would not bee seen. The members of the cartel had reason, had special reason to be careful at this first meeting we are going to see, and that's because it was occurring at the same time and in the same city as the meeting of the Poultry Trade Association. These are they customers, who are in the same city meeting. In

fact, that fact influences some of the things you are going to see said on this first tape. For example: as the meeting begins, you will hear conversation about them, who the empty chairs are for; one of them jokingly says that one of the empty chairs is for Tyson's. Tyson's is the largest purchaser of lysine in the world They were joking that was one of the customers that was going to be there. The prices that they were fixing to Tyson's. That another chair was for ConAgra, another very large purchaser. Then you will hear one member talking that some chairs are for the Federal Trade Commission and some are for the FBI.

The FBI is in the next room controlling the camera.

The knock at the door, at the end of the tape segment, when one of the gentlemen said FTC ,was in fact an agent of the FBI, disguised as a hotel employee. the reason for the knock on the door was, he was bringing a briefcase to the room that had been left by the FBI's cooperating witness, Mr. Withaker on the tape, had been mistakenly left at the table at breakfast. This briefcase had in it, a directional microphone to assist in picking up, so it was the FBI disguised in a hotel employee that brings the briefcase to the cartel meeting and the briefcase is then put on the desk for the rest of the meeting.

The next tape segment demonstrates another common characteristic for cartels and that is the reluctance of foreign members to conduct cartel activities in the United States for fear of detection by the United States Enforcement Officials. What you are going to see is the transcription of a telephone call. The conversation is between an ADM – Archer Daniels Midland executive at their headquarters, in the United States. The person who was cooperating witness, Mr. Withaker, in the investigation. An executive from a Japanese firm, named Giamoto. They are discussing the location of the next cartel meeting and you will see that the japanese executive is clearly reluctant to meeting in Hawaii, but ultimately agrees to meeting there because it is convenient for the people involved, because of the attraction of nice golf courses close to the meeting place.

As you will see from the next tape, the Japanese executive's reluctance to go meet in Hawaii was a well placed reluctance. The meeting in Hawaii was taped. Another common characteristic of international cartels is one that was actually alluded to in this tape, but is discussed specifically in the next tape, and that is using trade associations as a " coat cover", as a cover for illegal activity. This next tape segment is from the Hawaii meeting that was just discussed there. You will see an ADM executive talk about using trade associations as the "perfect cover".

The gentleman that was saying at the end, that it was a perfect cover is Mr. Wilson, of ATM and we will have more to say about him later. Later

on that tape, we've cut them all down for purposes of this meeting but later on that tape they talk about the preparing of false agendas and the preparation of the complete false minutes of the meeting That people would not know, in fact, later they prepare pages of minutes completely fictional about the meeting. Another thing that occurs to me that I have insert right here is that the camera was very close to the shoulder of on person and then pinned around the room to another person. One of the things that was difficult for the FBI, in setting this up and putting the lamp in each room, was to arrange the room to make sure that nobody would sit in front of the lamp, and therefore, block out the pictures. Another common characteristic of international cartels is it's power to control prices around the globe. On worldwide basis you change prices almost immediately. Executives from around the world you will see in a moment gathered in a hotel room and agreed upon on the delivery prices to the penny per pound for lysine sold in the United States. Then agreed to the - in equivalent currency and weight measures – agreed to the price in every other country of the world, including every country in South America to be effective the very next day. In this particular tape segment, because the actual segment where they agree upon prices for all the countries of the world runs more than three hours, you're seeing a particular portion of the tape where they are talking about the United States and Canadian prices.

You heard them say a dollar and sixteen cents, not a dollar ten, not a dollar twenty, but a dollar sixteen to the penny or pound. They made those same determinations for every country in the world. You heard them say that it was already night time, they were in Hawaii and it was already night time in Canada. They were making the prices that were announced effective in very country in the world the next day (the evidence the trial shows that that in fact happened). The next morning, the price for the commodity changed, in every country in the world. The members of most cartels come to realize that their price fixing conspiracies work much better if they also allocate volume among themselves. And so cartels typically meet in what sometimes they call budget meeting, and sometimes they call something else. But cartel participants typically meet to determine how much each producer has sold during the previous year. They then calculate what the total market was for that year. In all cartels, they then estimate what the amount is going to be in growth for the following year. Then, they divided it back in growth themselves. That's the way they allocate it. In this next tape segment, you're going to see the cartel members having decided already that the growth for next year in the cartel market is going to be £14,000 (fourteen thousand pounds). That's the number you're going to see here several times, and what they are doing is they're deciding among themselves how to divide up that £14,000 (fourteen thousand pounds)

among themselves, because those will be the new numbers in the new budget for the cartel for this coming year. They've already been operating on an old budget, these are the new numbers:

It is common for members of a cartel to keep one another in line, or to keep one another in compliance with their agreement. by actual or threatened retaliation if someone gets out of line. So one cartel member will drop its price, or increase its volume in a manner to hurt the business of another cartel member if that cartel member is doing something that they haven't agreed to. Sometimes the threat of retaliation is enough to make people come in to line in the first place or to keep them from getting out of line. And in this next tape, you're going to see an ADM executive – this is the same meeting that we have just had – this is Mr. Wilson speaking again, you are going to see the ADM executive pose a threat to get his co-conspirators to go on with the proposed volume allocation agreement and to stick with it.

In the next, another common feature is the compensation scheme to discourage cheating. A compensation scheme works like this: a cartel gets together...[*]

(...) prosecution in the United States, is what my colleague, former colleague from Canada, Martin Low, refers to as the (...) and three years in jail for having evidence like that. There is one more common characteristic that we have on tape. We had agreed to limit this section to 45 minutes, by my watch we're now at 40 minutes, and this is a long segment and it also takes a bit to set up. Let me deal with it in one minute, and we're going to skip it. It has to do with budget meetings and how a cartel sets up a budget for itself. The vitamins prosecutions which you are all familiar with. All the companies in the vitamins prosecutions got together. The executive from the various divisions got together and computed a budget for the cartel, just as you would compute a budget for firm. From that budget, come things like compensation scheme, volume allocation agreement, and so on. In the three minutes we have left before the 45 minute deadline, let me just give just an epilogue of the things you saw on this tape.

All of the companies, or their corporate parents, that were in the lysine cartel, eventually pled guilty and paid large criminal fines. I will talk about the fines in the United States and in their presentations I believe that both Gerwin van Gerven and Martin Low are going to talk about the fines in Canada. ADM ended up paying one hundred million dollars. At that point, and now it sounds like not very much money, with fines of five hundred mil-

[*] Problemas de gravação

lion dollars floating around. But at that time it was seven and one half times larger than the highest fine that had ever been imposed in any trust case before. The three ADM executives were convicted at trial. Mr. Andreas that you saw, Mr. Wilson, and Mr. Withaker, were convicted at trial. They were sentenced to financial fines up to three hundred and fifty thousand dollars and jail sentences.

In the case of Andreas and Wilson three years and thirty months in jail. Mr. Withaker, who is a cooperating witness, at this time got an even longer jail sentence because he violated his cooperation agreement with the United States Department of Justice. While he was cooperating and assisting in the making of these tapes, he was embezzling more than 10 million dollars from ADM. Lost the protection of cooperation agreement, therefore received his protection on the antitrust offense, was sentenced in that offence, also received a sentence for his embezzlement and fraud and is currently serving a term of more than 8 years in a United States prison.

The other gentlemen you saw on the screen, Messrs. Yamamoto, from Giamoto, Yamamoto, from Kyowa, the two Japanese companies, Mr. Kim, from Sea One. All agreed to plead guilty and paid heavy fines. Mr. Yamada, the Giamoto executive who was at the volume allocation agreement, on behalf of the Asian competitors. He was speaking on behalf of both Korean and Japanese competitors. He did not agree to plead guilty. He did not subject himself to the United States jurisdiction, was therefore indicted and he is now an international fugitive, subject to arrest for in the United States and subject to extradition from Japan. This is the end of segment number one and if the panel will please come back, we'll begin segment number two. So, this is the end of the movies.

MAURO GRINBERG

Senhoras e Senhores, eu quero fazer uma observação. Duas observações, desculpem. Primeira, o Fernando Marques numa conversa que nós tivemos ontem, na diretoria do IBRAC fez referência a este filme como um filme de terror. A segunda referência, que existe um livro, escrito por um jornalista chamado Kurt Eichenwald, The Informant. Não tem nada a ver com aquela história dos cigarros. Ele que conta este julgamento, o processo em detalhes e no meu escritório ele se tornou leitura obrigatória para os jovens advogados e estagiários. Eu quero agora, passar às exposições individuais, de cada um dos três convidados estrangeiros a começar, já que ele está no pódio, pelo Gary Spratling, a palavra é sua.

GARY SPRATLING

Martin, and Gerwin and I are each taking 15 minutes to talk a bit about these tape on cartel enforcement and immunity, amnesty, or leniency policies as they may be called in each of our respective jurisdictions, the United States, EU, and Canada.

But first, I'm going to take just one minute to tell you something that may be apparent from what you've seen in this tape and it may not. Enforcement authorities have found, around the world that cartels, like the lysine cartel, because the lysine cartel is a good model, involving literally scores of products, are operating everywhere on every continent of the planet. And enforcement officials are doing something about it. Around the world, international cartel prosecutions are soaring. Competition authorities everywhere are targeting international cartel participants in unprecedented efforts and going after the maximum penalties allowed by the law in their jurisdictions. In the last several years, authorities from countries all over the globe have brought international cartel prosecutions in thirty industries.

Turning to the United States, my assigned topic, for the last few years, senior officials in the United States Department of Justice as an Antitrust Division have stated that international cartel enforcement is the Antitrust Division highest criminal priority. They've done things that reflect that language. Just in the last fiscal year, the US Department of Justice has brought charges stemming from international cartel activities against 14 corporations and 18 individuals; prosecuted cases involving 10 separate cartels, including many cartels that affected Brazil; and obtained over 280 million dollars in fines. Currently, over 30 grand juries are investigating suspected cartel activity in the United States. Fifty percent of the corporate defendants in cases brought by the Antitrust Division of the Department of Justice in the last had been foreign based. And nine percent of all the fines collected had been as result of international cartel prosecutions.

The Antitrust Division has uncovered cartels operating in a broad spectrum of industries and you have heard of many of them, some of them, you may not be familiar with. Auction houses, constructions, vitamins, food addictive in addition to the feed addictive, lysine, chemicals, graphite electrodes, which are used in steel making, marine construction, transportation, and so on. The Department has obtained 1.5 billion dollars in fines from international cartels prosecutions as US$1 billion, US$ 500 million in just the last three years. Including fines of US$ 10 million dollars or more against US, Dutch, German, Japanese, Belgium, Swiss, British and Norwegian based

companies. In case you think that the senior executives are getting away with it, the Department of Justice has brought criminal cases against individuals, executives from Germany, Belgium, the Netherlands, England, France, Switzerland, Italy, Canada, Mexico, Japan, Korea, and most recently Spain, many of those sentences involve incarceration in the United States prisons.

The subjects or targets of the US Department of Justice investigations are located in more than 20 different countries on 5 continents. Those investigations have already revealed meetings of international cartels in 35 countries and over 100 cities. So this is a massive investigative effort. I divide the United States Department of Justice' s program directed at international cartels into a three part plan.

This is something that I divided since I left the Department, they may not refer to it at the same way. The first part of the plan is simple: provide the ultimate reward, immunity for the corporation and its employees and the opportunity to get off the hook, if they come in and self-report. The second part of the plan is increasing the severity of the consequences for companies and executives who failed the report. A pretty simple counter-balance. And the third part of the plan is to enhance the risk that the violations are likely to be detected. Because you see, no matter how severe the penalties, if there's not a high risk that they're going to be detected and prosecuted, it means nothing. People will not come in and self-report, if there's not a high risk of getting caught. And each of those are developed at length in my paper and I'm going to focus just on one those.

That's the first part of the Department of Justice's plan, which is to provide the ultimate reward to those who self-report. That is done through the Department's Corporate Leniency policy, also called its amnesty policy. It is the Department of Justice's most effective generator of cartel cases. Is believed, according to the Attorney General of the United States to be most effective generator of large commercial cases in the United States history. Cases of any type. Over the past five years, the Corporate Leniency Program has been responsible for producing more cartel cases, than all of the search warrants, audio and video tapes that you saw, informant and cooperating witnesses combined. The majority, far more than 50% of the international cartel cases have been advanced through the cooperation of an applicant in the Amnesty Program in the United States. Amnesty in the United States is available to organizations to self-report before and after a Government investigation has begun. But only the first organization to come and to cooperate can get amnesty.

In 1993, the Antitrust Division revised its Amnesty Program to make it easier and more attractive to companies coming in and it was different

than the old program in three ways and these are three critical elements. The first is that, if you come in before investigation has begun, amnesty is automatic; no prosecutorials question involved. Number two, if you come in and you cooperate, and the company gets the amnesty, then officers, directors and employees of the corporation who cooperate also get amnesty (a complete pass from prosecution). The last is, that amnesty is still available after an investigation has begun. When I used to talk about the Amnesty Program with the Department of Justice until the year 2000, when Canada changed its Program, I was able to say, unfortunately, that those three elements not only made the Antitrust Amnesty Program unique in the United States, it also distinguished it from all other Amnesty Programs in the world. There was not an Amnesty Program in another country that was the same. Now as you will hear Martin say the Canadian Amnesty Program is virtually identical and highly successful. You'll hear Gerwin say that the EU is moving in that direction. There are other jurisdictions in the UK, Ireland and other jurisdictions that we know are working but not public, that they are moving into that direction as well.

The reason why is because the financial benefits are just huge. To take the vitamins prosecution that most of you know about, and I believe that Gerwin referred to because of the action that was taken by the EU two days ago. There are the Amnesty applicants Ron Pollack received zero dollars in fines, no criminal convictions, all the individuals got a complete pass from prosecution. Yet Hoffman La Roche paid 500 million dollars, BASF paid 225 million dollars. Three executives from each firm served time in the United States prisons. That's the difference between Amnesty and no Amnesty.

We said we were going to keep one another honest on the 15 minutes. Let me tell you in addition to the Amnesty Program itself, two other things that the United States has done to make this a race to the prosecutor's jurisdiction, because defense counsel when they talk about the United States Amnesty Program they talk about it in terms of a race. Why? Because the Department of Justice has revealed that in many instances, there has been only one day between the time the first person came in and the time the second company came in. In some cases, less than a full day, only a few hours, between applications. I personally was the recipient in three cases, where there was one day or less than a day between the applications. So, it is a race.

The other two things the Department of Justice has done to enhance the race to the prosecutor and increase the likelihood are: number two, they've announced a policy and published the statistics on the great benefits for coming in second. So, if you come in second, you haven't lost everything. You still get very valuable rewards that are just not as good as the amnesty applicants rewards. The third thing that they've done is they developed a policy

called Amnesty Plus, which works like this: if you're in an investigation, and you're in negotiations with the Department of Justice. You've reached the bottom line figure and the department says "I'm sorry the lowest fine you can get, with all the credit we can give you for everything you've done, the lowest fine you can get is 43 million dollars, hypotethically. Unless, of course, you can tells us about a whole new cartel. If you tell us about a whole new cartel, we will give you amnesty in the new one, *plus* we reduce your fine in the current cartel from 43 to 19 million dollars. The Amnesty Plus has been very effective working with the Amnesty. In fact, one half of all international investigations, conducted by the Department of Justice are outgrowth of current investigations. That´s all to conclude.

MARTIN LOW

Thank you very much. I was a terrible disappointment to my mother. Because she thought I should be a priest. So from time to time, I try to make up for it by giving a little sermon in a dance of doing a presentation like this. You have all been witnesses to a crime today in viewing those tapes. I have had the experience in prosecuting these offences of judges and people at the other side of the television camera asking me what the big deal is with cartel offenses. Judges who have said why shouldn't parties get together and establish reasonable prices altogether.

When we prosecuted the vitamins case.. I said: well, let me just tell you how immoral these offenses are. In North America where the vitamins manufacturers raised their prices. The people who used vitamins, the makers of cattle feed, people who used vitamin pills to provide essential supplements, so their children don't go blind or suffer from rickets or degenerative diseases of the nervous system, people had to stop using them. When people stopped using them, if the conditions are bad enough, people die. Cattle don't develop, chickens and pigs do not grow. It's not just an economic cost, it's a social and a human cost. And I said, these are just as much crimes as if these executives from Switzerland, Germany, France, came along and put their hand in your pocket and stole your money.

So, cartels are not just bad for business. They're bad because they're criminal. When you're dealing with criminals sometimes in our society people ask questions about leniency. What the policy desirability of letting a criminal go, because he's going to turn an informant and tell what they know against their co-criminals. In Canada, United Kingdom and America for over 300 years society has wrestled with this problem and we have accepted. In order to

detect and to prosecute serious covered economic and other crimes, the most effective evidence is that of a co-conspirator. It enables not just detection, it enables us to prosecute the people who are really responsible. The people don't actually have their fingerprints on the scene of the crime, the key executives who dreamed it up in the first place.

Let me begin by describing with that little sermon the Canadian experience here. In Canada we have an independent agency, the Competition Bureau, run by the Commission of Competition. We have searches, seizures, wire tapped evidences and we have orders for producing documents. This is a little chart of how things begin and they generally start typically with complaints or the Bureau may begin itself, they conduct an investigation through market place contacts, targets, or industry experts. These days, they conduct investigations based on applicants for immunity. They take an enforcement decision, negotiate outcomes and they go to trial. The key to this is detection, as I think Gary said, once again, here are the ways in which cartels are detected, customer complaints, unhappy employees. Very frequently, the sixty five year old secretary, who has been traded in for a newer model, but just manages to keep the boss's diaries. Whistleblowers, Mr. Withaker, my description of a turned employee. And once again, these days, leniency or immunity.

Deterrence is the other critical feature in cartel practice, there must be a risk of detection. There must be a certainty of really serious punishment. There must be individual, as well as, corporate exposure – in my view. And the outcome of these offences, once they've been detected. It is certain that there will be very serious management distraction, over a very extended period of time while managers deal with people like Gary Spratling and Martin Low in our former capacities.

In Canada, corporations are liable to a fine of 10 million dollars per count, or for some offenses like bid rigging, unlimited fines. Same for individuals, but they're also exposed to 5 years imprisonment, private damages and in Canada, there is a significant trend towards stiffer and stiffer sentences.

From 1980 to 2001, there were 54 cartels in Canada that were detected and prosecuted. There were 22 trials and there were 3 successful trials. There were only 3 convictions in that entire period, when the cases went to trial. The total outcome of those three contested convictions were fines of 7 million dollars. Between 1995 and 2001, there were 31 guilty pleads, of which I was responsible for 28 I'm afraid, and total fines of 151 million dollars. The comparison is just staggering. The reason for that chance is this Leniency Program, the Immunity Program. In 1991, the record fine 1.7 million dollars, 1995, it went to 2.5 million dollars, the ADM case – the lysine case - ADM

paid then a record fine of 16 million dollars. Then in 1999, the vitamins case, Hoffman La Roche paid a fine of 50.9 million dollars.

Here are some of the ways in which evidence is obtained in Canada: search warrants, production orders, they can require the production from a local affiliate of evidence that is held by their foreign affiliates. They can search computers for any data that is available through the computer, that is found in Canada. They can engage in wire tap authorizations. Here are some of the outcomes in the lysine case in the US, as Gary mentioned, ADM paid a 100 million dollars, 14 for lysine plus 2 million for citric acid in Canada. In the EU they paid 47 million euro's (I'm afraid that dollar sign is incorrect). Ajinomoto, 10 million, 3.5 in Canada 28 a bit in Europe. Kyowa Hakko was given immunity from prosecution, even though we knew about Kyowa Hakko's involvement in the conspiracy. Kyowa Hakko provided enough evidence to enable us to take proceedings against the other parties. In the case of CHAO or CSA as you saw on the tape, they had no sales in Canada and action against CHAO was not taken. The vitamin's case gets a little more interesting: 500 million in the United States, 48 million in Canada plus some citric acid as well. In Australia a few months ago, 15 million dollars. In the EU the day before yesterday, they were fined in 162 million Euros. In Brazil, if you go down this column, you'll see the cases are pending. I won't spend more time on that except on one feature: in the United States, Rhone Poulanc, or as it now is Aventis, was given amnesty and its evidence resulted in these convictions. In Canada, Rhone Poulanc was the fourth party to cooperate with the Canadian investigation. They were given a very significant discount, but they were required to plead guilty and they paid a fine of 14 million dollars. That was the cost of not being well enough coordinated to decide to seek amnesty in the United States and to move quickly in a coordinated way in other jurisdictions.

The timelines that I mentioned, how difficult it is for manager of these industries to deal with these cases over extended periods of time. Lysine pleads in the United States in between August and December 1996; Canadian pleads came in May of 2000; in the European Union it took years before they got to resolution. Graphite electrodes, similar sort of periods, 1998 the first outcome in the United States through to July of 2001 before matters were resolved in the EU. In vitamins, we've gone from decisions in the United States in May of 1999; in Canada, pleads were achieved a few months later. I think that is the result of a Canadian investigation that had gone on for some time prior to the proceedings in the United States let to the convictions. But from that point to November of this year, things have been under negotiation

in the European Union. A think I said they are pending in Brazil. I understand that proceedings in that cartel are pending in a number of other jurisdictions.

In Canada, this is another critical element to operation of cartel enforcement, and certainly to the operation of the Immunity Policy that is effective, there must be clear protection to the confidentiality of information in order to provide people with the reassurance that they can cooperate with the Enforcement Agency, that is prepared to give them immunity. Without having that information spread out to other jurisdictions where they may not be able at the time to deal effectively with that agency. The further problem with confidentiality is, at least in the United States and Canada, the parties are facing major civil claims by victims of the offenses. So they need to be able to deal with the Enforcement Agencies on a footing of confidentiality. It was well recognized in Canada for a very long time, to preserve the efficiency and the effectiveness of a criminal investigation. A guarantee of confidentiality can be given by the enforcers, then courts will not require a breach of that confidentiality undertaken. That's about fourteen minutes...

Thank you very much. I wanted to say it is remarkable to me, coming from a country where we have had antitrust enforcement confidentiality for over a hundred years. To Brazil, where you've had it for 6 or 7 years and to see a gathering of nearly 200 professionals engaged in this kind of work. I have to say that we would be heart pressed to attract this many Canadians to a Conference of this sort. I think it might be because we don't have a place as nice as Foz do Iguaçu.

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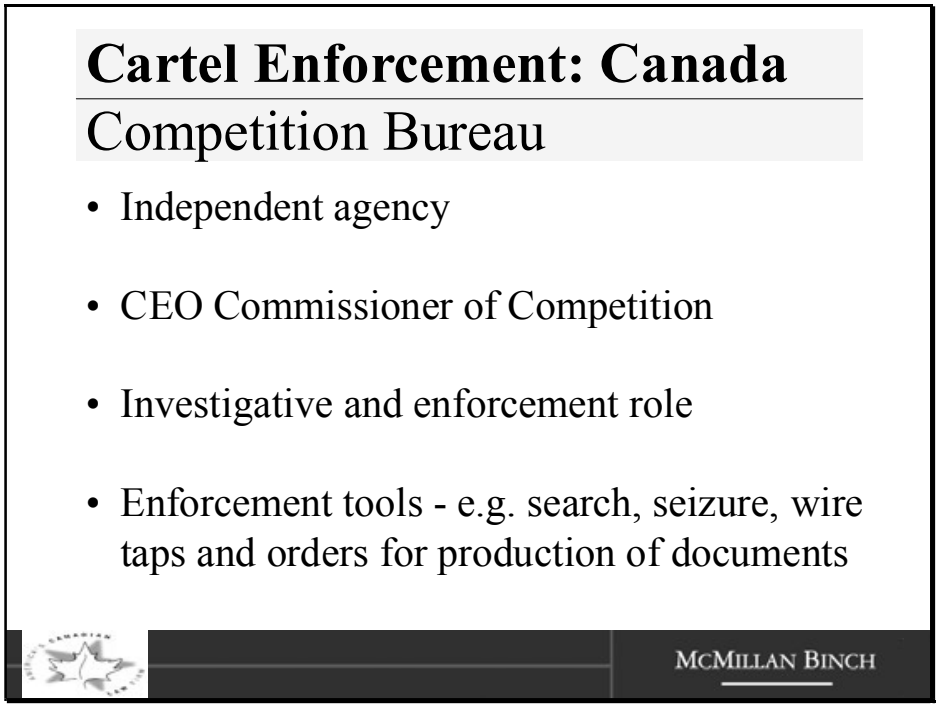

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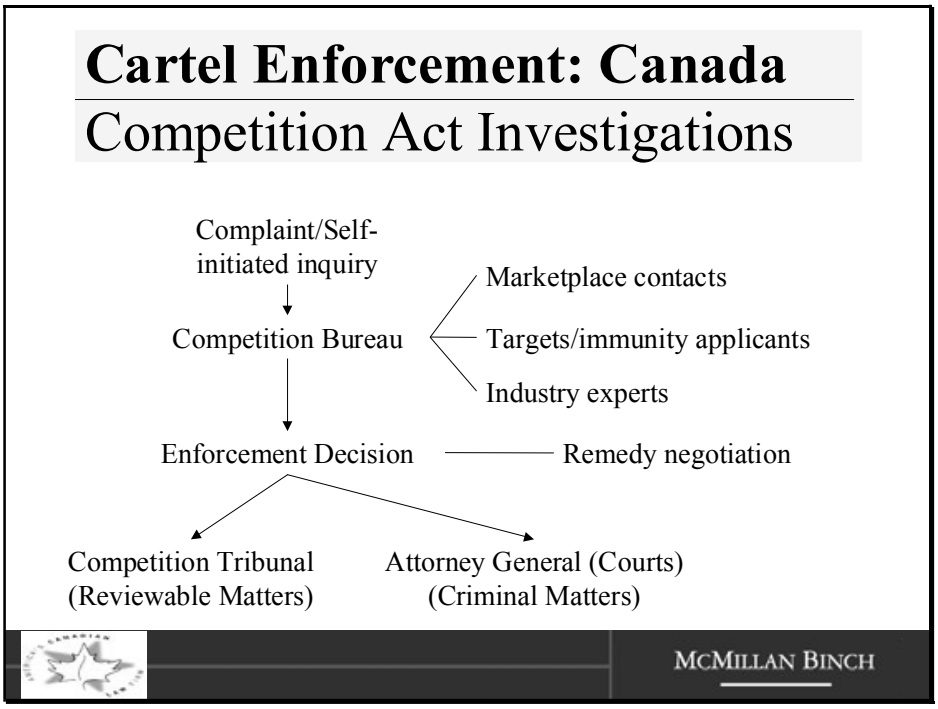

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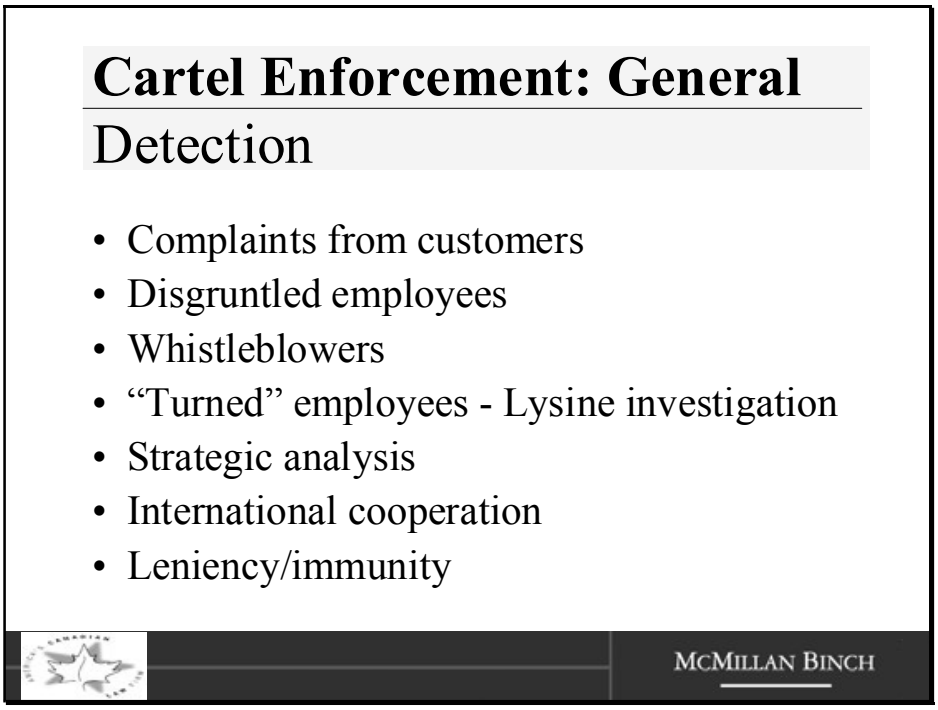

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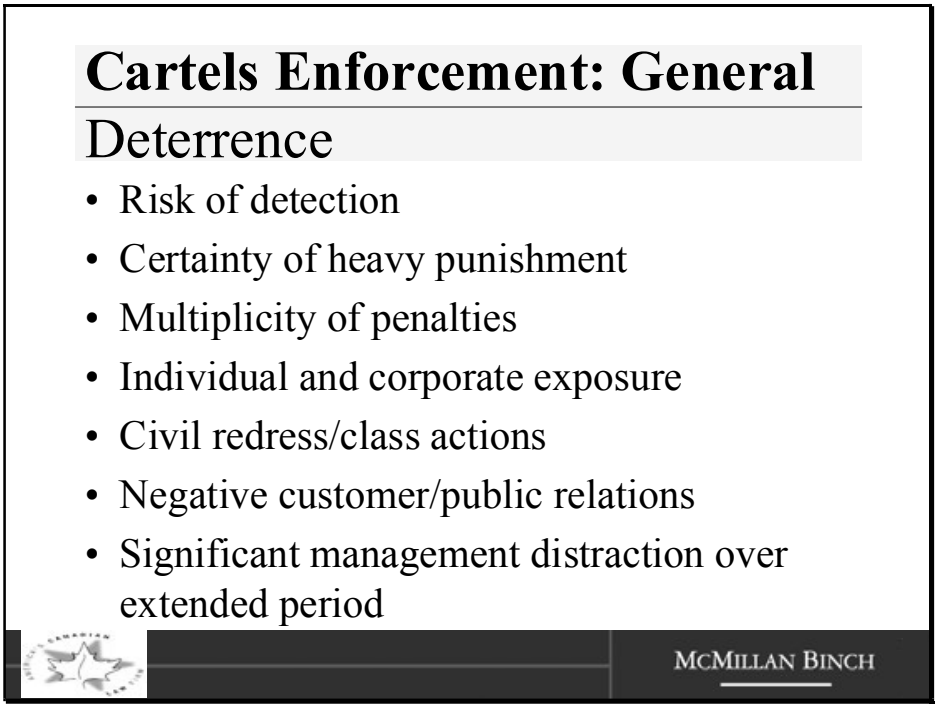

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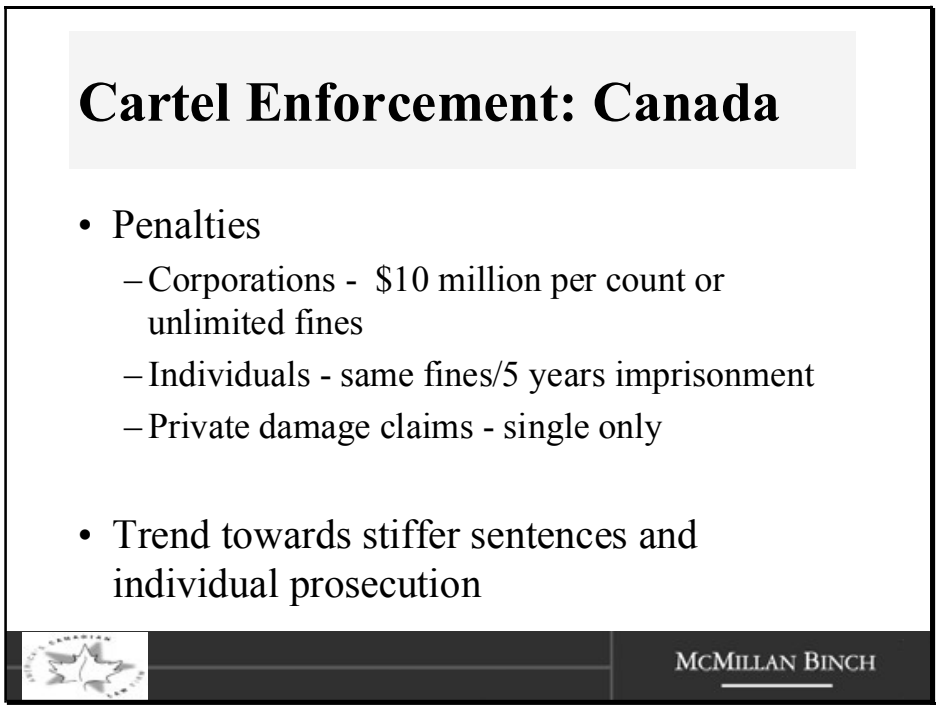

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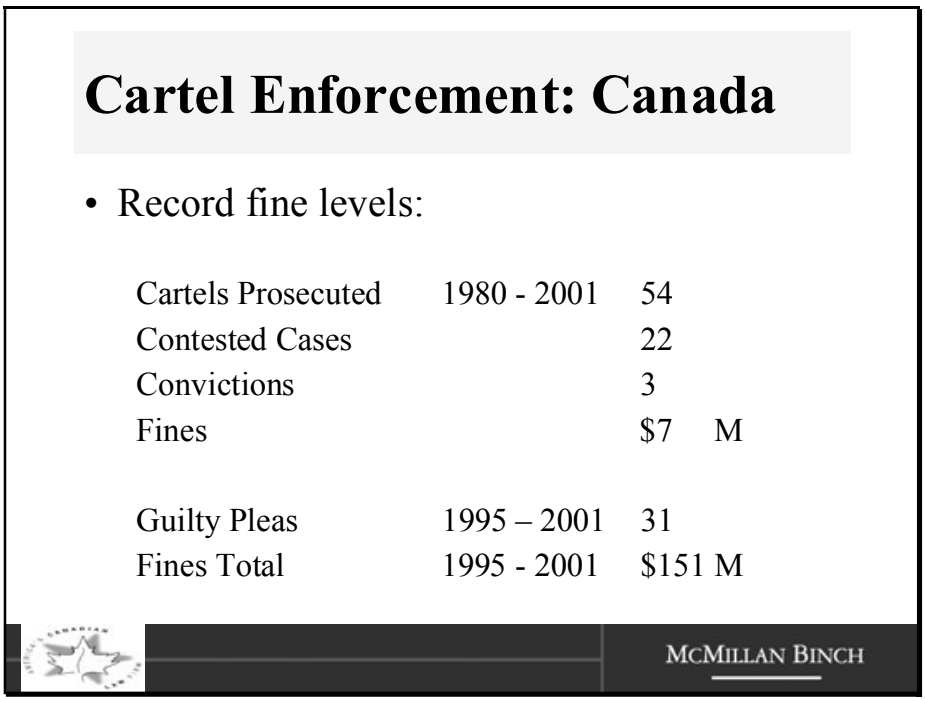

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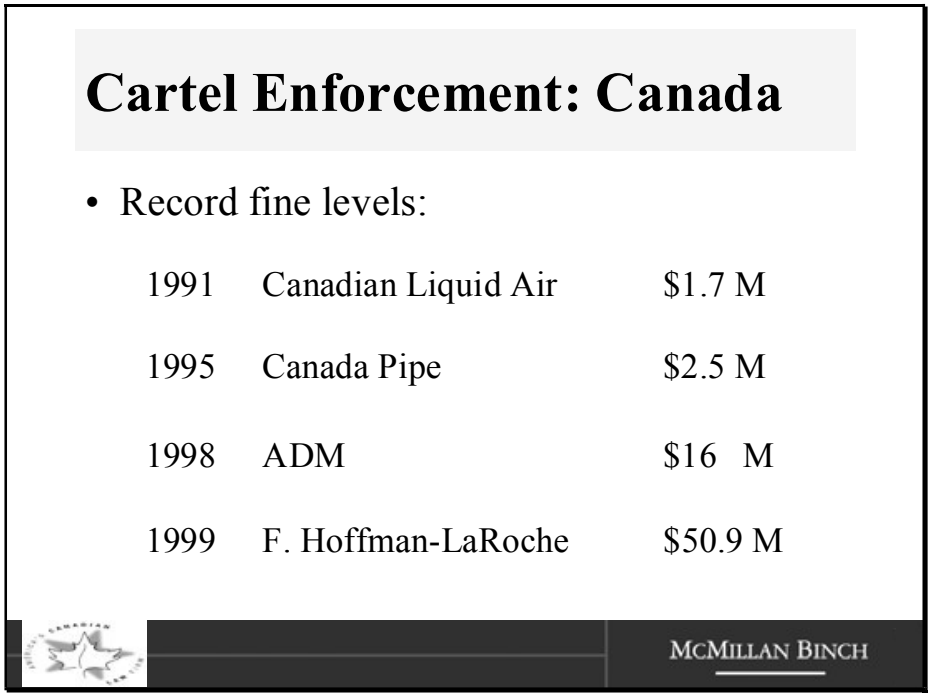

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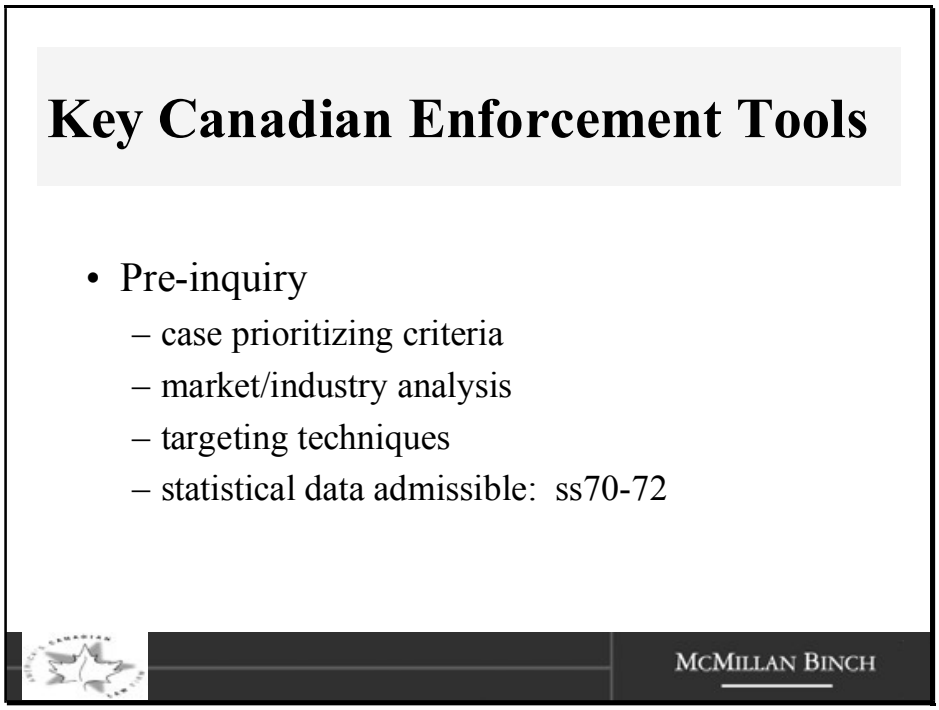

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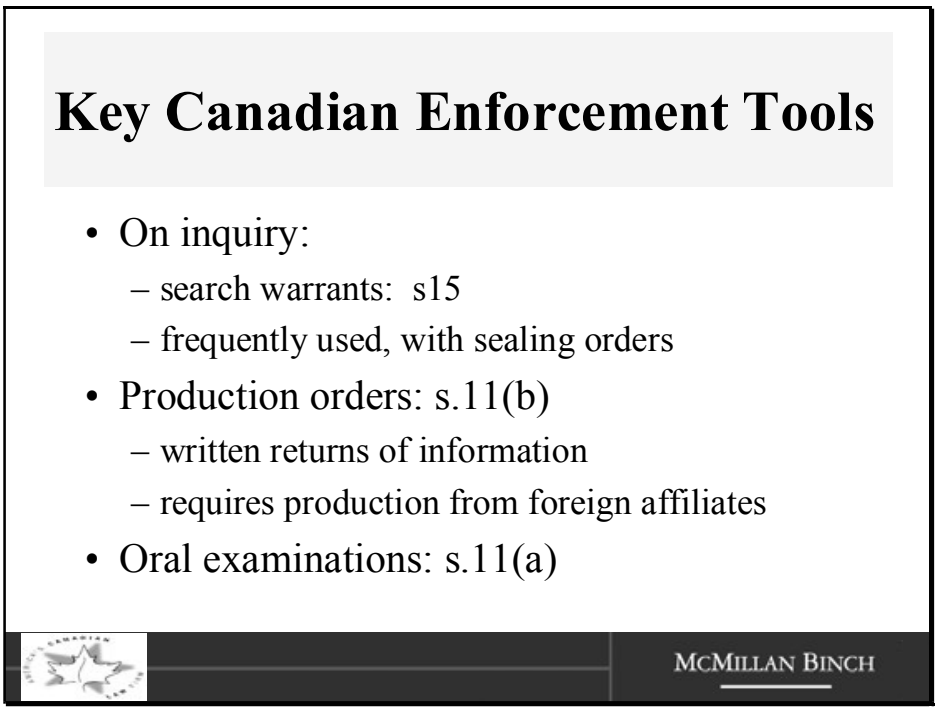

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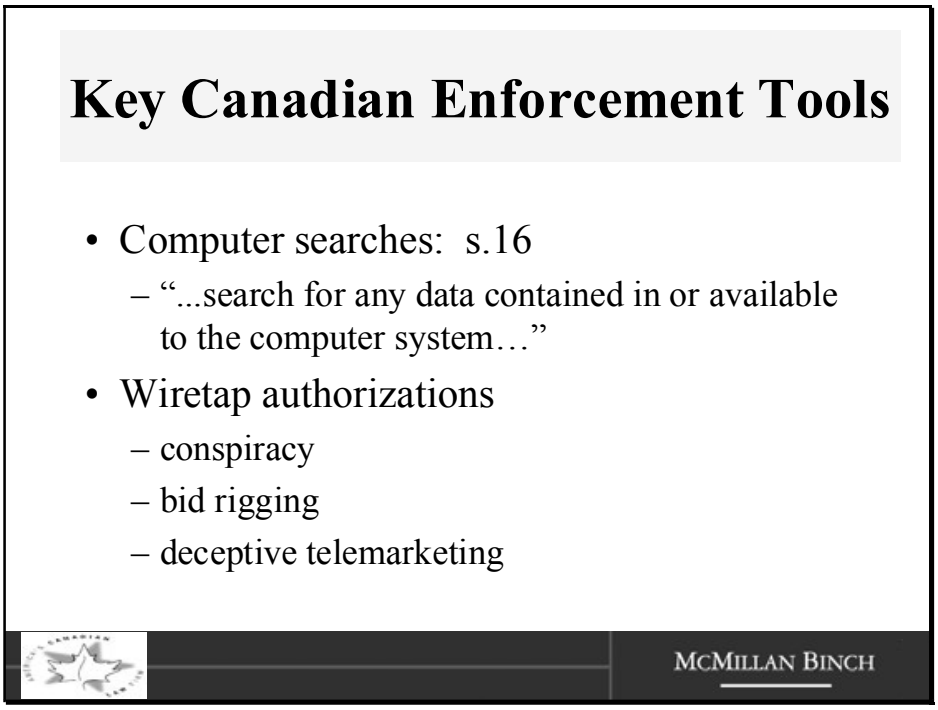

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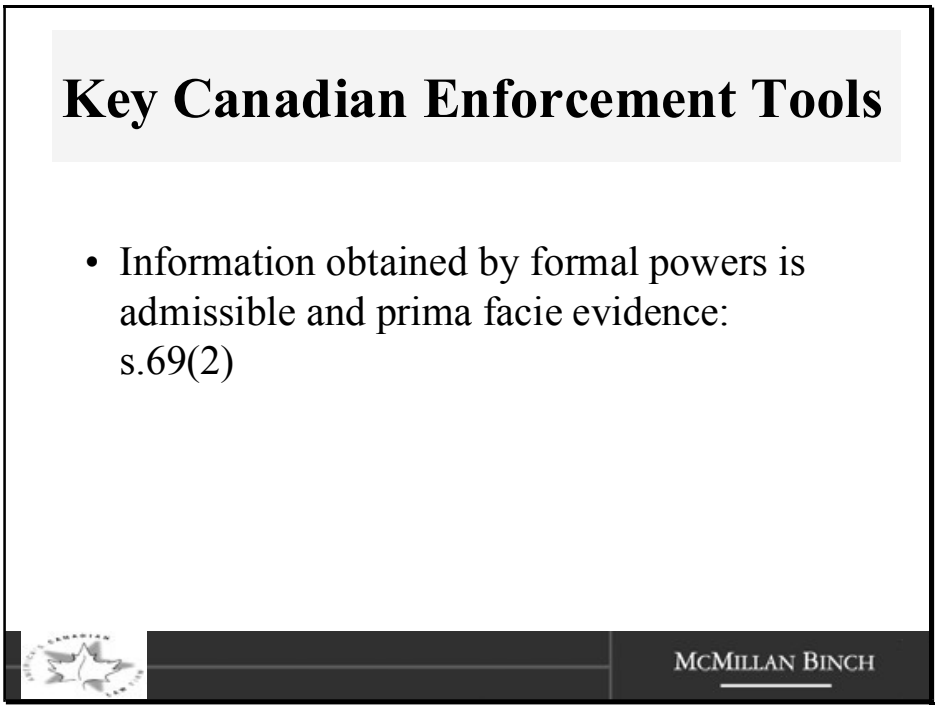
Key Canadian Enforcement Tools
• Information obtained by formal powers is admissible and prima facie evidence: s.69(2)
McMillan Binch

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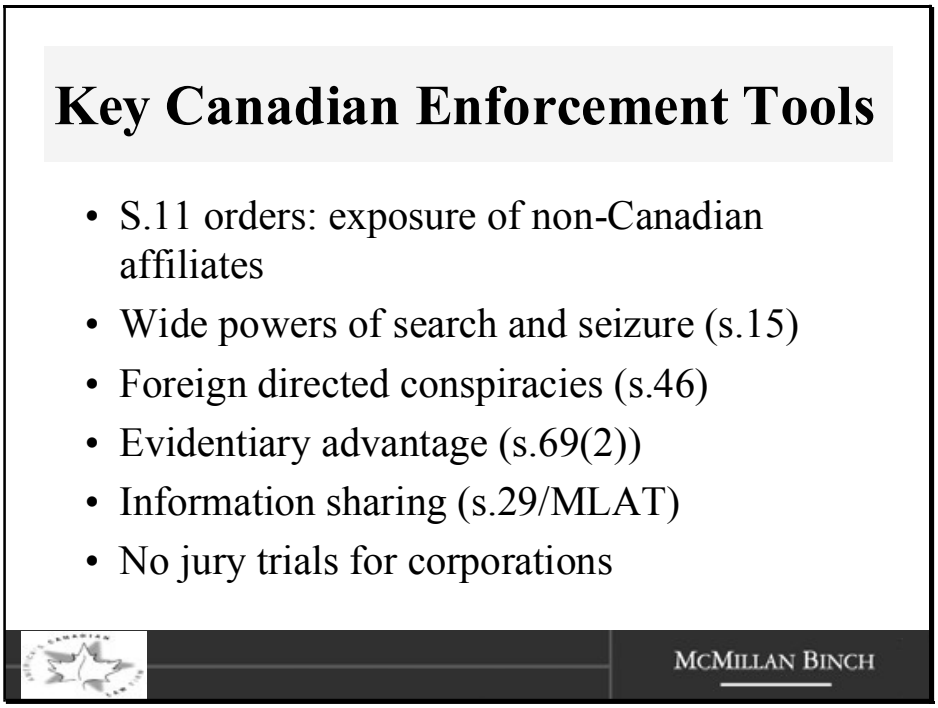
Key Canadian Enforcement Tools
• S.11 orders: exposure of non-Canadian affiliates
• Wide powers of search and seizure (s.15)
• Foreign directed conspiracies (s.46)
• Evidentiary advantage (s.69(2))
• Information sharing (s.29/MLAT)
• No jury trials for corporations
McMillan Binch

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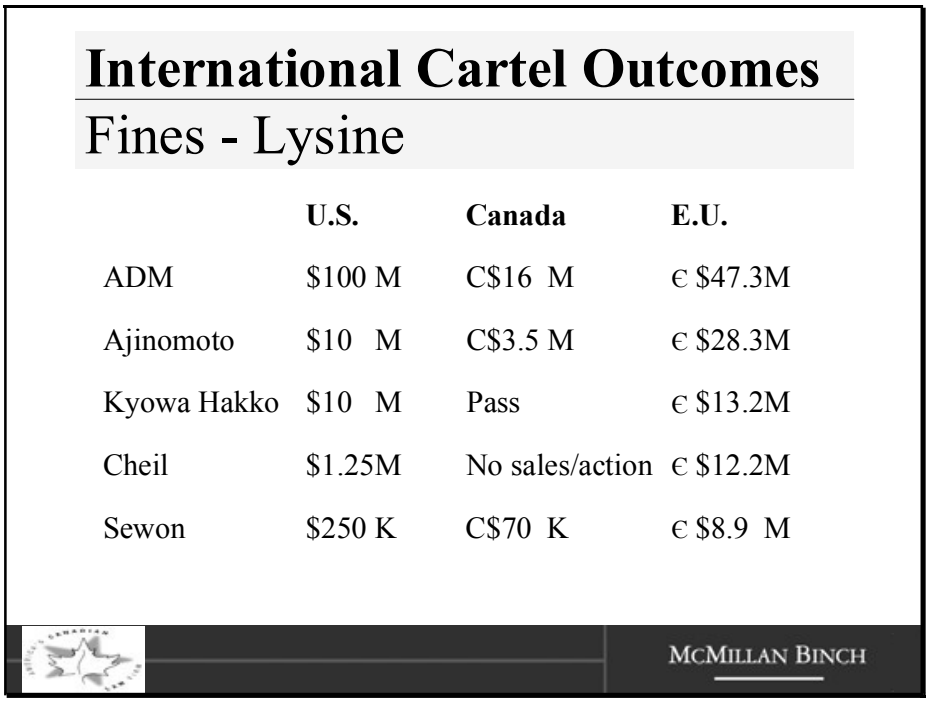

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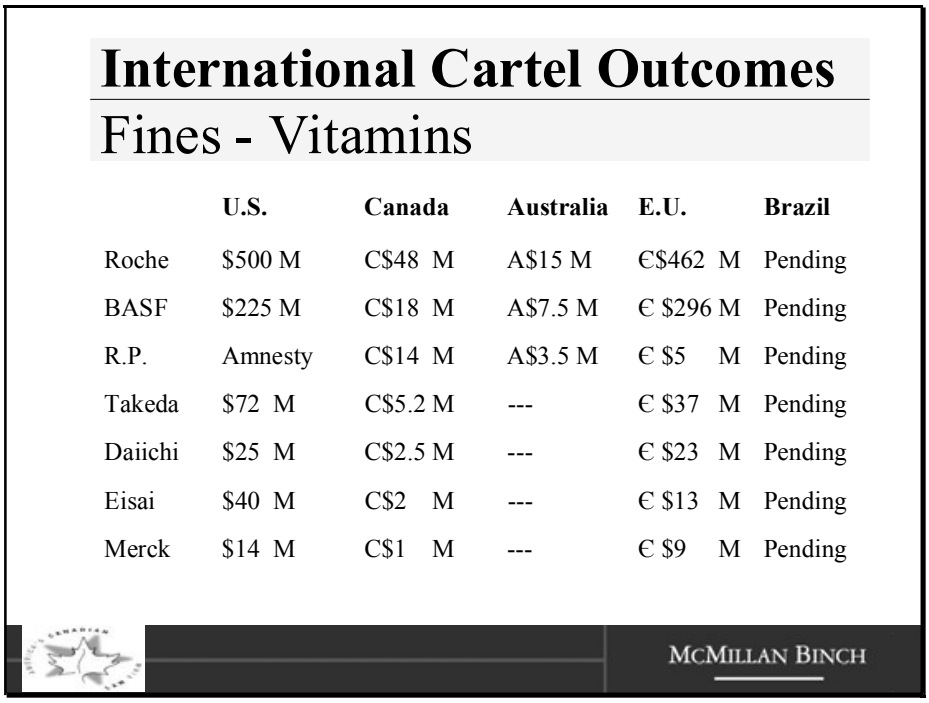

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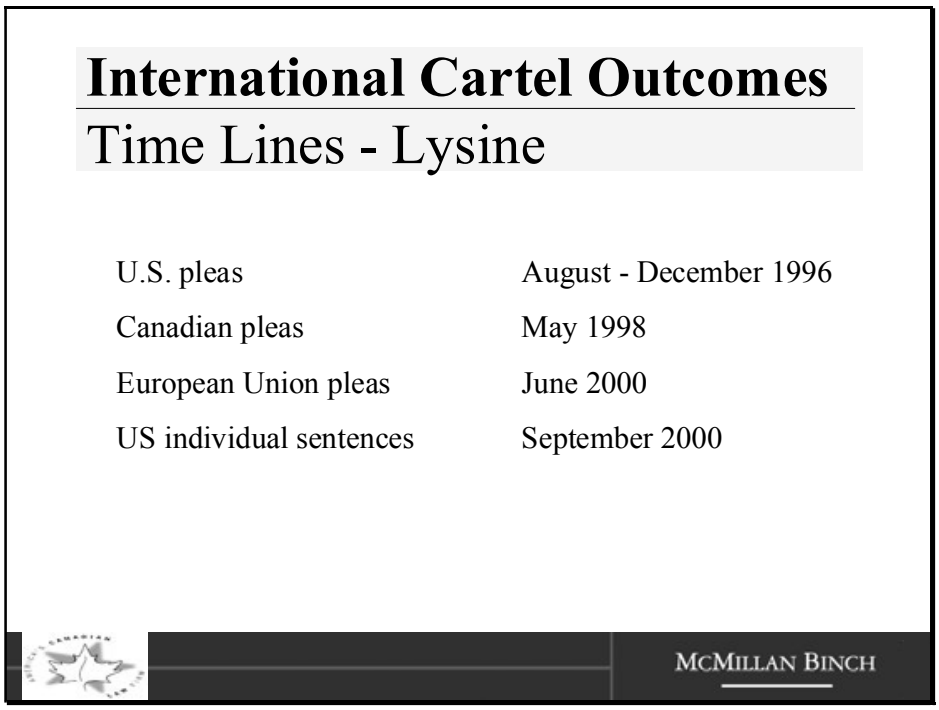

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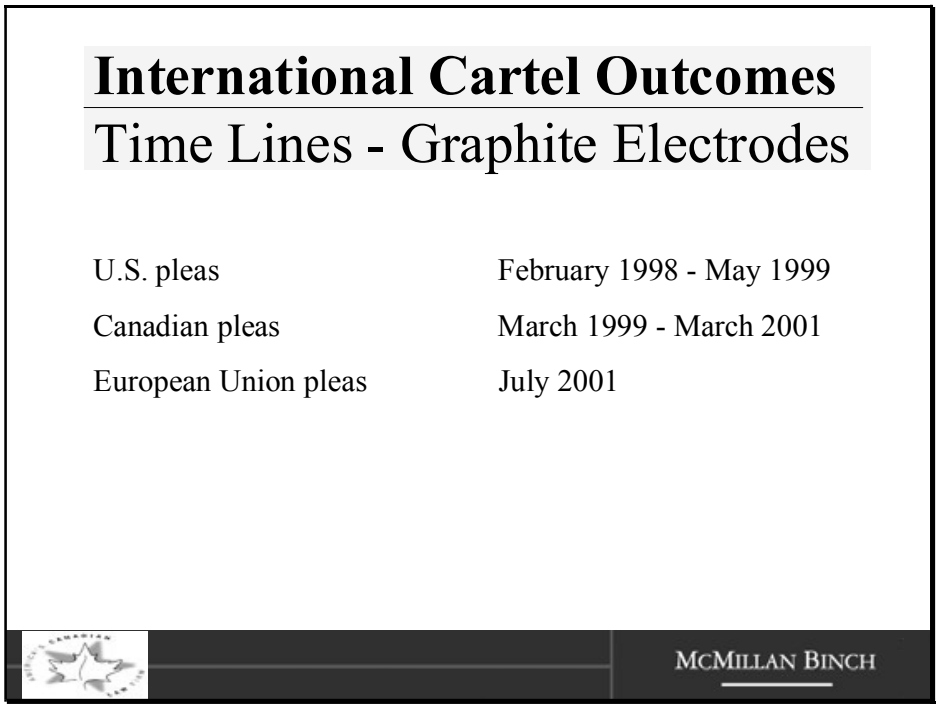

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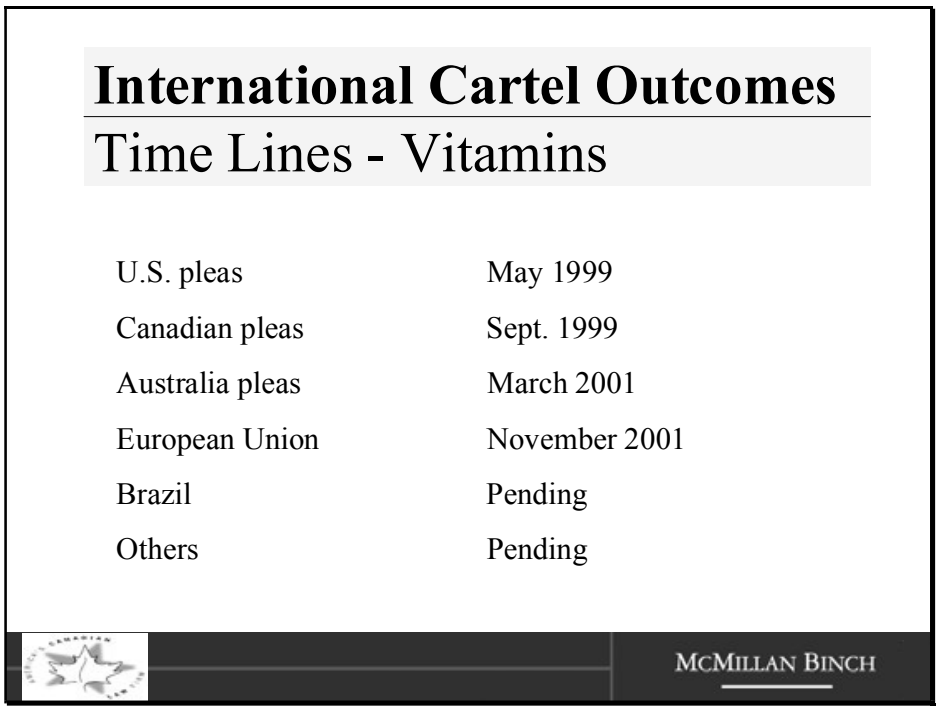

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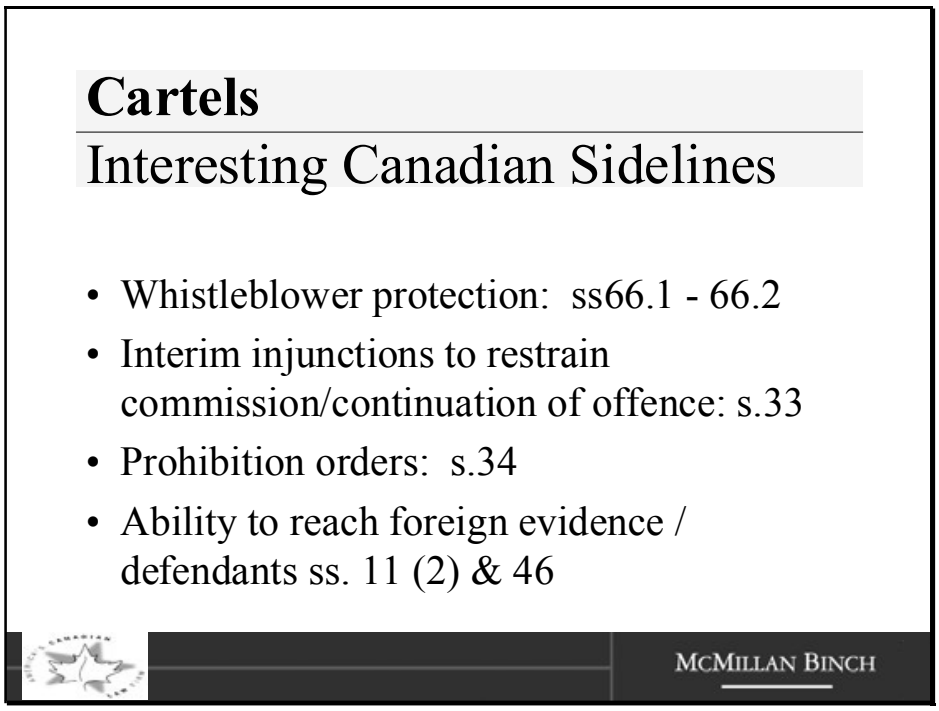

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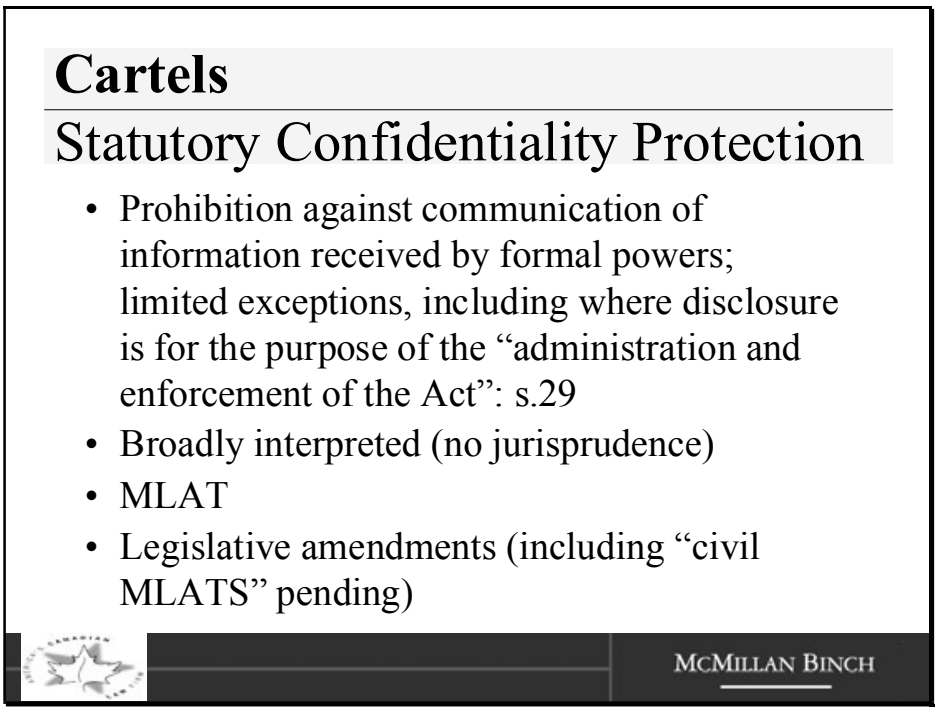

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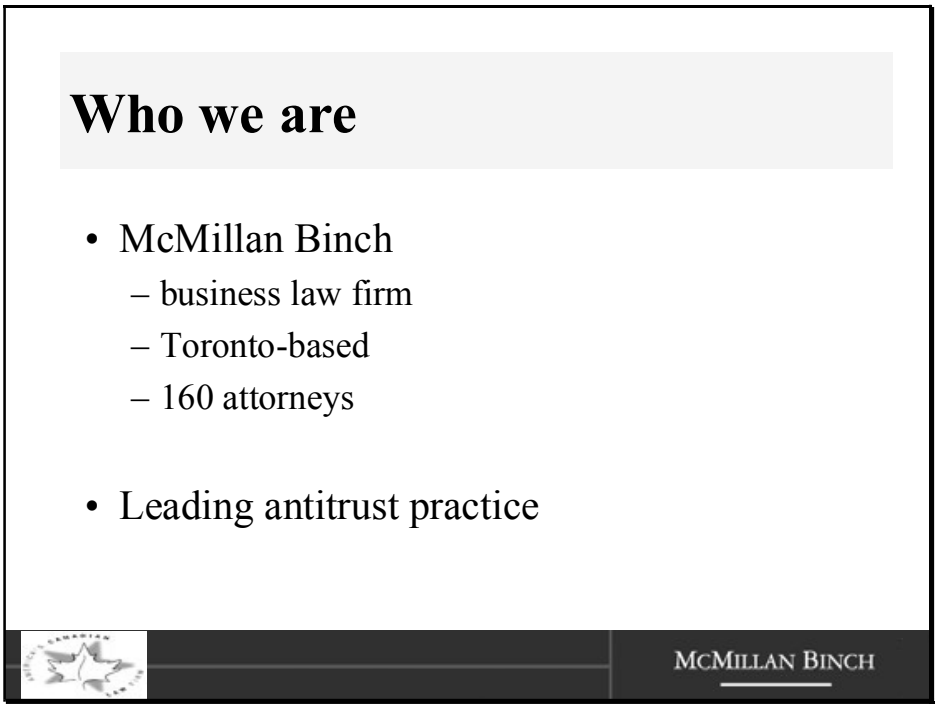

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GERWIN VAN GERVEN

Good afternoon. Let me first of all tell you how pleased I am to be here this afternoon. It's my first time to Brazil. I must also admit I had this morning the opportunity to visit already the falls and it's just incredible. I am very, very happy to be here, not only for the falls, but also for this Seminar, which I agree with Martin is quite impressive and it is certainly an idea. We don't do that in Europe and it's certainly an idea I want to take from here. If in a not too distant future some of you may be introduced to something similar in the south of France or Italy, remember me.

There is one thing about leniency that you should know: that best thing to do is to be first. It will probably do if you're second, but if you're third you're definitely at disadvantage. On the other hand, Gary and Martin, we have a compensation arrangement. Gary spoke 30 minutes, Martin, 14. So I have 18 minutes. Anyway, let's talk here. They don't agree, that's the end of our cartel.

Just very briefly, cartels in Europe as you probably know are illegal since a very long time. They are illegal as result of our general prohibition in the EC treaty article 81, that is, restrictive agreement and consented practices are considered illegal. Cartel Enforcement in Europe is not new. The first

cartel case goes back to a decision in 1969, where 8 producers of canine wear at that time had fines of stunning amount of half a million euros. You will see in a second that, Europe has come a long way since then. What is new though, is that the fight against cartels, hard core cartels, is now a much higher priority in Europe. Indeed the European Commission, which is primarily responsible, I should say, for enforcement of European Antitrust Law, is making it really much more a priority and is giving it more resources than before. As a matter of fact, we are in the midst of a significant overhaul of European Competition Procedure rules. One of the reasons why the Commission is doing that, is in order to free resources to dedicate them more to the fight against hard core cartels.

As you may know, the European Commission can only impose administrative fines. So the European Commission does not have the power to impose criminal fines or criminal sanction. It cannot send people to jail for constitutional reasons, it is very unlikely in my view, if not impossible, that it would get those powers in the near future.

Nevertheless, the Commission has significant powers and has significant stick I would say, because it can fine participants in cartels up to 10% of their worldwide turnover. While that was unheard of in, until very recently. There are recent cartel cases in which the Commission has done so, where firms have been fined up to 10% of their worldwide turnover. One thing you should also know is that Commission doesn't have the power to impose criminal sanctions, but some of the national competition authorities that also have the power to enforce their own cartel laws, their own antitrust laws, but also European competition law has those powers that creates a number of interesting issues, but for the moment I will not go into that.

Here you have a short table with the top five cartels fines. I've looked at the five cases, where the highest fines per participant were paid. These are fines for the ringleaders in those cases. As you may see from the paper I have submitted in the materials, I had to adapt, after yesterday, this table in order to take account of the vitamins decision that took the day before yesterday. You will also see what vitamins represent in terms of setting a new record. Until the day before yesterday, the record was 80 million euros (a little bit less – roughly 75 million US dollars). That was a very recent record. As recent as July, that was imposed on the ringleader in the graphite electrode's case. You see, the new record seems, the day before yesterday, is 462 million euros by one of the ringleaders of the vitamin's case. Another thing which I think that is very visible here are that these are all very recent cartel cases, which is an indication that in order to increase the fight, the Commission in recently is significantly increasing the fine levels. A few words about leni-

ency, because the European Commission has a leniency policy and because this discussion we are going to have in a few minutes, is to compare the different leniency policies just to give you a little background on the current Commission Leniency Policy, that goes back to a Commission notice, guidelines in 1996. I'm not going to go in great details of actual conditions are, just that you know, that the 1996 notice, which is by the way under review at the moment. I will come to that in a second, suffers clearly from too conflicting policy objectives, and that you will always have in any leniency notice. First the objective that obviously you want to punish cartel participants severely, and there is a little bit of a friction or tension to let some of these people get off the hook, get away with no fine or a relatively light fine. On the other hand, you want incentivize people to come forward to declare cartels to self-report cartels. Finally the lying balance there obviously is always not an easy task in 1996 for the Commission to do. One of the very things that are important to know about the 1996 Leniency Notice was that it did not guarantee immunity. So even if you met all, if you were in the highest category to say, if you met all the conditions, the Commission was still unwilling to give, to guarantee immunity. It could guarantee immunity, as you know, it has now given immunity in one case, but there was no guarantee and obviously the Commission's leniency policy and results have suffered from that.

There is still a current law, with relatively little transparency and predictability that the Commission wanted to keep a large degree of discretion on its part to decide how much reduction in fines it would give. In my view also, a problem with notice was that it was relatively generous for latecomers. The notice was not only dealing with the people who came first, it provided a system of staggered fine reductions depending on when you came in and how much evidence you gave, you could either receive immunity or a reduction in fine. As a matter of fact, it proved that many people have come in relatively late in the game, after the Commission had started investigation, or the investigation was well on the way, and still that they were entitle to significant fine reductions. These are the conditions that are currently on the books in order to qualify for immunity. Again, immunity is under the current law not guaranteed, but these are all the conditions you would have to meet.

One thing that is very different from, for example, the United States Amnesty Program is that you had to offer decisive evidence and the big question has always been what is decisive evidence and I mentioned that the Commission wanted to keep a large degree of discretion, obviously you can see that there is a lot of discretion in there in terms of what is decisive evidence. Five years down the road, the results of the Commission Leniency Policy, I think there is not much disagreement about that, are relatively mixed. There have been now 12 cases where the Commission since 96, where the

Commission has applied its leniency policy with well over 70 applications that means that there are more than 70 companies in those 12 cases that benefited from some degree of leniency. The majority of these cases were fine reductions between 20 and 10%. There are very, very few cases where actually significant fine reductions were granted simply because the conditions were relatively strict and a number of companies, who really made a difference in certain cases, in cases like lysine, graphite electrodes, and some other cases because they did not meet one of the conditions, one or more of the conditions, never were able to get immunity.

As a matter of fact, when I was preparing for this there was still that until now there was no immunity granted by the European Commission on the leniency policy. The day before yesterday in the vitamin's case, the Commission granted its first immunity to Aventis, sorry, the successor of Rhone Poulanc, who got away with basically zero fine, because it was the first one in the Community that cooperated, offered decisive evidence and did so a pre-investigation. As I said, there were only two other cases where fine reductions were more than 50% were granted but there quite a number of cases where people got 50, 40 or 30%.

In July of this year, the Commission published for consultation a draft leniency notice, that if it is going to be adopted then it will likely be adopted in January or February of next year, will change significantly the Commission's leniency policy. The Commission's leniency guidelines, as Gary mentioned already, will bring them much closer, or much more in line with the US Program, which has proven to be so successful. The major differences with the current program are listed here, one of them and I think that it's probably the major difference is that in certain circumstances, the first applicant will be guaranteed automatic immunity. There is a possibility for automatic immunity, and on top of that, the applicant that meets the condition and he is likely to receive immunity will know so very soon in the game. One of the problems with the current policy is that you will always somewhat in the dark. As a matter of fact, to a large degree in the dark, as to whether or not the application that you made was going to be successful and was going to give you either immunity or a high degree of fine reduction. It is obviously unavoidable, because one of the conditions is that you must offer full and continuous cooperation, as it is the case in the United States. So the final decision of if he can only be taken at the end of the road, where a procedure is finished and when a decision is adopted. But under the new rules it would be possible when you go in the Commission very, very soon. In a matter of days, would be able to tell you what you are going to offer or what you have offered is sufficient to give you immunity, on the condition that you will continue to

cooperate in an open and honest way with the Commission. That you would also, obviously, at the end of the road, it is proven that you meet all the other conditions. I think the new leniency notice really improved the incentives to go in early, creating a much better mechanism for a race that is so important to have an effective leniency program.

What are the new immunity conditions going to be. That is the last slide and I will conclude with that. I see Mauro giving me the sign for one minute. So I think I will make it, maybe a little bit more but not too much. I won't need my three additional minutes, that's certain. The new conditions are here and I think it is also a progressive discussion, it would be good to just spend one minute on it. The current text says that in order to qualify for immunity, the Commission should not yet be aware of the cartel. Now that is a very high standard because in many cases, the Commission may be aware of a cartel as a result of what is going on in the United States or in other jurisdictions. That means that for that reason, the applicant would not qualify for immunity. Now the Commission has already announce, at least informally, that this condition is going to change. It is going to change to what it was to a certain extent before, when the applicant has to come in before the Commission has launched the investigation. It may very well be that the Commission is aware of the existence of the cartel, but when it has not yet launched investigation. In EU jargon, it means when it has not yet carried out " down race". the condition satisfy, that first condition would be met. evidence in order to allow the Commission to start an investigation to carry out a down rate. It will not be sufficient to say I have been a member of a cartel in that sector. It will have to give really some information in terms of documents: who were the participants, etc. In order to allow the commission to carry out a successful down rate at the premises of the participants. The applicant must offer full and continuous cooperation with the Commission throughout the proceedings. It must also, immediately, terminate the involvement in the cartel. At the time it goes in, it must stop its involvements of the cartel and interestingly because we come back to that in the discussion, it should not be a bully. That means it should not have forced all the participants in the cartel to become a member of the cartel or to stay a member of the cartel. So far for my introduction. I thank you for your attention first of all. I hope we can now move to discussion.

Leniency in EU
Cartel Law

Gerwin Van Gerven
IBRAC
7th International Seminar on Competition Law

EU CARTEL LAW

Article 81 of the EC Treaty

Prohibits restrictive agreements and concerted practices
Applies to hard-core cartels that have an effect in the EU

Antitrust agencies

European Commission ("EC")
National Competition Authorities ("NCAs")

SANCTIONS

Only fines

But up to 10% of world-wide turnover
Only firms and their trade associations
1998 Fining Guidelines

No criminal sanctions

But some NCAs have the power to impose criminal sanctions

REFORM OF EU COMPETITION LAW

EC Focusing on

Merger control (with Community Dimension)
International hard-core cartels
Abuse of dominant position and vertical market partitioning (cases with Community interest)

No longer Art. 81(3) notifications !

NCAs will deal with other cases
They will apply EU competition law
Including national cartel cases

TOP 5 CARTEL FINES (by firm)

Industry	**Fine**	**Firm**	**Year**
Graphite Electrodes	€ 80 million	SGL Carbon	2001
Heating pipes	€ 70 million	ABB	1998
Lysine	€ 47 million	ADM	2000
Liner Shipping	€ 41 million	P&O Nedlloyd	1998
Sugar	€ 40 million	British Sugar	1998

1996 LENIENCY NOTICE

- **Section B :100% - 75%**
- First to offer decisive evidence "pre-investigation"
- No immunity guaranteed
- **Section C :75%-50%**
- If the applicant does not apply "pre-investigation" but is the first to offer decisive evidence
- **Section D : 50%-10%**
- If Section B or C conditions are not met

- **"SECTION B" CONDITIONS**

- **Application must be pre-investigation**
- **First to adduce "decisive evidence"**
- **Immediate termination of involvement in cartel**
- **Full and continuous cooperation**
- **Not a ringleader or instigator**

- **MIXED RESULTS (5 years)**

- **11 cases and over 60 effective applications**
- **Immunity was not yet granted**
- First immunity grant expected soon
- **Only one Section C treatment**
- Lysine case (80% reduction)
- **All other applications yielded Section D treatment**

FINE REDUCTIONS

Reduction	# of beneficiaries
80%	1
70%	1
50%	4
40%	6
30%	8
20%	15
10%	31

- **2001 DRAFT LENIENCY NOTICE**

- **Both immunity and fine reduction**
- Provides for automatic immunity
- **More straightforward conditions**
- Improved clarity and predictability
- **"Status" confirmation early on**
- Conditional immunity in writing
- **Improved incentives to go in as soon as possible**

- **IMMUNITY CONDITIONS**

- **EC unaware of cartel**
- **First to apply**
- **Sufficient evidence to enable "dawn raid"**
- **Full and continuous cooperation**

- **Immediate termination of involvement**
- **No "bully"**

- **NATIONAL LENIENCY PUnited Kingdom**

- Follows US model
- **Germany**
- Follows EU model
- **France**
- Large discretion
- **Some other NCAs are working on a Leniency ProgramROGRAMS**

MAURO GRINBERG

Vocês já perceberam que esse painel tem algumas inovações em relação ao modelo tradicional. Uma delas foi a exibição de um filme. E a outra inovação é o início da sessão, após essas exposições individuais, com um debate entre os três expositores estrangeiros. Eu vou deixá-los livres e a primeira parte disso durará exatamente 15 minutos, e eu vou deixá-los livres para fazê-lo. Gary, você começa o debate?

GARY SPRATLING

Sure, I'm happy to. This is directly to you Gerwin. The United States thought, when it revised its Amnesty policy, that one of the most important aspects of it was that it provide for the opportunity of amnesty after the government had begun an investigation. The experience of U.S. enforcers is that, the majority of the large investigations have been advanced by such amnesty. The ones which were on a short today. Vitamins, graphite electrodes and so on, are all matters that started as result of amnesty after a government investigation. The Canadians changed their policy. The amnesty was available after an investigation had begun. It's common knowledge. I think it's fair to say, that the U.S. strongly encouraged the EC to adopt the policy that was similar to the U.S. and Canada. They allow amnesty after an investigation had begun and that was consistency among the jurisdictions. I know that you don't represent the EC, but do you have any idea why the draft noticed for 2001, the

draft as he noticed, does not allow or provide for the possibility of amnesty after an investigation has begun?

GERWIN VAN GERVEN

Indeed, I think there is a difference with the program in the United Stateswhich it is not possible. I must say that I'm not really have an insight why it is done. As a matter of facts, the commission wanted to change, as I mentioned, the condition to being it. Information must be provided pre investigation. The commission should not yet be aware of it and slightly to move back. In my view, this idea, this conflict between the two policy objectives that makes the commission somewhat uneasy to give immunity after an investigation is started, because when the investigation is started, obviously it means the Commission is aware of the cartel. It also means that it has obtained sufficient evidence to start an investigation. Normally that would mean, if the investigation is successful, the commission should probably have the smoking or should probably obtain gun documents, but that can obviously not be guaranteed. So personally I think it would also be a good idea to allow immunity. Certainly no longer guaranteed immunity, because on the U.S. assistant which is also not the case, allow for immunity if an applicant came forward and following an investigation that had not been so successful. As a result of that, they gave the commission evidence that kick started the procedure. It is probably also an addict incentive for applicants to come forward. I think that is a very important incentive. We'll have to see it. As far as I'm aware, I'm not sure that the Commission would add that possibility, but we'll see it.

We will only know when the final text is out. I strongly agree with what Gary is saying. I think a need for aligning these leniency programs and just as an aside a little bit. In Europe it's not only the Commission that is developing leniency programs, also the national competition authorities are developing their leniency programs. UK has one, France has one, Germany, Ireland has one and there is a number of all those who are working on it. It is going to get very complicated, because these cartel authorities can also apply European antitrust law. I think there is a need for some alignment in these policies and in this moment, there is not. I think it allows for a number of tactical games that could be played and I'm my view, is best to avoid it.

MARTIN LOW

Let me just ask about a suddenly different subject, that is the process of cooperation from one jurisdiction to the other. In a perfect world, if you are representing a cartel participant, you would want to be the first to apply to the United States, where your executives would go to jail. You would like to be the first to apply in Europe, if you have significant sales there. You might want to get in to Canada, because your executives would go to jail there. There is a coordination problem. What I'd like perhaps to address is the process by which they cooperate. They have to produce information and evidence in three jurisdictions, and everybody is gonna want to go fast ... Gary, can you just talk about what your expectations would have been, what your formers colleagues would now expect?

GARY SPRATLING

Yes, first of all I really didn't know that Martin was going to ask this question but I'm delighted, and it's important to recognize.

MAURO GRINBERG

Nem tudo foi combinado aqui, viu? Not everything was settled before.

GARY SPRATILING

Oh, no.

MARTIN LOW

Spontaneity is very important.

GARY SPRATLING

It is difficult to make an amnesty application. One might say when looking at Martin's chart up there: why was Rhone Poulanc so late in Canada? Was it deliberated? Or was it because they work first in the United States, then they came back and I don't know the answer for that.

The fact is that even if you want to apply in all jurisdictions and your board of directors has made that decision, you cannot do it instantaneously. It's a hard thing to do. Because you have to collect the evidence to make the application to the various jurisdictions. And before I get to what I think the rule is, let me tell you about a process that's allowed in the United States and Canada, and it's not allowed now in the EU. But under the draft notice it will be allowed, which you can approach the jurisdiction and get a marker. What I mean by that is, you can approach the jurisdiction and you would say, for example, the United States Department of Justice authorities: We believe that we have violated the Antitrust Laws and we have authority from our board of directors to provide you the results of our internal investigation and to make an application for Amnesty in the following industry, but we don't yet have all the information, because the information is located in the EU, in Canada, in France and in Brazil. We have to go and talk to people in these jurisdictions to get the information. How much time will you give us? And the Department of Justice might say: we will give you two weeks, or we will give you three weeks. Until you come back with your first production of information in support of that application. Once you do that, the amnesty application and immunity agreement that you reach with the Department of Justice.

The standards for application are pretty close to the same in the United States and Canada, but they're not with the EU. Right now, in the EU you have to have decisive evidence, which is a much different standard than in the United States and Canada. Even under the new standard, you would have to have enough evidence to support a down rate. Not only is that a discretionary standard, as Gerwin mentioned. It's discretionary. So you don't know exactly what it is. It is a higher standard than either in the United States or Canada where the standard simply is produce whatever information you have. When people do that, they qualify for Amnesty. In terms of where you go first, the answer isn't always the same. It's not always true you go to the United States first. I think generally you will, because of the likely exposure of your executives. But there are some situations where you might not have such exposure in the United States, you get huge exposure in the EU too. The question I think one asks is: where am I going? Where is it going to hurt me most to come in second place? That's an analysis of what happens to you in each jurisdiction, if you're second. Wherever that harm is greatest, that's where you go first. Because you want to prevent that harm from occurring to you if you decided you were going to go everywhere. If the answer is the EU, you go there first. If the answer is the US, or if it's Canada, you go there first. Did I get close to answering your question?

MARTIN LOW

Very close. Let me just do a little follow-up. I have a client who has applied to be first in Europe. Gary is quite right. The rule is: you have to come in and be ready to go and have everything tied up in a bow. In fact, without applying the new policy, which is not yet in place, they gave my client three weeks to prepare its submission. Certainly, we get that kind of leeway in Canada. Because I think you find that the enforcers understand which people need to protect themselves everywhere they can. And it is in everyone's interest to enable them to do this in a coordinated way. But what we would expect in Canada is that party would agree that we could consult with other enforcement agencies, where they also had been given immunity. Because typically, it will take you a little bit of time to get in everywhere. After that has occurred, the agencies typically will want to go very quickly and they will not want to have their immunity applicant appearing to drag their feet in their cooperation.

GARY SPRATLING

Martin mentioned another subject. He mentioned it for the second time, which he raised in his presentation, that's with respect to the confidentiality of this. Jurisdictions treat the Amnesty applications, as the most confidential type of communication to an authority and do not disclose that information even to a sister enforcement authority if they ask. If Canada asks the United States information provided by an Amnesty applicant, the United States does not provide that information, nor will Canada, nor the EU. What Martin is talking about is a waiver of that. They are all allowed to talk to the other jurisdiction and jurisdictions may request it or may not. Applicants may or may not, grant the waiver. The reason for that is that I'm involved in a situation, right now, where I have not granted a waiver in response to another jurisdiction's request, even though. Ultimately we will approach that jurisdiction with all the information, because to grant the waiver to the other jurisdiction, would provide them access to information where we hadn't completed our investigation and all of our work in the subject country yet. It would disadvantage our company with respect to that enforcement authority and we have explained that to the jurisdictions which asked for the waiver. So, the waiver may or may not be granted.

MAURO GRINBERG

Nós tínhamos falado em 15 minutos desse debate e já está próximo, mas eu quero antes de passar para a fase seguinte, lembrar que nós temos 4 debatedores e estava previsto que teríamos 30 minutos das apresentações deles. Dividir 30 minutos por 4 dá 7,5 minutos que é meio difícil de contar, mas eu vou tentar.

O Dr. Cláudio Considera vai ter que se afastar em razão de um congresso internacional, e ele me pediu para falar agora. Então a pedido dele farei uma pequena inversão de pauta. Vamos ouvir as observações do Dr. Cláudio Considera e passaremos ao intervalo para o café, que será de 15 minutos. Depois retornaremos para a continuação do debate entre os três expositores estrangeiros e os demais debatedores da mesa. Dr. Cláudio Considera, por favor.

CLÁUDIO CONSIDERA

Agradeço ao Coordenador da mesa a compreensão deste problema. Nós estamos, justamente, indo a um encontro internacional de grupos que combatem cartéis. Nós fizemos um grupo internacional grande e o segundo encontro será agora no Canadá. O primeiro foi em Brighton e este é o terceiro. No Brasil, o quadro que nos foi mostrado há pouco, pode ser razão da nossa vergonha ou orgulho. Vergonha porque há vários casos pendentes que nós não conseguimos julgar. Não conseguimos completar as investigações. Orgulho, por nós termos trazido esse assunto. A equipe que está aqui representada, trouxe esse assunto ao ponto focal do nosso trabalho, ao invés de se dedicar exclusivamente a atos de concentração, como foi no passado. Vocês viram pela própria organização da agência a atenção destinada ao combate a cartéis. Eu gostaria de salientar, a respeito das várias inovações que fizemos na lei, a deficiências em termos de investigação na tentativa de combater cartéis de forma mais eficiente. Temos deficiências materiais, de gente, para a investigação mas temos também deficiência no que se refere à lei propriamente dita. A lei obriga que avisemos uma empresa com 24 horas de antecedência que iremos fazer uma inspeção nos computadores e etc. Obviamente isto algo que beira o ridículo.

A primeira inspeção que fizemos foi no sindicato de postos de combustíveis em Salvador. Eu mandei dois dos meus técnicos para essa inspeção e eles me perguntaram: e se o cara não quiser me deixar entrar? Eu disse: volta para casa. Evidentemente que agora nós temos a polícia federal conosco, que

nos acompanha numa batida que nós viermos, eventualmente, fazer. Ainda assim, temos que avisar com antecedência o que vai se passar. Nesse sentido, estamos buscando auxílio dos Ministério Públicos para tentar que a ordem judicial seja dada sem a necessidade de advertimos com 24 horas de antecedência que haverá busca na empresa. O que se nota na verdade, e não daria tempo para descrever como o processo de trabalho afinal culminou nesta estratégia, é que anteriormente nós pensávamos: teremos uma investigação administrativa e depois isso passa à fase criminal. Caso, por exemplo, do cartel de aço, que foi condenado em termos administrativos e poderá, eventualmente se alguém se interessar, passar a uma fase criminal com ação no Ministério Público para condenar também criminalmente o cartel. Isso não se passou ainda. Não foi ainda para a área criminal esse cartel. Já deveria ter ido. Um ministério público eficiente certamente já teria levado isso para a fase criminal. O que você podem estar percebendo é o seguinte. Nós estamos transformando a questão do cartel. Nós estamos começando, e isso dá para sentir quem tá fazendo esse trabalho, nós estamos começando a fazer uma coisa que é a parte administrativa mais a parte criminal ao mesmo tempo. Ou seja, quando isso foi para o CADE julgar doravante, provavelmente vai estar na corte criminal ao mesmo tempo, porque nós estaremos trabalhando junto com os ministérios públicos e estamos fazendo três experiências desse trabalho, provavelmente os senhores terão notícia em breve a respeito disso. Três experiências desse trabalho de forma a tornar a nossa investigação mais eficiente e não apenas burocrática como a lei hoje nos permite fazer.

Isso deverá mudar no futuro, nós imaginamos que no futuro, as cortes criminais também terão que ser refeitas e termos cortes especiais para esse tipo de problema ser julgado na medida em que eles apareçam com mais freqüência. Gostaria de abordar também que o programa de leniência foi muito atacado de forma geral, uma oposição muito grande ao programa de leniência dizia que isso não é da tradição brasileira e etc. Volto a dizer aqui, o que não é da tradição brasileira é os cartéis serem pegos. Na medida em que eles começarem a correr o risco de serem pegos, o programa de leniência vai funcionar. Nós já temos pelo menos três conversações em torno desse programa. Obviamente, não vamos aqui falar a respeito disso. O que nós podemos ver é estamos muito atrasados em termos de caça a cartéis, embora estejamos muito mais avançados do que estávamos a três anos atrás quando começamos.

Gostaria de dar a notícia a respeito de dois cartéis que estão aqui avaliados: lisinas e vitaminas. O de lisinas, evidentemente que todos os senhores são advogados e sabem quais são todas as medidas protelatórias para se impedir que um caso avance muito rapidamente. Então a última medida protelatória que nos exigia é que os documentos fossem carimbados pelo Ministério da Justiça, documentos esses que são públicos nos Estados Unidos e aqui o

caso foi à corte, ele deixou de existir dois dias atrás quando recebemos todos os documentos carimbados pelo Departamento de Justiça americano. Agora, o caso está com os documentos necessários para seguir adiante, já que eles são oficiais, carimbados pelo Departamento de Justiça americano. Evidentemente nós temos um problema, em termos administrativos o caso está prescrito, mas com certeza com a ajuda do Ministério Público nós vamos levar a ADM para a corte criminal, porque em termos criminais é de 12 anos o prazo de prescrição. No caso de vitaminas, um caso clássico com poucos instrumentos de investigação e com a parca colaboração americana, porque eles não podiam nos dar as informações que queríamos, a respeito de como funcionou na América Latina o cartel e, particularmente no Brasil, nós conseguimos descobrir no interior do Rio Grande do Sul, um dos gerentes de uma dessas empresas, esse gerente nos prestou todas as informações, nós conseguimos levantar exatamente como funcionava o cartel de vitaminas na América Latina e no Brasil em particular, e nós podemos então, graças a ajuda do Departamento de Justiça americana, uma ajuda... pouca ajuda porque eles não poderiam nos dar a informações propriamente dita porque o caso não foi à corte, foi um acordo que houve entre as empresas, uma da empresas pelo menos que aplicou o programa de leniência, mas eles nos puderam responder algumas perguntas que nós podíamos fazer a eles algumas perguntas do tipo: é isto, e eles poderiam dizer sim ou não. Então nós fizemos várias perguntas em que eles nos responderam sim ou não e nos permitiu dirigir a investigação no Brasil e na América Latina. O caso está bem traçado, está na SDE em fase de processamento. Era isso, eu agradeço essa oportunidade e lamento ter que deixá-los.

MAURO GRINBERG

Muito obrigado, Dr. Cláudio. Antes de ir para o intervalo, quero fazer uma observação pessoal, nunca foi tão fácil presidir uma mesa face ao respeito que todos tiveram até agora com relação ao horário. Isso é um elogio aos que falaram e uma lembrança aos que vão falar. Muito obrigado, até já. 15 minutos. Ao público também, 15 minutos.

Senhoras e senhores, vamos continuar aqui o nosso trabalho. Eu quero passar aqui imediatamente ao Dr. Paulo Corrêa para os, desculpem-me, 7,5 minutos de debate.

PAULO CORRÊA

Mais uma vez boa tarde a todos. Eu queria agradecer a oportunidade do IBRAC para participar desse painel. Eu vou separar minha intervenção em duas partes. Farei alguns comentários iniciais e depois algumas colocações para os painelistas principais. A três anos atrás nesse mesmo evento do I-BRAC, também num painel sobre cartéis e na companhia pelo menos do Laércio Farina, a gente começou a insistir na importância desse tema, não só do ponto de vista da política antitruste, mas também em termos do impacto que o *enforcement* do antitruste, especialmente com relação a cartéis intrinsecamente nocivos, poderia ter sobre o desenvolvimento econômico.

Já em 1999 a gente deu início ao caso das lisinas, muito inspirado por uma palestra semelhante que o Gary Spratling fez, com um pouco mais de tempo certamente, durante o primeiro W*orkshop on International Cartels,* realizado pelo Departamento de Justiça nos Estados Unidos. Em 2000, iniciamos o caso das vitaminas, também contando um pouco com a colaboração bastante informal e certamente criteriosa do Departamento de Justiça Americano, mas contando com algumas pistas e algumas dicas muito importantes de um outro colega de painel que é o Martin Low. De lá para cá bastante coisa foi feita nos no meu modo de ver e eu queria recuperar algumas delas em matéria de cartéis.

Essas iniciativas foram tomadas, em grande medida, seja pela SEAE seja pela SDE ou em conjunto pelos dois órgãos. E aqui vale a pena reconhecer a importância de pessoas que não estão presentes neste momento, Darwin está mas eu queria chamar atenção também para a importância que o Caio, que muito dos senhores conhecem, teve na época que foi Diretor do DBDE, para tocar adiante essas iniciativas. Bom eu queria recuperar, então, muito brevemente o que foi feito de lá para cá. Nós, em primeiro lugar, desenvolvemos alguns instrumentos legais que facilitam ou que dão alguma capacidade de investigação para SEAE e para a SDE. Desenvolvemos um programa de leniência incluindo um programa de *Amnesty Plus*. A SEAE, em particular, criou três coordenações, uma no Rio, uma em São Paulo e uma em Brasília para cuidar apenas desse tipo de infração. Nós iniciamos conversas tanto com a Polícia Federal quanto com o Ministério Público. Acentuamos a cooperação informal tanto com o Departamento de Justiça Norte Americana quanto com outras autoridades antitruste no resto do mundo, especialmente em fóruns como esse *Workshop on International Cartels,* que teve a sua, que terá a sua seqüência a partir da segunda-feira em Ottawa. Nós participamos do grupo de trabalho criado pelo Ministério da Justiça para reformar a lei 8137, discriminando algumas condutas estabelecidas. Fomos o primeiro país não membro da

OCDE a assinar a recomendação sobre a priorização do *enforcement* contra *hardcore cartels* da OCDE, enviamos ou estamos em fase de envio ao CADE de vários casos como o de aço, casos em vários setores que eu acho que não vale a pena mencionar mas que tem impactos econômicos seja para o consumidor final ou para as empresas bastante substantivo.

Um caso que eu gostaria de chamar atenção e correspondente ao que é o caso de lisinas nos Estados Unidos, guardadas as proporções, é o caso de postos de gasolina em Florianópolis, onde por iniciativa tanto da SEAE quanto da SDE, um procurador de bastante talento daquela cidade foi capaz de gravar os acordos e as conversações que donos de postos de gasolina faziam para acertar os preços e as condições de concorrência naquela cidade. É bom frisar que esse caso vai ser examinado agora pelo CADE e se a condenação ocorrer, talvez se torne um *leading case* especialmente em termos de apresentação de evidências mais duras, de *hard evidences*.

Finalmente nós tivemos essa preocupação como um elemento importante da reforma da lei. Toda a simplificação de análise de atos de concentração, nós esperamos, liberará recursos financeiros e humanos para serem investidos nessa área. Os senhores notaram pela manhã que o projeto da agência contempla um departamento específico para tratar deste tema. Não há nenhuma razão teórica por trás disso, apenas a demonstração de uma determinada ênfase que se deve conferir à sugestão de tratar cartéis como infração *per se*. Demonstrando a nossa sintonia com uma tendência internacional de dar absoluta prioridade as infrações do tipo de cartel ou, pelo menos, aos acordos horizontais intrinsecamente nocivos.

Em 1 minuto, eu queria propor algumas sugestões para os panelistas, para o Gary Spratling, seria interessante ouvir um pouco mais sobre os meios de investigação que o Departamento de Justiça tem, outros além da leniência obviamente, nesse caso de investigação de cartéis o que ele se referiu como a terceira parte do plano. Ao Martin, eu talvez me anteciparia a perguntar como é que ele vê a experiência de adoção do programa de leniência no Canadá, sobretudo em termos da aceitação, num primeiro, momento desse tipo de programa. E, complementarmente, como a tradição jurídica canadense afetou a adesão a esse tipo de programa? Ao Gerwin Van Gerven eu perguntaria finalmente, ele se referiu na sua exposição a *high priority* ao combate a cartéis que estaria sendo usada já há algum tempo na União Européia. Eu perguntaria como ele vê essa prioridade, essa ênfase na política antitruste européia com a noção também originária dessa tradição jurídica dos cartéis de crises, ou os *crisis cartels* ? Muito obrigado.

MAURO GRINBERG

Obrigado, Dr. Paulo. Eu quero só fazer uma observação antes de passar para o Franceschini, as respostas dos expositores serão feitas depois dos três debatedores, aquela supressão dos 15 minutos que os expositores estrangeiros ainda teriam, foi feita por sugestão deles mesmos. Eu esqueci de avisar antes, eu peço desculpas. Mas agora, Dr. Franceschini, eu vou pedir que o Sr. siga a tradição dos demais e se mantenha dentro do tempo.

JOSÉ INÁCIO GONZAGA FRANCESCHINI

Eu acho que meu hábito de extrapolar um pouquinho é bem conhecido, por isso eu havia combinado com o Dr. Paulo Corrêa que ele diria oi e eu diria tchau, assim ficaria mais rápido. Mas, fazendo ou procurando fazer pelo menos um pouco de contraponto, porque todas as vezes em que eu vou em seminários desta natureza e se trata de questões desta ordem, me remonta a idéia do Direito Penal medieval, onde o carrasco mostrava a sua vítima os diversos implementos de tortura e depois seria aplicada a pena correspondente.

Diante desta questão, tentando fazer um pouco de contraponto, eu gostaria de dizer que isto é muito lindo, tudo muito maravilhoso, mas nós temos que atentar para realidades nacionais que demandam alguma preocupação, principalmente, ao respeito dos direitos básicos das empresas envolvidas e dos seus executivos e seus administradores. Isto eu digo porque o Brasil tem uma tradição cartelizante não só por forças de mercado, mas até de políticas governamentais de outrora que incentivavam e criaram a mentalidade de cartelização, de condutas coordenadas, inclusive com a participação própria e direta do governo em seus vários níveis. Atualmente, estamos livres da quase totalidade dos órgãos de controle de preços, de vez em quando há uma certa regressão, como é o caso dos medicamentos, mas o fato é que freqüentemente no Brasil há uma facilidade muito grande de se acusar empresas de cartelização, e isso leva a uma grande preocupação em termos de segurança jurídica. Toda vez que há um problema setorial qualquer, a primeira coisa que se faz é acusar as empresas de cartel, aí se convoca a empresa para fazer uma cartelização com o próprio governo que se não se chega a um acordo, se processa a empresa por cartel. Em seguida, corre-se para procurar prova que afirme se há ou não o tal do cartel. Esta é uma prática comum no sistema jurídico e social

brasileiro que demanda uma preocupação quanto às garantias constitucionais, as garantias legais para aplicação dessa norma.

Eu gostaria de lembrar que o atual projeto de lei, traz avanços inegáveis e deve ser reconhecidamente aplaudido, especialmente após as alterações que foram realizadas. Na realidade, o projeto de lei que está em análise exterioriza coisas que sempre foram ou deveriam ser, mas apenas agora tem uma consagração. Como, por exemplo, a inconstitucionalidade da dicotomia do órgão que julga não é o que instrui e o que instrui não é o que julga, consagrando o papel de acusador que hoje seria representado pelo DPDE. No tocante a cartel, há uma coisa curiosa porque a nossa lei antitruste não considera o cartel tal como definido na economia, uma infração à ordem econômica. No artigo 21, o considera como uma infração meio e não a infração fim do artigo 20. Uma primeira impropriedade que estaria sendo corrigida, inclusive pela atual redação da proposta a ser encaminhada ao Congresso Nacional, o fato de se transformar aquelas infrações em infrações passíveis de serem repelidas, ou seja, desconsideradas em termos de se houver eficiências econômicas, há a aplicação da regra da razão, isso sempre foi. Não há muita novidade, apenas uma consagração daquilo que se chamava regra da razão e era um termo jurídico, agora passou para um termo econômico chamado eficiências econômicas.

Uma correção muito correta, o projeto anterior falava que quando houvesse uma eficiência econômica, haveria uma extinção da responsabilidade ou extinção da punibilidade o que está evidentemente errado, porque haveria o reconhecimento de uma infração, apenas se extinguindo a responsabilidade ou a punibilidade. A atual redação, mais adequada, extingue e não reconhece a atipicidade da conduta praticada. A única observação que eu tenho, a título até de cooperação, é que se dá ênfase muito grande a eficiências alocativas, quando nós sabemos que ela é a parte mais pobre de todos os tipos de eficiência. Eu tenho uma visão de preferência muito maior pela visão de Schumpeter, ou seja, aquela destruição criativa que ataca o mesmismo e que gera bem estar social a médio longo prazo para o futuro, e não apenas para um momento circunstancial que é o que ocorre com a eficiência alocativa. A preocupação é que se confere a atipicidade da conduta por uma eficiência pobre, que é a alocativa, quando se deveria dar muito mais ênfase para as eficiências de natureza inovativas ou produtivas, que me parecem tem muito mais interesse.

No ponto de vista do cartel, enganam-se, com todo o respeito, aqueles que imaginam que poderá ser tido como um cartel com uma figura, uma infração *per se*. Isto não existe no direito brasileiro. Isto é absolutamente inconstitucional, não só pelas garantias de ampla defesa e do contraditório, que

são garantias previstas no artigo 5º. Com todo o respeito toda vez que alguém fala de infrações *per se* no Brasil eu vejo tremer um pouquinho o artigo 5º da Constituição que trata daquelas garantias constitucionais mínimas do cidadão brasileiro. Também não nos esqueçamos que a legislação antitruste brasileira tem embasamento no artigo 173, parágrafo 4º, que diz: *A lei proibirá o abuso do poder econômico que vise o domínio de mercado.* Altere-se a constituição, mas enquanto a constituição estiver em vigor, este conteúdo teleológico só tem um significado: o impedimento da consideração do delito *per se*. Toda matéria repressiva com responsabilidade objetiva é juridicamente herética. E mesmo, há de se entender, que quando se fala em responsabilidade objetiva, ela não significa apenas uma condenação por indícios, que é muito freqüente. Se apregoa a todos os ventos que no Brasil teve um único caso de cartel clássico condenado, eu diria um dos casos clássicos de condenação equivocada, porque se parte do princípio de que uma empresa foi condenada com base em um indício qualquer e não em fatos como aqueles que foram comprovados ou aqueles que talvez tenham sido comprovados em Florianópolis. Se para condenar eu precise apenas de situações objetivas ou indícios e não de fatos concretos, não preciso do processo. Eu simplesmente acho o indício, não preciso do processo porque eu vou condená-lo por indício. É absolutamente inaceitável que se possa cogitar numa aplicação de norma de infração *per se,* sem as garantias constitucionais de função teleológica e sem o devido processo legal que garanta, inclusive, a análise do conteúdo teleológico. É claro com os aspectos minorados da necessidade do combate ao cartel como tal, e com as garantias mínimas necessárias de uma civilização jurídica de um Estado de Direito. Muito obrigado.

MAURO GRINBERG

Os senhores acabam de testemunhar um fato histórico nos anais do direito brasileiro. O Dr. Francischini ficou dentro do tempo que lhe foi assinalado. Isto é um fato histórico, é quem sabe até me habilito a presidir outras mesas em futuros eventos do IBRAC, porque só eu consegui isso.

JOSÉ INÁCIO GONZAGA FRANCESCHINI

Isso é em homenagem aos palestrantes estrangeiros porque eu ia ficar meio envergonhado se não fizesse. Mas só por esta razão.

MAURO GRINBERG

Dr. Farina.

LAÉRCIO FARINA

Eu posso usar o tempo em excesso que havia sido creditado ao Dr. Franceschini?

MAURO GRINBERG

Não.

LAÉRCIO FARINA

Muito obrigado. Curiosamente, o debate parece ter desviado um pouco. Eu só gostaria de dizer, com todo o respeito que tenho a autoridade do Dr. Franceschini, eu ouso discordar dessa questão da ordem constitucional, da questão inconstitucional relativa a infração *per se,* me parece que há uma confusão grande entre o Direito penal e mesmo o Direito administrativo. Esquecemo-nos, talvez na maior parte das vezes, quando estamos tratando de cartel e penalidades impostas pelo CADE, nós estamos tratando de matéria de direito administrativo, imposições de penalidades administrativas. Autores como Eli Lopes Meireles, por exemplo, sustentam que a penalidade administrativa independe de dolo ou de culpa.

Neste momento, nós estamos tratando realmente sobre um enfoque diferente a infração do que aquele que nós fazemos perante às cortes, a matéria penal que é tratada pelo poder judiciário em decisões que fazem coisa julgada, o que não acontece na decisão de direito administrativo. Alguns autores chegam até a denominar a penalidade administrativa de discricionária. Então há extremos. Mas, de fato, nó estamos em campos distintos. Essa discussão, me parece que é extremamente válida na medida em que ela afeta um tema que foi tratado pelos nossos convidados estrangeiros e um tema em foco que é o da leniência. Porque, de fato, como afirmou o Dr. Cláudio Considera, o instituto da leniência não é da tradição, não é da cultura jurídica brasileira. No entanto ele até poderia funcionar. Qual é o mote da leniência? O que faz com que alguém traia seus pares? É o medo de um prejuízo maior, evidentemente.

Ora, como é que os agentes econômicos podem ser levados a este tipo de temor, de modo a lançar mão do instituto da leniência? Com credibilidade do sistema de defesa da concorrência.

O sistema de defesa da concorrência brasileiro adquiriu credibilidade no que toca a concentrações. No entanto, em matéria de apenamento administrativo, nós estamos muito mais na forma, no campo do processo, como demonstra um levantamento do CADE que ilustra que entre 1993 e 1999, das multas aplicadas, quase 68% eram relativas a intempestividade, em matéria de concentração. Outros 20,58%, ou quase 21% eram relativas a inexatidão ou recusa na entrega de informações. Apenas 15,74% de ilícitos antitruste.

Em suma senhores, o sistema ainda não tem credibilidade perante os agentes econômicos para fazer aquilo que é a sua função precípua. Isto é, normatizar o sistema econômico. Trazer a função do agente econômico o mais próximo possível do modelo ideal de mercado ou de concorrência quase perfeita. Quando nós temos indícios de cartel num determinado setor, não há a menor dúvida de que este setor está sofrendo efeitos econômicos negativos, pela simples existência dos indícios. Se o agente econômico se preocupar em remover o simples indício, eu não estou falando do cartel puro, ainda que o cartel não seja terminado, encerrado, se é que ele existe. Mas a simples remoção do indício já traz resultados líquidos positivos para aquele setor de mercado. Ora, o agente econômico tem que se preocupar com a inexistência do indício dentro dessa lógica de raciocínio e dentro do raciocínio de que a discussão se trata exclusivamente no âmbito do direito administrativo e não do direito penal, porque é da multa administrativa que nós estamos falando, a repetição de infrações impostas pela autoridade antitruste, trará inevitavelmente ao mercado um efeito líquido positivo. Ora, tratar, julgar um caso com base em indícios não significa retirar deste caso o devido processo legal. O devido processo legal é o direito ao contraditório. Quando o julgador avalia um indício e o eleva a categoria de evidência convincente para o seu julgamento, ele não está negando o devido processo legal, se o acusado teve o direito de se defender. É uma questão de valoração da prova. A crítica que se tem feito a excessiva preocupação com relação a criminalização das condutas de cartéis, faz com que o julgador administrativo se preocupe em obter e exigir aquelas provas que seriam exigidas no processo penal. Quando vai proferir uma decisão para a qual independe o ato principal de culpa ou de dolo, quando vai proferir uma decisão que não faz coisa julgada. Ora, a partir do momento em que o julgador se convencer, o julgador administrativo se convencer de que o seu papel precípuo na economia é muito mais de regulação, que seja pela intimidação, volto a dizer os resultados líquidos serão positivos. A reiteração de multas administrativas, sejam ou não difíceis de serem cobradas em juízo, em função de aspectos puramente formais, trará credibilidade ao sistema, porque

elas imporão um custo de transação aos agentes econômicos, ainda que seja o custo de transação da defesa perante o judiciário. Eu tenho impressão que meu tempo acabou.

MAURO GRINBERG

Terminou, terminou agora.

LAÉRCIO FARINA

O Sr. demorou tanto para pegar o microfone que o tempo terminou. Mas eu preciso fazer a minha pergunta, e eu gostaria de dirigi-la ao membro da Common Law, é um sistema jurídico completamente diferente do nosso. Gostaria realmente de ouvir a sua opinião a respeito dessa colocação, lembrando o seguinte: o sistema da União Européia é muito parecido com o nosso, nesse particular, a decisão é administrativa. Me parece que essa é uma matéria de reflexão porque envolve outras questões além daquelas de ordem constitucional levantadas pelo Dr. Franceschini, de quem aliás, eu peço vênia para discordar e o faço com muita honra, na medida em que as lições do Dr. Franceschini tem sido sempre um norte de atividade dessa nossa atividade. Muito obrigado.

MAURO GRINBERG

Dr. Laércio, muito obrigado. Nós temos perguntas já feitas aos senhores expositores estrangeiros. Em seguida as respostas que eles derem, vamos passar ao público.

MARTIN LOW

My usual rule is that I only accept one question at a time because questions to retrieve. Paulo asked me a number of questions, which I think Gary will comment as well. What are the other investigative techniques that are used in Canada? How is the adoption of leniency programs accepted in Canada? When it was brought in? And what's the tradition in Canada regarding these kinds of leniency or immunity programs?

Well, other investigative techniques, the competition bureau has a monitoring body, which analyzes what's going on in the economy and in particular industries that we generally think of as cyclical in their participation in cartels. My rule of thumb was that every five years there will be a cartel in the concrete industry, somewhere in Canada, that's the way it is. The sugar industry is prone to this sort of problem, but typically you will find that any product that is a commodity where sales depend primarily on price rather than qualitative aspects, is sometimes prone to be cartelized, it's easy to do, relatively speaking. And the Bureau monitors the industries that have those characteristics, for suspicious price increases, that sort of thing, that takes some time and effort, but apart from that, apart from the economic analysis and monitoring unit, the usual things are insiders who complain, complainants among customers, one of whom broke open the therm of fax paper conspiracy in Canada, by taping conversations with their suppliers, which demonstrated that they had gotten together in the United States and fixed prices. We gave the evidence to the Department of Justice and that launched about four years of investigation. With respect to the other program, the questions about the leniency program, initially, the leniency program in Canada got off to a very bad start. The Attorney General, who prosecutes these cases was suspicious of this kind of program, the program was set up so that it gave no guarantees of immunity, there were discretionary elements of it, and it simply didn't work, as you saw from my slide show, there were really only a handful of applications, they were made by people who were effectively insiders with the Competition Bureau and it really was not publicly accessible.

From 1995 to 1998, well, we just went ahead, we did it, we didn't worry about the former policy. We realized that the American policy was working well and we tried to make it administratively and prosecutorial decisions that emulated the finest points of the American program. Now, since September last year, when we adopted a new formal policy, immunity applications are being made at the rate of one a month, previously there were no domestic Canadian cartels that were notified to the Competition Bureau under the leniency or the immunity program, now I'm told that out of the 14 applications that have come in the last year, 6 of those have been domestic Canadian cartels. It has become accepted very, very well by the BAR and the business community. Was there a tradition? There is no tradition at all in Canada about this. The judges have accepted the evidence of co-conspirators as a necessary evil, in my paper I've cited a judge who said this: "The State when it moves into prosecute those who have allegedly committed crimes, does not have the luxury of picking and choosing their witnesses. The State may have to rely on drunks, prostitutes, criminals, perjurers, paid informants, as well as solid citizens to prove the case".

It is sometimes distasteful to exonerate some who is a criminal, but as you have seen from the record of improved enforcement, in both the United States and Canada and other jurisdictions, sometimes you have pay heavy price in order to restore competitive conditions in the market place, which is the primary purpose of this after all, it's not necessarily to penalize people, but it is to avoid the economic effects of cartels in our societies. No tradition, but historical acceptance. Just about Dr. Farina's point about the administrative rather than the civil process, Canada is both a Civil Law jurisdiction and a Common Law jurisdiction, administers the Civil Law in Quebec and we understand the difference, we have in the Competition Act both, administrative penalties with lower burdens of proof for some kinds of offenses, but we are talking as I said earlier about cartels and we can rationalize it as regulatory or administrative offenses, but if you consider that damage is done to people and to economic conditions, we should not assume these are not real crimes and when we find the kinds of offenses that are hardcore cartels, price fixing, bid rigging, volume market and customer allocation, there is no excuse for these offenses, they are clearly criminal and they are prosecuted with all the severity that the law can bring to bear and I don't wish to give you advice but I think that your economy would be improved, it would be better if that were the overall approach of your, to enforcement of these cases.

GARY SPRATLING

The specific question put to me by Paulo was the other investigative techniques in the Department and Martin mentioned that few other cases come to the Canadian Government those are also avenues by which cases come to us. But, specifically with respect to investigative techniques. We, of course, as was evident from the tapes you saw, make use of the Federal Bureau of Investigation. The FBI is an investigative arm of the Department of Justice and therefore is available to the Antitrust Division in these cases. While I was Deputy Assistant Attorney went through a lot of work with the FBI. We got the FBI to make Antitrust a priority, one of its tem priorities for enforcement in the United States and that made a huge difference in the amount of the FBI resources available. In addition to that the Antitrust Division is the only division of the Department of Justice which has FBI agents assigned to individual offices and so, when you go into some offices of the Antitrust Division a resident FBI agent is there to assist attorneys in the initial investigation of criminal type matters, which of course cartels are. Secondly, with respect to resources the Department of Justice, the Antitrust Division has about 350 attor-

neys that doesn't account economists, and paralegals, and investigators and so on.

So, you get an idea of the resources involved in this. Paulo said, during his remarks that there's just the need for more funds and the need for more staff. Clearly, that is required if I have any understanding of what is the situation in Brazil. I said during my prepared remarks that there must be a high likelihood of detection and they are also there must be a high likelihood of prosecution and imposition of sentence. If there isn't either one of those, then nothing's ever go anywhere. You can't do those without people, you can not. There is not a high risk of detection and a high risk of prosecution and imposition of sentence without sufficient staff to do it.

Paulo did not put the tradition point squarely to me, but since Martin mentioned and two of the other speakers did, I would like to say something about tradition. I think the United States is generally viewed as, it's part of the tradition to be a stool pigeon. Or as they say, to squeal on somebody, because in the movies from the United States you've seen it in bank robbery cases, in drug cases, the "mafia" cases and so on. You've seen that. But let me tell you what did not use to be the case. That is people who reported in white collar crime, that did not use to be the case. In fact, when the Antitrust Division first proposed its revised leniency policy, I was called into the office of the Attorney General and asked to explain it. How it made sense? When the Attorney General finally gave authorization for the policy, we were asked to try to explain it to the United States Attorney's offices across the country, who thought we had gone mad. Who thought we were completely crazy to be doing something like this. Over the course of a few years, it now is touted, not by people in the Antitrust Division, not by my former colleagues, but people outside of the Antitrust Division, as the model for enforcement, when you have more than one person committing a crime.

Amnesty doesn't make any sense in a bank robbery. Amnesty doesn't make any sense in an environmental crime, because one person can commit the crime. But when you have a conspiracy, and one party can come forward, and can tell you about the rest and give you a blue print for prosecution of the rest. Especially one that's the type of crime that we know that otherwise often time goes undetected and unprosecuted by anybody. Then it makes sense, to point now that other Government Agencies in the United States have announced new Amnesty Programs.

I don't know if you saw the Financial Times recently. The Financial Times talked about the new Program at the Securities and Exchange Commission, which they admit was modeled on the Antitrust Division Program. It was yet one of the agencies when the Antitrust Division first came out they thought we were nuts to have an Amnesty Program. There was not a tradition

for this. I know Dr. Farina quoted, Dr. considered an early remark about a tradition in Brazil against it. I would only say, at the risk of offending anybody here and I don't mean to, because I'm a foreigner, what do I know. Traditions change. They have changed in other countries in the world. They have changed in the last three years. They have changed in countries that said three years ago this would never work, in countries that three years ago said there was no possibility of criminal sanctions for antitrust violations, now they're talking about the United Kingdom. They now have an Amnesty Program that mirrors Canada and the United States. This week, they proposed their criminal sanctions for any antitrust violations. A jurisdiction that three years ago said it would never happen.

The reason why is because this is an idea whose time has come in the world market place. An idea whose time has come among enforcers around the world. If one has any doubt of that, talk to the people who are going to beginning in Ottawa on Monday. The convention of antitrust enforcers on cartels from around the world and the number of countries that are currently developing sanctions for Antitrust violations and Amnesty Policies.

GERWIN VAN GERVEN

I had one specific question from Paulo on the crisis cartels. I must say that, philosophically, I do not believe in crisis cartels, but nevertheless I will answer the question. It's the idea that there may be good cartels and bad cartels. Europe has flirted with that idea for some time, as a matter of fact. The European Commission I think is somewhat involved in the crisis cartel and the steel industry for some time. As far as I can tell, whatever you've used on crises cartels, whether such a thing is possible, leniency applies only to secret cartels. So a crisis cartel must be a cartel that is organized in the open in Europe would what is still possible on the current rules be notified to the European Commission to have its use. I think it is very difficult to engage in secret crisis cartel, because if you're purpose is to really keep it a secret. In my view, it's hard to see how you can consider that cartel to be beneficial or to be "a good cartel".

There is only one very short comment I want to make on leniency debate, whether we should have it. Leniency is not only a tool to deal with it or to make sure that existing cartels are brought forward. I use the leniency policy also in compliance training that I give from time to time. I think it's a very good tool to prevent cartels in the future. In the past we had to say to business executives: Look, do not engage in a cartel, don't sit down with your

competitors about prices, because it's against the law, and the Government may find out about it. That did not always do the trick, I'm afraid. If now we can say to business executives: Look, if you're going to sit down with your competitors and talk about prices, there is one thing that you should know for sure. One of these days, one of the people you are going to sit down with will betray you. The famous quote from the movie, "your friends are your enemies". I think that is a very powerful message for a business executive. I personally believe that also in that sense leniency is good policy.

MAURO GRINBERG

Senhores, antes de passar para as perguntas do público, eu quero fazer uma pequena explicação. Tenho uma solicitação dos debatedores da mesa e lamentavelmente, uso aqui minha autoridade de presidente da mesa, para dizer que eu ficaria com pena de perder a oportunidade de explorar um pouco melhor os nossos convidados estrangeiros, já que é tão difícil ter um trio desse quilate e dessa importância disponível. Isso vale também para mim, eu estou me refreando ao máximo para não emitir as minhas opiniões. Estou tentando me comportar, rigorosamente, como presidente da mesa, apenas mediando os debates. Eu quero passar para as perguntas. Priscila, por favor:

PRISCILA BRÓLIO GONÇALVES

This morning we have been discussing the convenience of introducing an explicit *per se* prohibition for cartels in the Brazilian Antitrust Legislation. Now during the afternoon, listening to the speeches of representatives of three very important foreign countries, US, Canada and the EU, we have been presented arguments and facts, to affirm that it is essential to have enforcement instruments and resources in order to investigate and convict cartels. So, in this context, I would like to ask the expositors: what is the *per se* rule in the successful application of antitrust policy against cartel in their countries. I would also like to ask, maybe Paulo Corrêa may help me with this question, what is the level of cooperation between Brazilian antitrust authorities and the authorities of these countries which are represented here in regard to cartel investigation.

MAURO GRINBERG

Repetir a pergunta.

PRISCILA

The rule of *per se* prohibition?

GERWIN VAN GERVEN

I think that in Europe there is no. I mean, technically speaking there is no *per se* prohibition of cartels. I mean, this *per se* concept that is so often used throughout the world, coming from the United States, but technically speaking, we don't have *per se* prohibitions in Europe. Theoretically I would say and it has happened in the past, you can have a cartel you can notify it to the European Commission and ask that it be approved. That is typically the crisis cartel XXXX that is made. The fact that we do not have a *per se* prohibition. I think a strong policy of the European Commission, that finds that hardcore cartels, the things we talked about here, in secret fixing prices, sharing volume, are considered illegal and that leniency policy is an useful tool, in order to fight against these types of cartels.

MARTIN LOW

In Canada, we do not have a *per se* offense. The offense in Canada is to prevent or lessen competition unduly. The word unduly implies that there must be an economic effect that is sufficiently severe in the economy to want the prosecution. We have to prove that effect. That makes a cartel prosecution exceptionally difficult in Canada. I gave you the statistics about our very low rate of success. Prior to the adoption of a leniency or immunity program and access to the evidence of co-conspirators. The Commission of Competition at the moment is seeking to amend the section of the competition act that creates the offense, to delete the requirement for an economic effect test. I'm not at all sure that's necessary. In policy terms, when you have that economic effect shown you know that the cartel that you're dealing with, is invariably one of the most severe and pernicious. We'll see what policy unfolds, it would make it certainly easier to prosecute.

GARY SPRATLING

Obviously in the United States, we do have a *per se* rule. The Supreme Court has to find over years what offenses are *per se*. You perhaps, whether you know it or not, have asked one of the most difficult questions that there is to answer. Because there is often confusion between *per se* as a category of offense and what is prosecuted criminally, because they are different. *Per se* refers to what proof is required in the courtroom. As Martin just suggested, in Canada they have to show undue effect and in the United States we do not. That is a tremendous advantage. Even then, cartel cases are very hard to prove beyond reasonable doubt, some of the toughest cases that there are. It would be very difficult if an addition to that you would have to prove the undue effect, because often times effects are so hard to trace in a cartel, other times it would be easy. You've got documents, many times it would be hard.

The matters that the Department of Justice pursues criminally are more narrow, it's a narrower classification than the matters which are *per se*. There are some matters which are *per se* illegal that the Department of Justice does not prosecute criminally. Price fixing; bid rigging; customer allocation; territorial allocation and volume allocation. That's what the Department goes after criminally. There's no doubt, as Martin said, in his earlier answer, no doubt about the effect of those offenses. If you prove the offense, there's no doubt about the consequences. There are other things which are *per se*. I mean believe it or not, resale price maintenance is *per se* illegal in the United States, but no one would go after it criminally. Because then you would have all the difficulties you talked about.

MAURO GRINBERG

Dr. Paulo Corrêa?

PAULO CORRÊA

Vou me deter apenas à parte de cooperação. Temos um acordo, chamado acordo de primeira geração, com os Estados Unidos. Ele está na nossa *home page* e acho que inclusive na do CADE. Não sei se o Roberto tem informação sobre isso, mas na da SDE e da SEAE, certamente, você pode encontrar. É chamado Acordo de Primeira Geração porque ele prevê o início de uma relação institucional entre os dois jurisdições que levará, num futuro próximo, a um acordo mais sólido em termos de intercâmbio de informações. Inclusive a uma relação mais próxima, mais estreita, no que diz respeito à

produção de evidências, provas. Enfim, um auxílio na investigação. Isso com os Estados Unidos. Com o Canadá, infelizmente não temos nada. Com a União Européia começamos através do Mercosul um acordo de cooperação técnica também, como o Dr. Rivière já tinha mencionado na parte da manhã, um Acordo muito próximo do de Primeira Geração.

Agora, no estágio em que nos encontramos, acho que a cooperação informal tem sido muito frutífera. Claro que se busca aprofundar as relações com os outros países, mas a cooperação informal realmente tem sido muito útil. Como mencionei, nos dois últimos eventos que tive oportunidade de participar, nesses dois *workshops* sobre cartéis internacionais, fizemos contatos informais que nos levaram, não só a conhecer a possibilidade de iniciar casos no Brasil, como também, em algumas circunstâncias, encaminhar a investigação desses casos. Foram contatos informais baseados, às vezes, em conversas que iniciadas em *coffee breaks*. Assim, eu diria que embora não tenhamos, ainda, uma relação muito aprofundada com esses países, tem-se tido bastante êxito na cooperação informal.

Não sei se o Mauro me dá mais um minuto... Eu acho que houve uma pequena confusão do Franceschini com relação à noção de eficiências. Em nenhum momento existiu uma dicotomia entre uma eficiência alocativa ou produtiva no projeto de lei, primeiro porque eles não são contraditórias. Claro que se reconhece a eficiência produtiva, e nem poderia ser diferente, como uma ligação, um efeito positivo muito importante no que se refere a condutas ou atos de concentração. Obviamente essas duas coisas não são contraditórias em nenhuma concepção.

Acho que há outra confusão, pelo menos no que vi da interpretação que ele apresentou, é trata de associar a eficiência produtiva com eficiência *schumpeteriana*. Acho que esse não é o ponto. O ponto na questão de *Schumpeter*, aqui peço desculpa ao Prof. Mário Posso que é certamente a maior autoridade no assunto ou uma das maiores, seria enfatizar que trata de um problema de longo prazo. Em curto prazo seria uma ênfase em estado e processo, quero dizer, sempre que se pensa em *Schumpeter*, se pensa em longo prazo e num processo cujo elemento principal é o investimento produtivo. Quando que se trata de eficiências alocativas, em geral no ponto de vista neoclássico, há uma tendência a se pensar mais conservadoramente em eficiências estáticas e, portanto, de curto prazo. Eu diria que em nenhum momento o projeto de lei pretendeu ter uma ênfase quer em eficiência alocativa em detrimento da produtiva, quer numa visão neoclássica em detrimento da *schunpeteriana*. Pelo contrário, acho que a ênfase está em reconhecer, explicitamente, a introdução de inovações de qualidade ou a introdução de novos produtos, a redução de

custo como eficiência. Afinal, isso aumenta o bem estar agregado, o bem estar do consumidor, sendo o bem estar agregado nuclear nesse processo.

Inclusive, isto está por trás da ênfase à preocupação com a eficiência *schumpeteriana* dada ao projeto, para que ele espelhe um sistema institucional que priorize e sinalize aos agentes econômicos que o investimento improdutivo no país, o investimento em "(...) *meant seecking"* ficou mais caro, visto que os retornos líquidos esperados da atividade de cartelização reduziram, favorecendo, portanto, o investimento produtivo que é o motor da eficiência *schumpeteriana*. Obrigado.

MAURO GRINBERG

Nós temos duas últimas perguntas a serem feitas. Após essas perguntas do Dr. Sérgio Bruno e da Dra. Cristiane Zarzur, e as respostas dos expositores, esta mesa deixará o lugar e nós permaneceremos no auditório para a outorga do prêmio Esso. A Dra. Sirlene já está ansiosa para fazer a entrega e a Dra. Cristiane para receber. Sérgio Bruno e Cristianne Zarzur.

SÉRGIO VARELLA BRUNA

Eu queria pegar carona na pergunta da Priscila e perguntar sobre a legalidade *per se,* sobre o reverso da moeda, que é a regra da razão. Pelo menos ao que se entende, a regra da razão tem dois sentidos. O primeiro está associado a questões de eficiência econômica e de razoabilidade da prática, na medida que a prática se justifica por uma razão de negócio. A segunda acepção dessa regra, seria a possibilidade daquele que é acusado provar que não tem poder de mercado. Essa é uma acepção fraca da regra e, pelo menos, essa a leitura que faz, aqui entre nós, o Calixto Salomão no livro dele.

Claramente aqui, o artigo 21 proposto para lei está, vamos dizer assim, rejeitando a possibilidade de haver recurso nessa primeira modalidade de regra da razão, na medida em que não permite uma defesa baseada nas causas da eficiência econômica que eventualmente estariam associadas à prática desse cartel, se é que teoricamente poderia haver alguma.

Eu não estou certo, porém, que a segunda acepção dessa regra da razão também esteja sendo rejeitada pelo projeto, mas eu não vejo nenhum indício na redação que permita interpretar que, aquele que vier a ser acusado no Brasil de prática de cartel, possa recorrer; ou aqueles que estiverem envolvidos na prática possam recorrer alegando não exercerem poder de mercado, portanto, não afetando o cartel o mercado. Por isso tudo seria necessário, o

recurso a toda, vamos dizer assim, o nosso *metier* de mercado relevante, posição dominante, o que parece também ser um desejo a se evitar no novo projeto.

Eu queria aproveitar a presença dos conferencistas internacionais e perguntar se existe na jurisdição americana uma restrição ao acesso à regra da razão, nessas duas acepções, quanto a prática de *price fixing,* que é *per se*? Também gostaria de saber como essa questão é tratada em seus regimes jurídicos? Se é possível que um acusado de cartel tente, eventualmente, se defender, com base na alegação de que não possuem poder de mercado e que, portanto, esse acordo de preços não é assunto para o direito da concorrência.

MAURO GRINBERG

Eu vou pedir permissão para os expositores para colher a pergunta da Dra. Cristiane e eles responderem em bloco, porque nós já estamos bastante adiantados na hora.

CRISTIANNE ZARZUR

Cristianne Zarzur, escritório Pinheiro Neto. Eu gostaria de perguntar ao Dr. Gary Spratling, em relação aos acordos de cooperação, quais os limites, se existirem, na troca de informações em investigações de processos em andamento?

GARY SPRATLING

I'll take the questions in the order in which they were put. In a *per se* case, there is no access to economic efficiency evidence on behalf of the defendant. The whole purpose of a *per se* prosecution is to eliminate any evidence of economic benefits from the case and that has a long history in the United States. Before I get to market power, let me make one caviar that.

Often times in *per se* prosecutions, there is economic evidence admitted and if the defense puts on an economic expert, then often times the government will put an economic expert as well. The economic evidence admitted does not go to efficiencies and does not go to market power, again we'll get to you in a moment. The economic evidence admitted goes to whether or not there was willing or agreement. Because if there was an

agreement, it's a *per se* violation. Often times the defendant say, it was not an agreement and there is proof of no agreement. They put in price studies to show that the prices did not go according to the agreement that the government elegies. That is the only circumstance in which economic evidence is admitted in an United States court room on a price fixing case.

As to new market power, it may interest to you that we and Canada have each received arguments in international cartel cases, that the company should not be prosecuted because they had no real market power in the international cartel. Yes, they were there at the meetings and they might have said that they went along with it. In fact, they were only there as observers; or they were there and they gave their agreement, but the cartel would have worked fine without them. The United States, if I dare speak for Martin on this.. the United States and Canada view is the same. If you are a participant in a cartel, your market power doesn't matter. If the other parties to the cartel believed that you agreed being by your presence at the meeting or your aquiescence in what was said. That was critical to the cartel's existence, because without your agreement it was something that would have been unsettled that they would have had to deal with it.

Turning to your question on the nature of cooperation agreements and what is this closed. If what you're referring to is a weaver in the amnesty program. Is that what you're referring to or are you referring to a normal cooperation agreement between the countries? Normal cooperation agreement? That changes from country to country. One of the strongest cooperation agreements is between the United States and Canada. There is provides from all types of information being disclosed except, that information being provided to an enforcement authority pursuing to an amnesty agreement. You will not disclose that and you won't disclose it directly, of course, once an enforcement agent begins an investigation, if it is based on an amnesty applicant. Then very soon you'll get to a position whether the actions you are taking which by nature of the cooperation agreement you'll require the point to communicate to your system jurisdiction; or which they may ask you about and you're required to respond to. So, for example, let's just take product A . In product A there is an amnesty application. You don't report anything to anybody. Let's say that you then serve ???? or search warrens upon companies. At that stage, if it affected the interest of Canada, you would notify Canada, so the United States will notify Canada. Or that stage, if they made a request to you, regarding the investigation you would respond, but even then the investigation about product A wouldn't be known and by the nature of the information somebody may be able to figure out who the amnesty applicant was. But even then you do not disclose what the amnesty applicant reported to you. Well, you may ask why is that? The reason why, is because the amnesty

applicant gives you all that it knows. It is not the subject of compulsory process where you're trying to get something out of the party. They have gone to you and given you all that they now. So even after the investigation became know, if you deliver to another enforcement authority all the information, it would be tied with a bow on it and in mission to the crime by the amnesty applicant and it would be in the worst position that all the other people. I can see by the affirmative knockings heads that everybody gets this concept, but if the amnesty applicant says no.

GERWIN VAN GERVEN

In Europe, I think you can not use an efficient defense idea. The defense idea that has always been used out righting in the past was when the cartel participant saying: ok, we are sitting around the table, but when we walked away nobody followed what we agreed. That goes to show if there was an agreement or not or if there was an affect on the market. There is an affect on the market is irrelevant for the question whether there was a cartel whether you had a restrict of agreement. But the European Comission may take into account, it has in the past taked in to account in setting the level of the fines. So there it may play around the question what the effect of the cartel was on the level of prices in the community. It is a little bit difficult to see the difference...

MARTIN LOW

The canadian situation is different from both of those. In the definition of the offense one of the essential elements of the offense, there must be a showing of economic effects that our Supreme Court has describe as being *somewhere on the spectrum between a full per se offense and a full rule of reason announces.* There must be a showing that the participants in the cartel had the capacity to exercise market power. If there are substitutes that would impede the operation of increasing price or if there are competitors in the market place that had sufficient product available to undermine the operation of the conspiracy, then there is a risk that Court might find that the undueness element had not been proved. As it tuns out in the last tem years of the cases that have been prosecuted and lost, we see that everyone of them was lost on the inability to prove the existence of the agreement beyond the reasonable doubt and not the economic affect. That is a very important reason why I say that it is not necessarily so that you can prove these cases when you have the

additional element of trying to show the economic consequences in the market places.

Let me just mention another point about the question of limits of information exchanges. As it points it out, it depends on the terms of the agreements and the relationships with the individual participants. I would say that since the days when Gary and I were talking about whether he would give information that would effectively enable me to prosecute an individual that he gave the guarantee that would not be prosecuted in the USA. He wouldn't give it to me, but a quarter part of the situation with the amnesty applicant and quite without regard to the existence or otherwise a cooperation agreement. The reality today, in my experience is that we have change the attitude on the enforces around the world. It used to be, because the confidentiality requirements which were imposed on people who were prosecuted or investigated. The attitude was: I will only share information with another enforcement agencies, if I'm legally obligated to do it. Today the attitude is: I will share anything that I possibly can with another enforcement agencies, unless there is something that legally prevents me from doing so. It is a complete reversal of the willingness of enforcement agencies from one part of the world to another, to assist each other, as best as I can without ever contributing the confidentiality or other obligations that they wonder. I think that is a seen change in international enforcement that effects international cartels procedures.

Can I just say with respect to allocative efficiency, because I heard the debate. You have seen today, a perfect example of allocative efficiency on the part of our chairman who is allocated that scare system of resources of time very well. Congratulations.

MAURO GRINBERG

Meus amigos, eu tive a incumbência de dirigir essa mesa e contei com a colaboração de expositores e debatedores, sobretudo com relação ao tempo, nós começamos exatamente às 14:55, são 18:28. Dentro do horário que vocês receberam que era de 14:00 às 17:30, estamos rigorosamente dentro daquilo que nos foi dado fazer. Eu estou muito feliz de ter presidido essa mesa, de termos chegado ao final e ter visto e ouvido o que ouvi. Agradeço de modo muito especial aos nossos Martin Low, Gary Spratling e Gerwin van Gerven e aos nossos debatedores pela cooperação. Espero que tenha sido muito agradável para vocês também. Muito obrigado a todos, a sessão está encerrada.

Por favor, teremos a entrega do prêmio agora. Martin Low e os demais expositores estarão entre hoje e amanhã disponíveis para conversas pessoais.

ENTREGA DO RÊMIO IBRAC-ESSO

UBIRATAN MATTOS

Senhoras e senhores, eu considero este um momento muito especial nos eventos do IBRAC, porque tem a ver com a motivação e o incentivo de nossos jovens de várias partes do país. Antes de entrar no roteiro da premiação, eu gostaria de chamar a querida conselheira e amiga, Dra. Sisse Noronha, diretora jurídica da ESSO, a quem devemos grande parte deste evento. Também para compor a mesa, os professores que fizeram parte da banca examinadora, mas a maioria está, embora nem todos estejam. Eu chamo os professores Dr. Fernando Marques, Arthur Barrionuevo, Mário Possas, Elizabete Farina e Carlos Eduardo Toro.

Esta é a segunda edição do concurso de monografia. Quando surgiu a idéia deste concurso ela foi imediatamente aprovada dado o propósito comum ao IBRAC e seu próprio objeto social, que é divulgar e incentivar a cultura da concorrência. Fomos agraciados com a boa vontade da ESSO, na pessoa da Dra. Sisse Noronha, que cuidou de patrocinar o 1º evento, então dirigido apenas a alunos de graduação. Este ano a ESSO não só renovou o patrocínio como dobrou o patrocínio. O valor de prêmios que o ano passado foi de R$ 10.000,00, passou a R$ 20.000,00. O que nos permitiu ampliar o concurso para abranger também os alunos de pós-graduação.

Lançado o concurso, nós recebemos o total de 68 trabalhos, 41 de graduação e 27 de pós-graduação. Esses trabalhos vieram de 10 estados da federação, São Paulo, Rio de Janeiro, Minas Gerais, Paraná, Bahia, Pernambuco, Ceará, Rio Grande do Sul, Distrito Federal e Paraíba. Além de universidades da Alemanha, da França e da Argentina, num total de 43 universidades. Foi constituída uma banca examinadora com os melhores nomes que nós temos nesta área. Esta banca foi composta de professores de economia e professores de direito. Os professores de economia são: Dra. Elizabete Farina, Dr. Mário Luiz Possas, Dr. Arthur Barrionuevo e Dr. Gesner Oliveira. E os professores de direito: Alberto Venâncio Filho, Valter Sineviva, Celso Campilongo, Carlos Eduardo Montealegre Toro e Fernando de Oliveira Marques. A banca foi, eu diria até, extremamente rigorosa na revisão dos trabalhos e na avaliação, observando os seguintes itens: 1º item, relevância do tema. 2º item,

clareza de exposição. 3º item, rigor metodológico. 4º, originalidade e 5º, qualidade final. Daí resultaram os vencedores. Na categoria de graduação temos os prêmios: 3º lugar tem um prêmio de R$ 1.000,00, 2º lugar de R$ 3.000,00 e 1º lugar de R$ 4.000,00. Na categoria de pós-graduação temos 2.000, 4.000 e 6.000 para o 3º, 2º e 1º lugares. Passando a indicação dos vencedores, começando pelos trabalhos apresentados pelos estudantes de graduação, temos: 3º colocado, se inscreveu com o pseudônimo de José da Silva Pereira Filho, é aluno de direito do 5º ano da UFMG, sua monografia tem o título "Preços predatórios, elementos para a caracterização como infração da ordem econômica" e seu nome é Bruno de Vilhena Lana Peixoto; 2º colocado se inscreveu com o pseudônimo de Hoven Camp, é aluno de direito do 3º ano da USP, sua monografia é "Dumping e preços predatórios" e seu nome é Letícia Frazão Alexandre; o 1º colocado, infelizmente não pode vir, ele se inscreveu sob o pseudônimo de Nuno, é aluno de direito do 5º ano da UNIP em São Paulo, a monografia é "Política de concorrência e direitos de propriedade intelectual" e seu nome é Antônio Carlos Machado de Andrade Jr. (seu cheque estará a disposição no IBRAC).

Passando aos trabalhos de pós graduação: 3º colocado, que também não pode comparecer, se inscreveu sob o pseudônimo de Maurício, a monografia é " A defesa da livre concorrência e dos interesses dos consumidores", é aluno de mestrado em Direito Constitucional e Teoria do Estado da PUC-RJ e seu nome é Fábio Carvalho Leite; o 2º colocado se inscreveu sob o pseudônimo O Iconoclasta, faz curso de pós-graduação latu-sensu em direito de mercado de capitais na USP, faculdade de direito, a monografia é "Da intempestividade da apresentação dos atos de concentração ao CADE", e seu nome é Leopoldo Ubiratan Carreiro Pagoto. Finalmente o grande vencedor, 1º colocado na classe de pós-graduação, inscreveu-se sob o pseudônimo de Jane Austin, faz mestrado em direito comercial na UEL, a monografia é "Defesa da concorrência: práticas transnacionais e cooperação no âmbito do Mercosul e ALCA" e seu nome é Carolina Spak Kemmenmayer.

Mais uma vez agradecemos a Dra. Sissi Noronha e fazemos votos que o patrocínio seja renovado. A razão do fotógrafo é porque a divulgação desse prêmio este ano vai ser muito grande. A ESSO tem uma Circulação que é feita a distribuidores, parceiros, comércio em geral, público de mais de 4.000 exemplares. É muito bem elaborada e vai sair na próxima edição recheada com as fotos do prêmio e com os nomes dos vencedores. Além disso estaremos publicando os trabalhos na revista do IBRAC. Esperamos contar sempre com o patrocínio da ESSO. Muito obrigado a todos.