International Competition Network

ICN Unilateral Conduct Working Group

TELESEMINAR ON EXCESSIVE PRICING

18 NOVEMBER 2009

Introductory Remarks by Operator

International Competition Network

- Welcome by Operator

- Panelists and Participants please note:
  - Audience will be muted during most parts of the teleseminar call („Audience Call“)
  - Audience will be be unmuted during Q&A (press * 1)
  - Teleseminar will be recorded

Welcome by UCWG Co-Chair Randy Tritell

- The ICN has proven an effective instrument for promoting practical improvements in antitrust enforcement.

- The ICN has also been valuable for its less tangible functions of deepening understanding and promoting cooperation.

- The Unilateral Conduct Working Group seeks to facilitate discussion, including through its teleseminars, of issues that arise in analyzing unilateral conduct to enable members to delve into discrete issues of mutual concern, identify commonalities and differences in agencies' approaches, and better understand the relative advantages and drawbacks of different policies.

Teleseminar Agenda

International Competition Network

- I. Introduction by co-host Markus Lange (*Bundeskartellamt*, Germany)
- II. Panel Discussion
- III. Presentation of Case Study by Simon Roberts
- IV. Panelist Reaction to Case Study
- V. Q & A with Audience
- VI. Concluding Remarks by co-host Randy Tritell

Introduction by UCWG Co-Chair Markus Lange

- Excessive pricing is a difficult and controversial concept, because no clear, universally recognized methodology exists for determining when a price is excessive.

- Furthermore, in markets with relatively low barriers to entry, attempting to prosecute a dominant firm for excessive pricing may be even more difficult and controversial.

- The prices deemed excessive could entice other firms to enter the market, driving prices back to competitive levels without any state intervention. Such fluid markets, where entry is easy and exit frequent, tend to be self-correcting.

- That said, the German legislator has decided that in Germany the prosecution of excessive pricing may only play a prominent role in certain, rather specific situations. This is particularly the case where barriers to entry are high and a truly competitive market does not yet exist.

- The German gas and electricity markets may illustrate this situation.

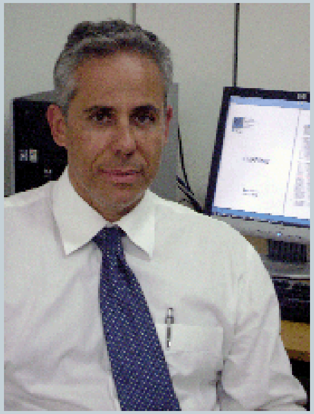
Introduction of Panelists (I)

- **Commissioner César Costa Alves de Mattos**, CADE (Brazil)
- **William Kolasky**, Partner, Wilmer Hale LLP, Washington, DC
- **Luc Peeperkorn**, Principal Expert in Antitrust Policy, European Commission DG-COMP
- **Simon Roberts**, Chief Economist and Manager, Policy and Research Division, South African Competition Commission

Introduction of Panelists (II)

- **César Costa Alves de Mattos**

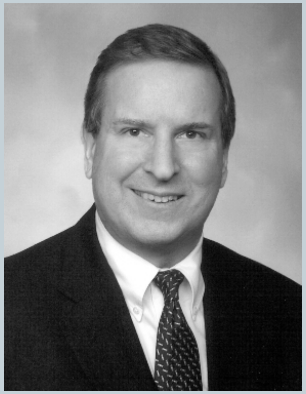
- César holds a PhD in economics. He has been Commissioner before the Brazilian Competition Agency, CADE, since November, 2008. He has been working with competition policy since working as (analogous of) the chief economist of CADE between 1996 and 1999.



- Mr. Mattos edited two books with selected articles of the main antitrust economist experts in Brazil in 2003 and 2008 (Antitrust Revolution in Brazil).

Introduction of Panelists (III)

- **William Kolasky**



- William Kolasky is a partner in the Washington, DC law office of WilmerHale and is a member of the firm's antitrust practice group. He served as a Deputy Assistant Attorney General in the Antitrust Division of the U.S. Department of Justice in 2001-02, where he was responsible for international antitrust enforcement and policy. Mr. Kolasky is credited with being one of the architects of the International Competition Network and he served as the first chair of the ICN’s Merger Working Group.
- Mr. Kolasky has taught antitrust law at the American University's Washington College of Law and speaks and writes regularly on antitrust topics. Mr. Kolasky is a graduate of Dartmouth College and Harvard Law School.

Introduction of Panelists (IV)

- **Luc Peeperkorn**
- After having studied economics and political science at the University of Amsterdam, Luc worked as an assistant professor at the Erasmus University Rotterdam where he specialised in industrial economics, public finance and welfare economics.
- In 1991 he joined the State Aid section of the Directorate General for Competition of the European Commission. Since March 1995 he has worked in Directorate A of DG Competition, dealing with general policy issues and co-ordination of cases. He was part of the team responsible for the review of EC competition policy towards vertical agreements and the main author of the rules that entered into force on 1 June 2000. He was also the author of the new De Minimis Notice adopted on 20 December 2001.
- Recently he was responsible for the policy review of Article 82 and one of the main authors of the Discussion Paper on the Application of Article 82 to Exclusionary Abuses published in December 2005 and the Guidance on the Commission's enforcement priorities in applying Article 82 of the EC Treaty to abusive exclusionary conduct by dominant undertakings published in December 2008. Currently he is responsible for the recently started review of the Vertical Restraints Block Exemption Regulation and Vertical Restraints Guidelines.

Introduction of Panelists (V)

- **Simon Roberts**

- Simon Roberts joined the Competition Commission of South Africa in November 2006 as Chief Economist and Manager of the Policy & Research Division. In addition, he was Acting Manager of the Enforcement & Exemptions Division from 1 November 2008 to 30 April 2009. Prior to this appointment he was Associate Professor in economics at the University of the Witwatersrand, Johannesburg, and also consulted widely on competition matters.

- Mr. Roberts holds a PhD from University of London (Birkbeck College), MA from University of East Anglia, and BA (Hons) from Oxford University.

Panel Discussion (I)

- Proposition 1:
  - A firm that acquires monopoly power through greater efficiency or innovation should be free to set prices at monopoly levels.

Panel Discussion (II)

- Proposition 2:
  - A competition enforcement agency is sufficiently equipped to determine what constitutes a “fair” price as opposed to what constitutes an “excessive” price.

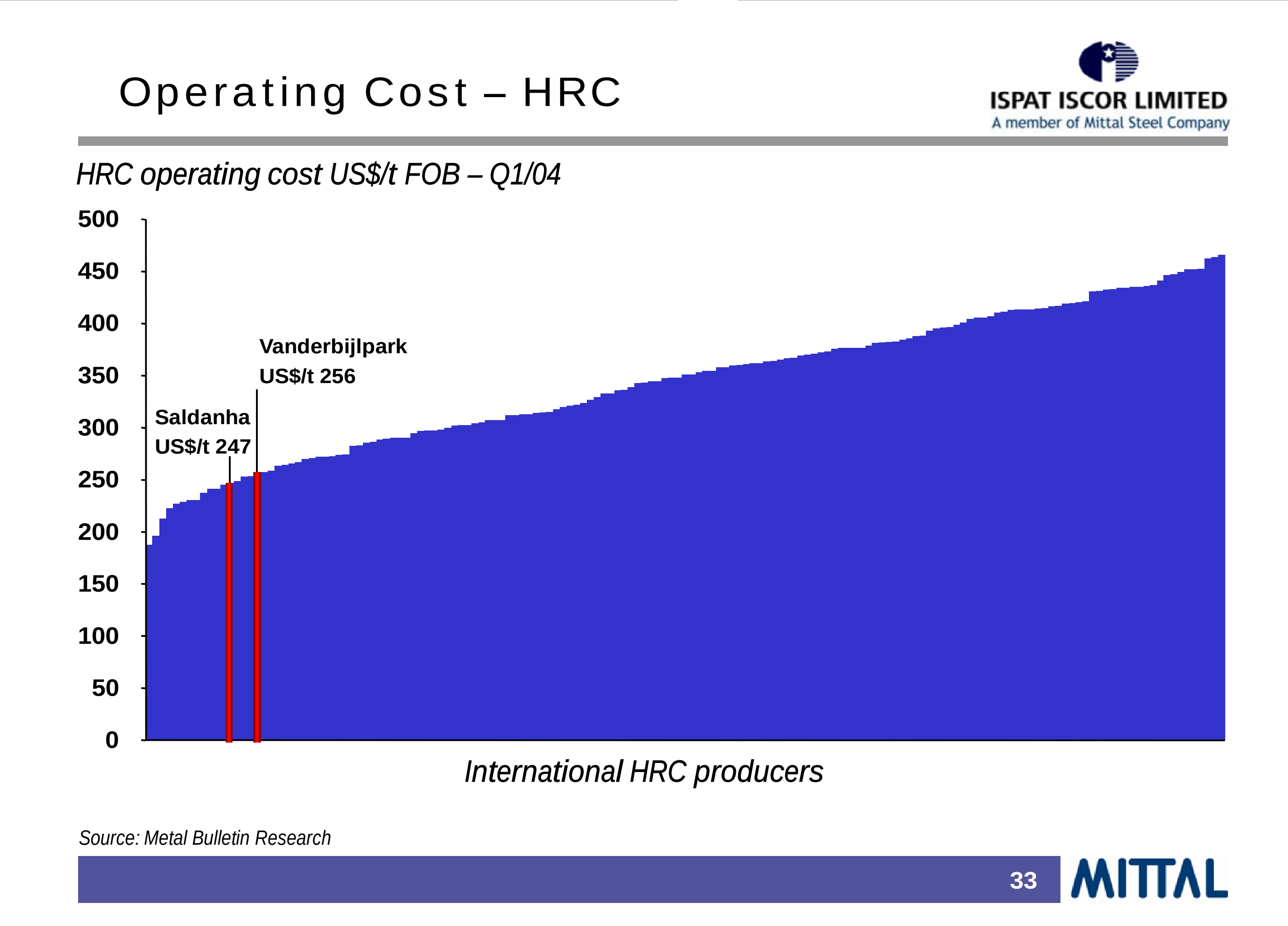
South African Case Study: Introduction

- Case brought against Mittal Steel South Africa by Harmony Gold and DRD Gold (Competition Commission had declined to refer the case to the Competition Tribunal)
- Prohibited excessive pricing is defined in South African Act as a price bearing no reasonable relation to economic value and higher than that value (economic value is not defined in the Act)
- Competition Tribunal found Mittal Steel <u>had</u> engaged in excessive pricing and imposed penalty and conditions
- Competition Appeal Court (CAC) found Tribunal had not applied the tests correctly and remitted it back for further consideration on specified grounds
- Parties settled before this happened

Case Study (I): Salient facts

- Mittal Steel SA (former State Owned Enterprise, Iscor) with 80%+ of local flat steel market (only local competitor makes very limited range due to technology factors)
- Low production costs (cheap energy and cheap iron ore) and very substantial exports (40% of local production)
- Prices to most local customers at 'import parity', that is, at international prices plus:
  - Sea freight, wharfage, port duties, agent's commission, forex cover etc, 5% to cover the costs and burdens of importing
  - Overland transport to main inland customer base (next to steel plant)
- Local import parity prices around 30-40% above fob price; around 60% above net export price
- Other special pricing arrangements where competing alternatives, e.g. where plastic and glass packaging compete with steel cans (with anti-arbitrage provisions)

Case Study (II): Mittal SA plants are very low cost



Case Study (III): Determining excessive pricing

- Case made by complainants:
  - Former SOE, with entrenched dominant position
  - Economic value is pricing levels that would be expected under effective competitive rivalry
  - Prices assessed against various benchmarks, for economic value
    - Ex-factory export prices of Mittal
    - Special deals
    - International comparisons
  - Maintained by anti-arbitrage provisions imposed by Mittal
  - Prices over different measures of costs
  - Assessed that competitive price comparators would be sustainable for Mittal were it to be efficient

Case Study (III): Determining excessive pricing

- Mittal defence?
  - Not dominant; global steel market
  - Have not been profitable over the steel cycle:
    - Must value assets at replacement cost, and weighted average cost of capital on this
    - Exports only cover variable costs, and are necessary because of scale economies relative to small local market

Case Study (IV): Rulings of Tribunal and CAC

- Findings of Tribunal
  - Mittal is in uncontested and incontestable market
  - Super dominant
  - Artificially prevented arbitrage
  - Exerted their market power to the fullest extent
  - This constitutes excessive pricing
  - Can be characterised as a structural test, defended by Tribunal as appropriate else they would be price regulators
  - Remedy concentrated on anti-arbitrage provisions imposed on Mittal's single export channel; threatened divestiture if conduct did not change

Case Study (IV): Rulings of Tribunal and CAC

- CAC
  - Tribunal applied the wrong test, no 'super-dominance' in law
  - The test as set out in the law requires an evaluation of price relative to economic value; the Tribunal must determine economic value
  - Complainants did make out a prima facie case
  - Tribunal must engage with this, and assess Mittal's defence

Case Study (V): Reflections

- South Africa as a small developing country has many entrenched monopolies:
  - High entry barriers with scale economies; far from other industrial economies
  - Durable dominance; conduct potentially with big impacts
- South African dominance cases almost all about entrenched state-created/supported quasi-monopolies, not in industries characterised by high levels of innovation
- State created monopolies goes beyond ownership, includes past & ongoing support: subsidies, finance, rights to infrastructure, inputs, regulatory provisions, licencing
- Focus on where are not-regulated today <u>and</u> where the advantage bestowed is not transitory
- Different country/economy characteristics suggest greater emphasis on excessive pricing cases in countries such as South Africa (not necessarily the result of a different stance)

Panelists' Reactions

- William Kolasky
- Luc Peeperkorn
- Cesár Costa Alves de Mattos

Questions & Answers

Questions by Audience to Panelists

(press *1)

Concluding Remarks

Outline of ongoing work in the ICN Unilateral Conduct Working Group

- Report on Refusal to deal (over 35 questionnaire responses posted (or promised) on the ICN website)
- Next teleseminar tentatively scheduled in February
- Next member conference call on December 2nd
- Next NGA call January 6th
- For any questions regarding the UCWG please contact
  - Cynthia Lagdameo at the FTC (clagdameo@ftc.gov)
  - Thilo Reimers at the Bundeskartellamt (thilo.reimers@bundeskartellamt.bund.de)

Find ICN at:

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