1. Aspenberg is a country in South Asia. Ever since it attained independence in 1947, the prices of petroleum, diesel, natural gas and other related products have been regulated by the Government of Aspenberg. In March 2008, the Government of Aspenberg, in furtherance of its liberal economic agenda, deregulated the price of petrol. Aspenberg enacted its competition law- The Competition Act- in 2002 (“Act”); however, due to opposition from the industrial and business groups, the provisions of the Act were brought into force in a phased manner with the complete act coming into force in June, 2011.

2. Petroleum Companies Association (“PCA”) is an association of petroleum suppliers, distributors and retailers of Aspenberg, in which both public and private sector companies are members. As of February 2010, the total membership of the association stood at 13. Aspenberg Oil Corporation (AOC), Grisham Oil and Natural Gas Co. (GONC), Wills Oil Corporation (WOC), Dafoe Oil and Natural Gas (DONG), are
members of the PCA and are the leading manufacturers, distributors and sellers of petrol in Aspenberg (hereinafter collectively referred to as “Petrol Cos.”). In addition there are some smaller private sector companies which are also members of the PCA. Society for Consumer Rights ("SCR") is a society registered under the Societies Registration Act, 1860 and is involved in work relating to the protection and furtherance of consumer rights. The members of the PCA together comprise 81% of the market share of the petroleum and natural gas industry.

3. In December 2010, the SCR filed an information with the Competition Commission of Aspenberg (CCA) under Section 19 of the Competition Act 2002 alleging violation of Section 3 and 4 of the Act. As per the SCR, the Petrol Cos. under the umbrella of the PCA have been indulging, directly and indirectly, into monopolistic and restrictive trade practices, in an effort to control the prices of petrol, by limiting and restricting the production and supply of petrol as against the available capacity of production. It further alleged that the Petrol Cos. in connivance with the PCA have also been indulging in ‘collusive price fixing’. The SCR pointed out that earlier in 2010, despite a fall in the international price of crude oil from 120 $ / barrel to 77 $ / barrel, and the Rupee gaining against the US Dollar, there was no reduction in petrol prices. Instead petrol prices were hiked by Rs. 3/ litre in the week when international crude prices fell down to 85 $ / barrel. Moreover, there was no increase in taxes or any other factors that could warrant an increase in petrol prices. The SCR contended that, the Petrol Cos., by virtue of the fact that they collectively hold a very dominant market share in Aspenberg, enjoy a position of dominance and arbitrarily increase the price of petrol and such acts under the aegis of the PCA, tantamount to abuse of dominance under section 4 of the Act. The SCR
contended that such restrictive practices by the Petrol Cos. were to the detriment of consumers. Petrol being a major source of fuel, any illegal practice by these companies would affect the common man and the economy of the country at large.

4. After receipt of the information u/s. 19 of the Act, the CCA formed an opinion that a prima facie case existed in the matter and vide an order u/s. 26 (1) dated 23rd January 2011, directed the Director General (DG) to investigate the matter and submit a report. Thereafter the DG investigated the matter and submitted his report on 17th April 2011.

5. The investigation by the DG revealed that although it has been claimed by almost all the companies that the price of petrol is decided every fortnight on the average import cost and the foreign exchange rates of the previous fortnight, it was observed that in many weeks, despite the international price of crude oil on a downward spiral, the price of petroleum in Aspenberg increased or remained constant. According to the DG, the prices are fixed and changed in a discretionary manner. The analysis carried out by the DG also confirmed that there was a production parallelism among the Petrol Cos. which strongly indicates their coordinated behavior. The DG, in his report, submitted that any one company can increase its share of the total by cutting its price but this is likely to cause a counter response by other companies also. Such competition will not increase total sales but will cut profits of all the companies. Under these conditions all the companies can increase their profits by reaching a tacit agreement as to the optimal; or near optimal price level. However, the DG observed that the major petrol companies- AOC, DONG, GONC and WOC- seemed to have divided the territory of Aspenberg into four regions, with each company dominating the sales in one region and having a nominal presence in
the other regions. The DG concluded that there seemed a tacit understanding between the Petrol Cos. to maximize their profits by not competing in each other’s regions.

6. Based upon findings of his investigation and after conducting analysis of factors mentioned in section 19 (3) of the Act, the DG concluded that it is established that the Petrol Cos. under the umbrella of the PCA are controlling the supply of petrol in the market by way of some tacit agreement. He concluded that the Petrol Cos. have indulged in collusive price fixing. The DG also concluded that the allegations against the Petrol Cos. that they have entered into anticompetitive agreements among themselves to manipulate the supply and price of petrol are substantiated. According to DG, the act and conduct of the Petrol Cos. is anti-competitive in contravention of the provisions of section 3 (1), 3 (3) (a), 3 (3) (b) of the Competition Act, 2002.

7. The Commission considered the report of DG and decided to forward the same to the parties for their objections, if any. The parties submitted their written objections/replies in response to the findings of DG. In addition, oral arguments were also made by them in course of inquiry proceedings before the Commission.

8. An objection was raised by the PCA and the Petrol Cos. challenging the jurisdiction of the CCA on the ground that the DG could not have investigated into allegations and considered, looked into data pertaining to a period prior to May 20, 2009 i.e. the date from which the provisions of section 3 of the Act were brought into force. The Commission, in this regard observed that it is true that the DG has referred to the data of the petroleum industry relating to the installed capacity, production, utilization, dispatch, prices and profit margins for period prior to May 20, 2009, the date with effect from which the provisions of section 3 of the Act have been made effective. However, the DG
had not only relied upon the data pertaining to a period prior to May 20, 2009, but also upon the data after that date. Moreover, the DG had relied upon data of earlier period only to relate them to dynamics of the industry as a whole and conduct of the parties in general. Mere examination of data belonging to period prior to May 20, 2009 cannot be construed to mean that the provisions of the Act have been applied retrospectively. Moreover, if the effects of an act/conduct, prior to May 20, 2009, continue post notification of the provisions relating to anticompetitive agreements, the Commission has the necessary jurisdiction to look into such conduct.

9. The Petrol Cos. also argued that the DG, in his report, had selectively relied on the oral and written evidence submitted by witnesses including petroleum distributors and retailers without providing them with an opportunity to cross-examine. In reply to this objection, the Commission observed that it is not a case that the report of DG had not been made available to the Petrol Cos. or the PCA by the Commission for their objections. In accordance with the provisions of the Act, the parties had been given copies on the investigation reports of DG. The parties were given opportunity to lay their own evidences—both written and oral in order to controvert the findings of DG. Therefore, the arguments of Opposite Parties on this count also didn’t have any merit since in accordance with the principles of natural justice they had been afforded full opportunity to explain their position.

10. The PCA in its written and oral arguments submitted that it was established in 1995 under the Societies Registration Act, 1860 as an association of petroleum companies to promote common interest of its members. It categorically denied having any committee on prices and said it didn’t indulge in disseminating communication among the members.
The PCA has further submitted that it is a fundamental right of an industry to constitute an association whether they are traders, manufacturers, retailers, residents, shopkeepers etc. It stated that it is an accepted fact that the associations play a positive role in development of the society and, have collective bargain power to take up issues concerning its members with government or other authorities. The PCA contended that the mere fact that Petrol Cos. formed an association does not imply that the said association was formed to indulge in any activity which is against the law.

11. The Petrol Cos. in their reply stated that it was well settled that the existence of an agreement which is alleged to be anti-competitive needs to be explicitly established for finding contravention under section 3 of the Act. They contended that the DG had failed in adducing any direct and cogent evidence to satisfy this primary criterion. They further contended that the threshold for establishing the existence of an agreement had not been met in the present case and therefore the accusations must stand dismissed and should not be entertained further. The Petrol Cos. stated that even if it is conceded for the sake of argument that indirect economic evidence can be admitted for the purpose of speculating the existence of an agreement, it is indisputable that such evidence must be unimpeachable. They pointed out that in the present case, even the indirect economic evidence produced by the DG was highly vague and suffered from numerous infirmities. They also contended that their conduct was guided by the market forces and any direction to stop intelligently responding to the market conditions would be counterproductive.

12. The Petrol Cos. further contended that for a cartel to survive there must be mechanisms in place for (a) coordinating the cartel agreement and to ensure its functioning (b) monitoring the behaviour and conduct of the members of the cartel and (c) punishing
members of the cartel who do not fall in line with the decision of the cartel. The DG has failed to produce any evidence which suggests that any of the above mentioned elements are present in the petroleum industry in Aspenberg. The DG had merely relied on the parallel nature of price movements to suggest that there existed a cartel in the petroleum industry, which is a baseless conclusion, in gross ignorance of the market conditions.

13. After hearing the informant as well as the Petrol Cos. and the PCA, the CCA passed an Order under Section 27 of the Act on 19th November, 2011. It concluded that no contravention of the provisions of section 4 of the Act by any single petroleum company or a group is made out in the present matter. The Commission found the conduct of the PCA and the Petrol Cos. was in contravention of section 3 (3) (a) and 3 (3) (b) read with section 3 (1) of the Act. Accordingly the CCA penalized the Petrol Cos. 1% of their average annual turnover for the preceding three financial years. The order of the CCA didn’t provide any explanation as to how this amount was arrived at. Furthermore, the CCA held that the PCA provided a platform to the Petrol Cos. and facilitated the collusive price fixing, and imposed a penalty of 10% of its total receipts for two years.

14. The PCA and the Petrol Cos. preferred an appeal against the decision of the CCA in the Competition Appellate Tribunal (COMPAT) re-raising, inter alia, their objection to the report of the DG. The matter was posted for final hearing on 29th September 2012.

NOTE:

- The laws of Aspenberg and the legal system of Aspenberg are in pari materia with the laws of India, subject to any exception mentioned in this problem.
- Counsels are to prepare a common brief for all the Appellants.