

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

**CAN DEVELOPING ECONOMIES BENEFIT FROM WTO  
NEGOTIATIONS ON BINDING DISCIPLINES FOR  
HARD CORE CARTELS?**



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## Executive summary

At the next WTO Ministerial Conference, to be held in Cancún 10–14 September 2003, Ministers will decide by explicit consensus on modalities of negotiations on competition issues. In addition to the decision on whether to proceed with negotiations, an agreement will have to be reached on what type of provisions should be included in a multilateral framework on competition, and of particular interest here is the desirability of including possible provisions on so-called hard core cartels.

Many developing countries have actively participated in discussions on competition-policy-related matters in the WTO and they can be expected to play a full part in the deliberations in Cancún. This paper assesses the potential costs and benefits of negotiations on potential provisions for hard core cartels for developing economies and begins by reviewing the factual record in this regard.

Estimates are presented here on the likely damage done to developing countries by the 40 or more private international cartels that were prosecuted by government agencies in the industrial economies in the 1990s. In the case of the international vitamins cartel, which was worldwide in scope and lasted 10 years, there is robust evidence that cartel members targeted those jurisdictions with little or no cartel enforcement for greater price rises and larger overcharges to customers. This evidence, as well as other evidence, raises the question of what measures, if any, are being taken to protect developing economies' interests against this form of international anti-competitive practice.

The first line of defence for developing economies is to enact *and* to enforce their own cartel laws, and in the last five years over 15 developing countries have found it in their interests to do so. Nowadays, cartel law enforcement is no longer the preserve of richer industrialized countries. However, problems remain as cartels can still find safe havens – in which to hide evidence of cartelization or to meet to organize and implement a cartel – in those jurisdictions where there is no or weak cartel enforcement capacity. In fact, drawing upon enforcement experience in the 1990s, the discussion here highlights two important knock-on effects from a nation's cartel law enforcement activities (or lack of those activities) to their trading partners, each of which provides a rationale for some form of international collective action against hard core cartels.

Having identified, in principle, a case for collective action, the discussion then turns to the adequacy of existing international initiatives to tackle hard-core cartels. Then, leading perspectives on the efficacy of further initiatives against such cartels in the WTO are described and discussed.

In the light of these findings, the paper goes on to discuss three of the leading options that developing countries have as they prepare for the WTO Ministerial Conference in Cancún. Rejecting any discussions on competition policy in the WTO, it is argued, is not a risk-less option. Furthermore, it is difficult to see how this approach, even if complemented by initiatives outside the WTO, would do much more to deter, prosecute and punish hard-core cartels. Non-binding approaches have been tried before and are, despite the considerable progress made in recent years, partly responsible for the unsatisfactory patchwork of measures that exists today. A second option – that of having discussions on competition policy in the WTO but excluding discussions on hard core cartels – suffers from similar weaknesses. The third option – initiating negotiations on binding disciplines on hard-core cartels – *can* be conducted on terms that advance the interests of developing economies, and this paper goes on to describe what those terms might be.

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## **I. Introduction: Hard-core cartels, the Doha Development Round and the forthcoming WTO Ministerial Conference**

Just like industrial countries, developing economies benefit when attacks on anti-competitive corporate practices result in prices falling towards incremental costs. The poor find that their incomes now buy more necessities. Exporters find that their costs fall as the prices of intermediate inputs to production are reduced, and Governments benefit as their limited budgets can now purchase more of the goods and services that underpin social protection programmes and alike.

Non-competitive market outcomes can have domestic sources – both government-inspired and firm-based. High tariffs, barriers to foreign direct investment (FDI) and to domestic entry, and excessive regulatory burdens can impede the very competition between firms that keeps prices down. Likewise, domestic firms can collude, cartelize, or in some cases monopolise local and national markets, with higher prices invariably being the outcome.

This paper focuses on a different source of non-competitive market outcomes in developing economies, namely private international cartels and the government policies that – deliberately or unwittingly – support these conspiracies. Even though there are a number of different types of private international cartel, a growing body of evidence suggests that they can result in substantially higher prices and fewer choices for customers. Furthermore, those customers are not just private consumers; often the purchases of other firms and governments are distorted by cartelization. In fact, it is precisely because of the *harm* caused by this *conduct* that the act of cartelization is condemned.

Anti-competitive corporate acts are receiving more attention in international forums – such as the United Nations Conference on Trade and Development (UNCTAD), the World Trade Organization (WTO), and the Organization for Economic Co-operation and Development (OECD) – principally because of a surge in international cartel enforcement actions in the 1990s and because of the recent wave of cross-border mergers and acquisitions, which was on an unprecedented scale. The focus here on private international cartels is not meant to imply that other forms of anti-competitive cross-border conduct by firms are unimportant, insignificant or uninteresting. It is just that, at this point in time, the empirical record upon which to base sound policy is much more developed for private international cartels than for any other type of cross-border anti-competitive practice.

Discussions on the appropriate national and international measures to tackle cartels are likely to intensify in the months leading up to the WTO Ministerial Conference in Cancún. At that meeting, members of the WTO are due to decide upon what terms, if any, to conduct negotiations on a potential multilateral framework on competition policy. It has been proposed by some developing and industrial economies that such a framework should include provisions on so-called hard core cartels (a term defined in the next section). These proposals were advanced in the work programme on competition policy matters that Ministers established for UNCTAD and for the WTO and its members in the Doha Development Declaration (see box 1).

**Box 1. The competition policy-related components of the Doha Development Declaration**

At the WTO Ministerial Conference in Doha on 14 November 2001, the members of the WTO agreed a work programme on competition policy for the two years leading up to the Cancún WTO Ministerial Conference scheduled for September 2003:

“23. Recognizing the case for a multilateral framework to enhance the contribution of competition policy to international trade and development, and the need for enhanced technical assistance and capacity-building in this area as referred to in paragraph 24, we agree that negotiations will take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations.

24. We recognize the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area, including policy analysis and development so that they may better evaluate the implications of closer multilateral cooperation for their development policies and objectives, and human and institutional development. To this end, we shall work in cooperation with other relevant intergovernmental organizations, including UNCTAD, and through appropriate regional and bilateral channels, to provide strengthened and adequately resourced assistance to respond to these needs.

25. In the period until the Fifth Session, further work in the Working Group on the Interaction between Trade and Competition Policy will focus on the clarification of: core principles, including transparency, non-discrimination and procedural fairness, and provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building. Full account shall be taken of the needs of developing and least-developed country participants and appropriate flexibility provided to address them.”

*Source:* Doha Ministerial Declaration at [www.wto.org/English/thewto\\_e/minist\\_e/min01\\_e/mindec1\\_e.htm](http://www.wto.org/English/thewto_e/minist_e/min01_e/mindec1_e.htm)

The goal of this paper is to assess whether developing economies can benefit from negotiations that might lead both to binding provisions on national cartel enforcement and to measures that encourage voluntary cooperation on cartel enforcement matters between official agencies. After this introduction, the first order of business is to define what a private international cartel is and to relate it to the commonly used term “hard core cartel.” In the third section of this paper, the enforcement record against private international cartels in the 1990s is reviewed and evidence presented on the prevalence of, and estimated damage done by, private international cartels. The fourth section discusses a number of ways in which States effectively encourage their firms’ attempts to cartelize markets abroad. Drawing on this evidence and the known enforcement record, the fifth section discusses the case for a binding international accord on cartel enforcement. This case is then related to both the existing non-binding international measures to strengthen cartel enforcement efforts and one of the leading proposals – by the European Commission (technically on behalf of the members of the European Union) – for binding provisions on hard core cartels. The seventh section of the paper discusses how the flexibility in the existing proposals for binding provisions on hard core cartels could be used to advance the interests of developing economies.

## II. Defining terms: Private international cartels

To fix ideas, the definitions of different types of cartels are presented. This will serve to clarify the distinction between international cartels and some other forms of cross-border anti-competitive conduct. It is worth noting that the definition of a private cartel stated below is one typically employed in economic analysis and need not be the same as the definition of such cartels found in existing international accords. More will be made of the distinction between the former and the latter later in this section and elsewhere in the paper.

A *private cartel* is said to exist when two or more firms that are not *de facto* or *de jure* controlled by a Government enter into an explicit agreement to fix prices, to allocate market shares or sales quotas, or to engage in bid-rigging in one or more markets. It is worth noting that the objective of a private cartel is to raise prices above competitive levels, thus harming the customers – who can be consumers, other firms (whose competitiveness is thereby harmed) or Governments.<sup>1</sup>

A private international cartel is said to exist when not all of the firms in a private cartel are headquartered in the same economy or when the private cartel's agreement affects the markets of more than one national jurisdiction. This definition therefore rules out cartels that involve State enterprises (as in the case of OPEC). Furthermore, it requires an *explicit* agreement between firms, which distinguishes cartelization from collusion.<sup>2</sup> Another aspect of this definition is that it includes Governments and the private sector as victims of private international cartels, as recent cases involving bid-rigging in American aid projects in Egypt can attest (see box 2).

### **Box 2. Bid-rigging on USAID-funded construction projects in Egypt, 1989–1995**

In a one-count felony case filed on 11 August 2000 in the US District Court in Birmingham, Alabama, American International Contractors Inc. (AICI) was charged with participating in a conspiracy involving bid-rigging from June 1988 until at least January 1995, in violation of Section 1 of the Sherman Act.

AICI pleaded guilty to participating in the conspiracy and was required to pay a \$4.2 million fine for rigging bids for certain wastewater treatment facilities construction contracts funded by the United States Agency for International Development (USAID) in Egypt. In addition, Philipp Holzmann AG, a construction company based in Frankfurt, Germany, pleaded guilty to its participation in the cartel and was ordered to pay a \$30 million fine.

The conspiracy involved firms deliberately submitting “losing” bids to the procuring authority. The “losing” firms were compensated with direct payments by the winning company. As a result, the market for such construction projects became far less competitive. The procuring entity was no longer able to obtain the lowest possible price. In turn, fewer projects were probably undertaken in Egypt and the quality of life of Egypt's citizens as directly affected.

It is also worth distinguishing between *private international cartels* and *export cartels*. The latter are a special type of private international cartel in which the conspiracy does not involve commerce in

<sup>1</sup> For a classic statement of the economics of cartelization see Stigler (1964).

<sup>2</sup> In economic analyses of collusion, firms enter into implicit agreements. Such agreements can arise after repeated interaction between the firms.

the economies where the cartel members are headquartered. Often discussions of export cartels implicitly assume that such a cartel is made up of firms from one nation and that the agreement is to cartelize markets abroad. (This interpretation is not surprising as many nation's laws grant specific exemptions from national antitrust laws to those cartels that only affect commerce abroad.<sup>3</sup>) However, in principle, an export cartel could include firms headquartered in more than one economy.

Another term is prominent in the discussions of private cartels, namely so-called *hard core cartels*. This term has acquired a special significance since the OECD members agreed in 1998 to a non-binding "Recommendation" on such cartels. According to the OECD, a hard core cartel is

"an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating consumers, suppliers, territories, or lines of commerce."<sup>4</sup>

Perhaps the most important distinction between the definition of "private cartels" and that of "hard core cartels" is the repeated reference to the phrase "anticompetitive" in relation to "hard core cartels".<sup>5</sup> This raises the issue as to whether a cartel could be pro-competitive, that is whether a cartel's formation could result in lower prices for purchasers. As some Chicago-school scholars have pointed out, as a theoretical matter it is possible for a cartel – under certain specific circumstances – to result in cost reductions large enough that prices paid by purchasers actually fall.<sup>6</sup> The relevance of this theoretical observation for policy discourse has not been established in the available empirical evidence on recently prosecuted private international cartels.

The definitions outlined above also serve to clarify the distinctions between private international cartels and other forms of anti-competitive corporate practices. First, cartels do not necessarily involve mergers, acquisitions and other forms of inter-firm combination, which may or may not result in anti-competitive outcomes. Second, cartels can involve firms that in principle could compete for the same customers. Therefore, cartels *can* differ from vertical restraints between firms, although some cartels have been found to have a vertical component too. Third, cartels, by definition, involve more than one firm, and so are different from attempts by a single firm to dominate a market. Finally, attempts by firms to collectively dominate a market are to be distinguished from cartels in that the former do not involve a formal agreement between the firms concerned.

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<sup>3</sup> Export cartel exemptions are distinct from export cartels; after all, the former is a legal instrument and the latter are acts by enterprises. In addition, the latter can arise without the former. Moreover, the former may not induce the formation of the latter. In section 4 of this paper, export cartel exemptions are discussed at greater length.

<sup>4</sup> See OECD (2000). Note here that the definition of hard core cartels is being discussed, not the important issue of the sectoral scope and practices covered by the OECD Recommendation. The latter is discussed in section 6 below.

<sup>5</sup> Note that a hard core cartel may well have an international component to it, but need not do so.

<sup>6</sup> See Landes (1983) for such a claim. Another logical possibility is for the formation of a cartel to increase the sum of consumer and producer surplus, and not just the former. For some empirical evidence on this matter, see Dick (1992).

### **III. The surge in enforcement actions against private international cartels since 1993**

Perhaps the most blatant and egregious foreign source of non-competitive market outcomes in developing economies is private international cartels. On the face of it, the greater integration of national markets through trade and investment reforms should have made it harder to sustain such cartels – at least those cartels which raise prices substantially. Even if it is generally the case that trade reform undermines these cartels’ operations, the large number of international cartels uncovered in the 1990s suggests that market forces alone do not offer complete protection against this menace to international commerce.

A brief account of why international cartel enforcement surged in the 1990s is instructive as it highlights both the effectiveness and the limitations of national anti-cartel regimes. The growth of cartel prosecutions occurred after 1993, when the United States revised its anti-cartel enforcement practices so as to strengthen the incentives for a cartel member to break away from its co-conspirators and to provide evidence of the cartel’s operations to authorities in return for a reduction in the potential penalties. Essentially, under its so-called corporate leniency programme, the US authorities guaranteed the executives of the *first* cartel member which agreed to cooperate with their inquiries consideration for a *full* amnesty regarding fines and criminal sanctions. Combined with the very strength of sanctions against cartelization in the United States – including provisions for executives to be jailed – this change in leniency provisions provided cartel members with strong incentives to come forward with information. The alternative to inducing firms to come forward with evidence is for enforcement authorities to search for evidence of cartelization, which is often costly. It is also often fairly fruitless because cartel members are adept at putting evidence of their meetings and agreements beyond the reach of enforcement agencies. Moreover, overly intrusive searches give rise to claims of harassment from the private sector.

It should be noted that the European Commission as well as other jurisdictions’ enforcement agencies – such as Ireland and the United Kingdom – have introduced similar leniency programmes in recent years. However, some nations have debated doing so but have rejected adopting a leniency programme. In the case of Australia, the rejection was on the extra-ordinary grounds that these schemes provide incentives for businessmen to “dobin” (an Australian term meaning “incriminate”) their friends and fellow businessmen.

### Box 3. The economics of cartel enforcement

The purpose of this box is to lay out – from a traditional “law and economics” perspective – the incentives supplied to firms by national anti-cartel enforcement regimes.<sup>7</sup>

From a law and economics perspective, the objective of anti-cartel laws should be to deter, and where necessary, punish firms that engage in cartelization.<sup>8</sup> Three characteristics of cartels are germane to understanding the incentives supplied by anti-cartel enforcement. First, cartels typically involve secret agreements between firms. Second, the objective of these agreements is to secure pecuniary gains for cartel members. Third, sustaining the cartel requires careful attention to crafting incentive-compatible agreements between firms that discourage cartel members from cheating by selling more than the agreed amount or by selling below agreed prices.<sup>9</sup>

A group of firms will be *collectively* deterred from cartelizing a nation’s markets if that country’s enforcers of competition law are expected to fine them *more than* the gains from participating in the cartel. Assuming that the firms are risk neutral; there are no costs to the firms in defending themselves before a fine is imposed; the pecuniary gain from cartelization equals  $G$ ; and the probability of the enforcement authority detecting and punishing the cartel equals  $p$ , then a fine  $f$  that equals or exceeds  $(G/p)$  will provide the necessary collective deterrent. An important insight is that even though cartel agreements are typically secret – and even though the probability of detection and punishment  $p$  is typically low – so long as  $p$  is positive there exists a fine that will collectively deter cartelization.<sup>10</sup> Secrecy may impede investigations, but deterrence is still, in principle, feasible. These arguments may also provide a rationale for why some nations, such as the United States and Germany, have made the maximum fines for cartel members a function of the pecuniary gain from their illicit activity.<sup>11</sup>

Anti-cartel enforcement officials have exploited the “incentive compatibility” problems faced by cartels through the introduction of corporate leniency programmes. These programmes – which offer reduced penalties to firms that come forward with evidence of cartel conduct – induce members to “defect” from cartel agreements. They have also been motivated by the observation that the successful prosecution of cartels typically requires evidence supplied by at least one co-conspirator.<sup>12</sup>

<sup>7</sup> For a recent exhaustive survey of the law and economics literature, see Kaplow and Shavell (1998). The discussion in box 3 focuses on the incentives supplied by public enforcement practices. Private suits – brought for damages by cartel victims – that are permitted in some jurisdictions may reinforce these incentives.

<sup>8</sup> As a testament to the influence of this perspective it is worth noting that the Ministry of Commerce in New Zealand recently published a report on the effectiveness of the deterrence provided by that nation’s enforcement practices and courts, which was explicitly built on the lines of reasoning discussed in this section. See Government of New Zealand (1998).

<sup>9</sup> These forms of cheating are sometimes referred to as “chiseling”.

<sup>10</sup> This simple calculation can be extended in a number of ways; see Government of New Zealand (1998). Perhaps the most important extension is to include enforcement costs, which leads to the finding that the optimal enforcement of cartels may result in some less distortionary cartels not being prosecuted.

<sup>11</sup> Although this box focuses on the deterrent effect of State antitrust enforcement, it should be borne in mind that some jurisdictions permit private suits by those entities whose interests are hurt by a cartel. In principle, the expectation of damages won by those interests can act as a deterrent to cartelization too.

<sup>12</sup> At the core of such leniency programmes lies the incentive to give evidence in return for reduced (or even no) punishment for criminal acts. Some members of the Bar have pointed out that this incentive may well distort the information offered to enforcement authorities and the statements that former conspirators are willing to make in court. See “The world gets tough on price fixers,” *New York Times*, 3 June 2001, section 3, p.#1ff.

The US corporate leniency programme, last revised in 1993, can be rationalized in these terms. Currently, only the *first* firm to come forward with evidence about a currently uninvestigated cartel is *automatically* granted an amnesty from all US criminal penalties. This encourages a “winner takes all” dynamic, where members of an otherwise successful cartel each have an incentive to be the first to provide evidence to the US authorities.<sup>13</sup> A second feature is that even if a firm is not the first to approach the US authorities, it can gain a substantial reduction in penalties by admitting to cartel practices in *other* markets that are (at the time of the application for leniency) uninvestigated. This provision has set off a “domino” effect in which one cartel investigation can result in evidence for subsequent investigations.

Jurisdictions differ considerably regarding whether they impose criminal penalties in cartel cases. In particular, few jurisdictions allow the incarceration of business executives responsible for cartelization.<sup>14</sup> However, US officials strongly believe that criminal penalties including the threat of incarceration are essential deterrents to cartelization.<sup>15</sup> How does a law and economics approach assess this claim? First, incarceration involves costly losses in and re-allocation of output: managers’ productivity is by definition less during their period of incarceration, and resources must be devoted to the construction and operation of prisons. If these were the sole considerations, incarceration would be a less desirable alternative to fines. However, given the low probability of punishing a cartel and the sizeable gains from engaging in such behaviour, the minimum fine that would deter a cartel may in fact bankrupt a firm or its senior executives. Bankrupting a firm that has been engaged in cartel behaviour could actually reduce the number of suppliers to a market, resulting, perversely, in less competition and higher prices. Furthermore, personal bankruptcy laws put a limit on what corporate executives can lose from anti-cartel enforcement. Incarceration may provide – through the loss of freedom, reputation, social standing and earnings – the only remaining means to alter the incentives of corporate executives. This argument is particularly important in industrialized economies because in recent years the use of stock options in executive compensation packages provides very strong incentives to senior managers to maximise firm earnings and stock market value.

The second law and economics argument is that incarceration is needed to reduce or eliminate the expected harm caused by repeat offences. There may be legitimate concern that executives who have successfully arranged explicit agreements to carve up a market will, after the cartel is broken up, attempt some other form of anti-competitive practice. The imposition of fines alone may not induce a

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<sup>13</sup> The German Bundeskartellamt (Federal Cartel Office) revised its corporate leniency programme in April 2000 to include such a provision. Dr. Ulf Boge, President of the Bundeskartellamt, argued in explicitly economic terms as follows: “By granting a total exemption from fines to the first firm that approaches us, we want to induce the cartel members to compete with each other to defect from the cartel.” See Bundeskartellamt (2000).

<sup>14</sup> Although the criminality of cartel behaviour has considerable implications for international cooperation and evidence sharing, the role of these sanctions as a deterrent is what concerns this paper.

<sup>15</sup> See, for example, Hammond (2000, who argues: “based on our experience, there is no greater deterrent to the commission of cartel activity than the risk of imprisonment for corporate officials. Corporate fines are simply not sufficient to deter would-be offenders. For example, in some cartels, such as the graphic electrodes cartel, individuals personally pocketed millions of dollars as a result of their criminal activity. A corporate fine, no matter how punitive, is unlikely to deter such individuals.” Scott Hammond is the Director of Criminal Enforcement at the US Department of Justice. In interpreting his remarks it is worth bearing in mind that the maximum fine under US law for individuals convicted engaging in cartel behaviour is \$350,000, which given recent trends in executive compensation is likely to be much less than the potential stock option and other gains paid to an executive whose firm’s profits have increased as a result of participating in a cartel.

firm's shareholders to replace the offending executives, especially if the latter can convince shareholders that the fine was a "cost of doing business" and that the benefits from implicit collusion (which they expect to secure in a market that is well known to them) will soon flow. Here, a clean break with the past may be needed, with incarceration simultaneously removing the relevant executives from their posts and acting as a threat to incoming senior executives not to attempt recartelization. Enforcement officials must also weigh the stronger deterrent effect of incarceration against the higher levels of evidence that are required in order to secure criminal convictions. The threat of incarceration exacerbates the difficulties that officials face in securing evidence and testimony from cartel participants, which in terms of the framework outlined above effectively lowers the probability of detection and punishment,  $p$ .

The law and economics perspective explains why *national enforcement efforts may be particularly ineffective in deterring international cartels*. First, the ability of executives to organize cartels (including attending meetings and the writing and storing of agreements) in locations outside the direct jurisdiction of the national competition authority, where the cartel's effects are felt, can effectively reduce the probability of punishment  $p$  to zero. For example, in 1994 the US case against General Electric, which along with De Beers and several European firms were thought to be cartelizing the market for industrial diamonds, collapsed with the trial judge citing the inability of US enforcement authorities to secure the necessary evidence from abroad.<sup>16</sup> Second, constraints on the ability to collect evidence and to interview witnesses abroad imply that the probability of punishment  $p$  is lower than it might otherwise be. Increasing the fines  $f$  imposed may not, given the substantial reduction in  $p$  and the limits imposed by bankruptcy, be sufficient to deter cartelization. In sum, supplying the right deterrent is more difficult when conspirators can hatch their plans abroad.

Third, in a world of multiple markets the gain from cartelizing an additional market may well exceed the extra profits from that market alone. As the number of markets in which a cartel operates increases, each cartel member can be more successfully discouraged from cheating on the cartel agreement in *any one market* by the threat of retaliation by other members in *all the markets* in which the cartel operates. This "multi-market effect" implies that the extension of an international cartel into a *new* market can raise prices in all of the markets in which a cartel *already* operates. Therefore, the fine that will deter cartelization of a new market must take account of the consequent increase in the cartel's total profits, not only on the extra profits being earned in the newly cartelized market. At present, even those authorities that base their fines on the illicit gains from cartelization do not consider the cartel's gains from outside their jurisdiction and so current practices are unlikely to deter multi-market cartels.

Finally, the effectiveness of national leniency programmes is compromised by firms' participation in cartel activities in many nations. A firm may be reluctant (to say the least) to apply for leniency in a single jurisdiction if that leaves it potentially exposed to penalties in other jurisdictions. Furthermore, even though a firm may be willing to offer evidence on cartel activities in many nations, a national competition authority will only value information on activities within its jurisdiction. Both factors reduce the benefits of seeking leniency.

*Source:* Adapted from Evenett, Levenstein and Suslow (2001).

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<sup>16</sup> See Waller (2000).

What did this combination of strong sanctions for cartelization and a specially tailored leniency programme accomplish? Evidence collected from amnesty programmes in the United States and the European Union has been instrumental in the prosecution of most of the 40 or more private international cartels uncovered since 1993.<sup>17</sup> Since 1993, fines imposed by American authorities on members of international cartels have exceeded \$1.9 billion. Last year alone, the European Commission fined international cartel members over a billion euros.

Table 1 lists the headquarters of the firms that participated in 40 private international cartels prosecuted by the United States and the EC since 1990. As can be seen in that table, these cartels affected a wide range of products and were not confined to a small number of economic sectors. Moreover, the cartel members were spread all over the world, having their headquarters in 31 economies, eight of which were in developing economies.<sup>18</sup> These findings, and others, suggest that it is difficult to sustain the argument that private international cartels are a geographically localized problem or one that is concentrated in a small number of industries. Furthermore, 24 of these 40 cartels lasted for at least four years, casting doubt on the claim that private international cartels quickly collapse under the weight of their own incentive problems or under pressure from imports from non-cartel members (Evenett, Levenstein and Suslow 2001). The duration of the private international cartels prosecuted in the 1990s is shown in figure 1.

Turning now to the effects of these private international cartels, the findings of detailed qualitative research are disquieting (Connor, 2001; Evenett, Levenstein and Suslow, 2001; Levenstein and Suslow, 2001). In addition to the fact that purchasers of cartelized products paid more, there is evidence that some cartel members took steps to: shut out non-members from markets through the use of antidumping investigations, co-opt new entrants in their industry (a point that is discussed further in the next section) and limit access to the latest technological developments only to cartel members. These latter effects imply that private international cartels also affect non-cartel members' access to, and ability to compete in, international markets.

Attempts to quantify the impact of private international cartels have grown in sophistication in recent years. Initially, studies focused on the price reductions observed after a cartel collapsed and most studies pointed to a 20 to 40 per cent fall in prices (Levenstein and Suslow, 2001; OECD, 2000b). In addition, various estimates have been made of the value of international trade flows that have been affected by cartelization. Figure 2 reproduces calculations of the total value of developing economy imports of 12 cartelized products throughout the 1990s.<sup>19</sup> (In this figure, if a cartel operated from 1993 to 1995, for example, only for those years are developing country imports of the cartel's goods included in the reported totals.) By 1995, annual imports of these 12 cartelized products by

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<sup>17</sup> US officials claim that before 1993 they received approximately one application for leniency a year. After 1993, they claim they received on average one application for leniency per month. It is worth bearing in mind that these numbers undoubtedly include leniency applications by firms in cartels that affect only US commerce, and so would fall outside the definition of a private international cartel.

<sup>18</sup> This finding suggests that private international cartels cannot be accurately characterized as a North–South phenomenon, with Northern firms exploiting – to use the deliberately emotive language of recent debates over international trade reform – Southern purchasers. Indeed, if such a characterisation were entirely accurate, it would beg the question as to why the EC and the US prosecuted these cartels in the first place!

<sup>19</sup> The source of the data for this figure is the *World Trade Analyzer* database of Statistics Canada. Considerable effort went into matching the products sold by each of the 12 cartels to the relevant four-digit (SITC) product category in that database. All reported values are converted into year 2000 US dollars.

developing economies routinely exceeded \$8 billion and exceeded \$80 billion since 1990. Assuming a 20–40 per cent price overcharge, this implies that developing economies paid \$12.5–25 billion dollars more than they should have done for these 12 products alone. This range of overcharges is likely to be a substantial underestimate of the true overcharges paid by developing economies since 1990 as it omits the overcharges on the products supplied by the other 28 private international cartels listed in table 1 and the overcharges of the undetected private international cartels.

The effects of certain individual private international cartels have been analysed with more sophisticated empirical techniques (Clarke and Evenett, 2003; Connor, 2001; White, 2001). A recent analysis of the international vitamins cartel, which divided up the world markets for various types of vitamins from 1989 until 1999, was able to recover estimates of the overcharges paid by 90 vitamins-importing nations throughout the 1990s. One of the key findings was that the vitamins cartel appears to have generated more overcharges in those jurisdictions with weak cartel enforcement regimes. For example, after the formation of the vitamins cartel in 1990, those Latin American economies that did not enforce their cartel laws saw their total import bills for vitamins jump by 53 per cent; which exceeds the 38.1 per cent increase in the comparable import bills of the Latin American economies that did enforce such laws. Similar discrepancies were also found in Asia and Western Europe (see figure 3), suggesting that, in addition to deterring the formation of cartels in the first place, tough cartel enforcement regimes also reduce the damage done by those conspiracies that still have the audacity to get underway.

Table 2 presents (what are actually under-) estimates of the overcharges on vitamins imports by 90 economies (see Clarke and Evenett 2003). The total overcharges in India amounted to \$25.71 million (converted to year 2000 prices). The total overcharges for the 10 European Union members reported in table 2 were estimated to be \$660.19 million, that is two thirds of a billion dollars.<sup>20</sup> The total overcharges for these 90 importers amounted to \$2,709.87 million throughout the 1990s, just under two and three quarter billion dollars for this cartel alone. Furthermore, as Connor (2001) has shown and as various OECD reports can attest, the international vitamins cartel is almost certainly not alone in creating over a billion dollars of overcharges. In sum, the 1990s saw many private international cartels exploit the very open markets that multilateral trade reforms have sought for decades to encourage. The result was to raise prices and transfer billions of dollars of rents from purchasers to cartel members. Private cartels are indeed a cancer on international commerce.

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<sup>20</sup> No doubt differences in the size of India's economy and Europe's economy account for much of the difference in the amount of overcharges.

#### IV. State encouragement of private international cartels

Another feature of recent research is that it has identified a number of ways in which States deliberately or unwittingly encourage the formation and durability of private international cartels. There is also evidence that cartel members use anti-dumping actions, a form of WTO-legal discretionary trade policy, to effectively “*police*” private international cartels. For example, Indian exporters of graphite electrodes complained that they were shut out of markets where cartel members operated through the *threat and use of antidumping investigations* (see box 4). Furthermore, US citric acid producers twice tried to use antidumping actions to prevent the entry into the American market of Chinese producers that were not members of the cartel. Fortunately, both attempts did not result in anti-dumping duties, but recent research has shown that even unsuccessful anti-dumping actions result in a “chilling” effect on imports (Prusa, 1999). These two examples further highlight the lost opportunities for developing country exporters that result from attempts to sustain international cartels using, or rather abusing, trade remedy laws. These export losses are especially important when ongoing shifts in comparative costs, which would otherwise have favoured developing economy exporters, do not translate into greater market shares – principally because existing cartel agreements tend to lock cartel members into market share allocations that were determined, in large part, by past cost levels. This factor was at work in the lysine cartel (see box 5).

##### **Box 4. The graphite electrodes cartel, 1992–1997**

Graphite electrodes are used primarily in the production of steel in electric arc furnaces. In this highly concentrated world market two firms – one German and one American – have a combined market share of roughly two thirds. Japanese producers supply a considerable part of the remainder, with modest contributions from a number of smaller producers based in certain developing countries, principally India and China. All of the major producers in this market operate production units in numerous countries, including developing countries such as Brazil, Mexico, South Africa, the Russian Federation, and Poland, and sell their products throughout the world.

In 1999, all seven major producers of graphite electrodes pleaded guilty to price-fixing between 1992 and 1997 after an investigation by the United States Department of Justice. Similarly, major suppliers to the Canadian, European Union and Republic of Korea markets were investigated and fined by each jurisdiction’s competition authority.

According to US and European Commission documents, cartel members agreed to:

1. Increase and maintain prices;
2. Allocate volume among conspirators;
3. Divide up the world market among themselves;
4. Reduce or eliminate exports to members’ home markets;
5. Restrict capacity;
6. Restrict non-conspirator companies’ access to certain technology;
7. Exchange sales and customer information in order to monitor and enforce the cartel agreement; and

8. Issue price announcements and price quotations in accordance with the agreement.

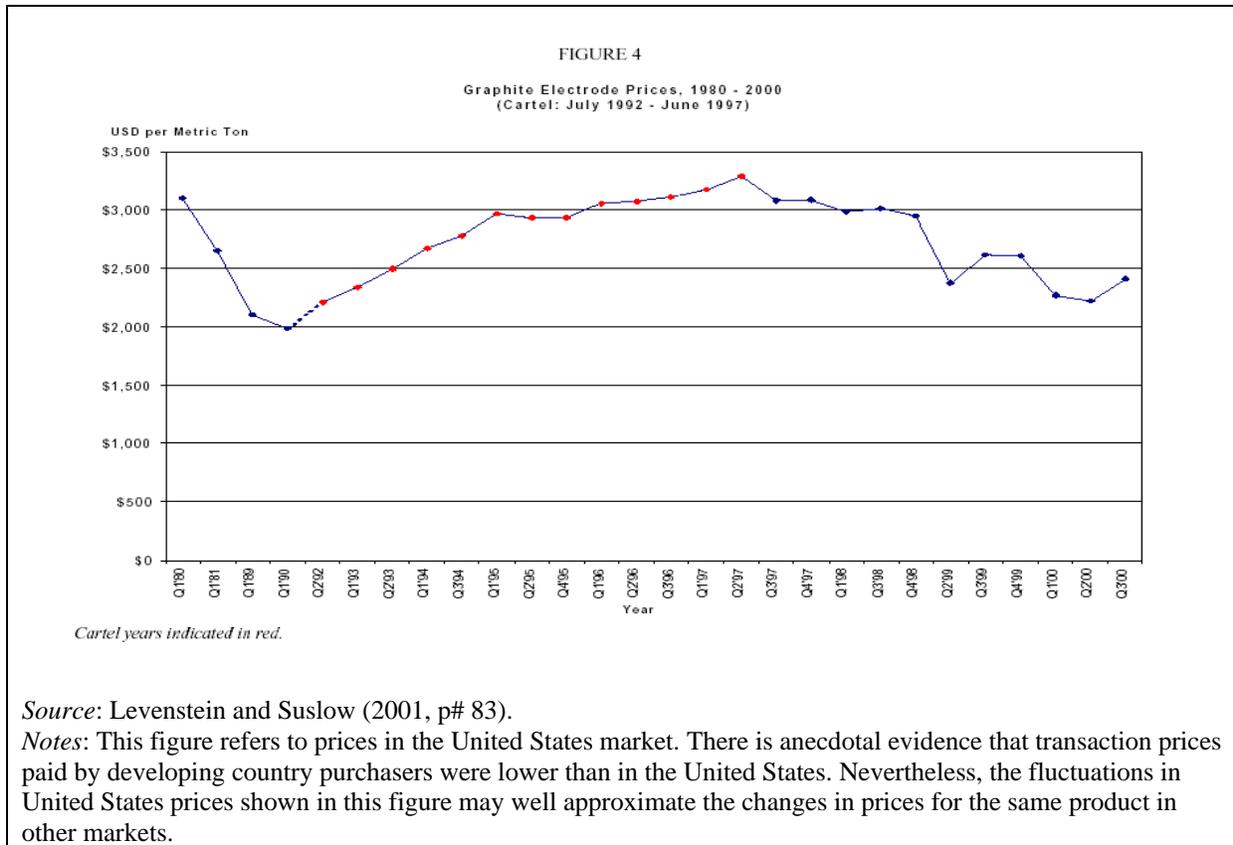
The OECD estimates that “the cartel affected \$5–7 billion dollars in sales world-wide. Throughout the world, the cartel resulted in price increases from roughly \$2,000 per metric ton to \$3,200–\$3,500 in various markets” (OECD, 2000b, p# 13).

Graphite electrode prices in the US market are shown in figure 4. Prices started rising immediately after the conspiracy started in the middle of 1992, and have displayed a clear downward trend since the break-up of the cartel in 1997. Although there is some evidence that actual transaction prices paid by developing country purchasers were in some cases lower than for consumers based in industrialized economies, the fluctuations in the US price can be assumed to accurately represent the changes in prices in world markets. The cartel’s negative effects on developing country purchasers were significant, especially for those economies that depend on graphite electrode imports for steel production. High prices in the graphite electrode markets translated into higher import prices of steel-based intermediate products for developing countries (Levenstein and Suslow, 2001).

The only direct estimate of pecuniary harm caused to developing country purchasers comes from the Korea Fair Trade Commission (KFTC), which in March 2002 convicted six graphite electrode manufacturers from the United States, Germany and Japan. According to KFTC, Republic of Korea steel manufacturers “imported graphite electrodes amounting to \$553 million from the six companies from May 1992 to February 1998, and during the period the import price increased from an average of \$2,225 per ton in 1992 to an average of \$3,356 in 1997 (a 48.9 per cent price increase). The damage incurred by the companies importing graphite electrodes is estimated at approximately \$139 million. Korea’s major industries, such as automobile and shipbuilding industries, that consume much steel were also influenced by this international cartel”. (KFTC, 2002, p# 2).

The cartel’s effects on developing country producers are ambiguous. On the one hand, some producers were certainly able to increase their prices under the cartel’s umbrella during the period from 1992 to 1997. On the other hand, some developing country exporters may have been hurt by cartel members’ attempts to shut them out of markets with anti-dumping actions. Indian exporters bitterly complained that such measures were being taken against them by firms that turned out to be part of the cartel (Levenstein and Suslow, 2001).

Since the break-up of the cartel, the industry has been characterized by the emergence of several joint ventures, such as the one between UCAR, an American corporation, and Jilin Carbon, the largest Chinese producer of graphite electrodes. They may well have dampened competitive pressures in the industry.



### Box 5. The lysine cartel, 1992–1995

Five producers – Ajinomoto and Kyowa Hakko (Japan), Sewon/Miwon and Cheil Sugar (Republic of Korea), and Archer Daniels Midland (United States) – participated in the lysine cartel between 1992 and 1995, controlling over 97 per cent of global capacity for three years (Connor, 2001, p# 176). Cartel members engaged in price-fixing, allocation of sales quotas and monitoring of volume agreements. At the peak of the cartel’s effectiveness in 1994, the price of lysine reached about \$1.20 per pound, which was approximately \$0.50 above the competitive price level in the long run (Connor, 2001).

Estimates of the overcharges to United States customers during the conspiracy period vary according to the measures used, and are as high as \$141 million (Connor, 2001, p# 264). Although no formal analysis of non-American overcharges is available, prices observed in Asia were lower, a fact which suggests that the cartel-induced price increase may have been less in the rest of the world than in the United States. According to Connor, a reasonable projection of the global overcharge by the lysine cartel would be in the \$200 to \$250 million range (Connor, 2001, table 8.A.4). A more conservative estimate assumes a 10 per cent overcharge over \$1.4 billion of global sales during the period of the conspiracy, equal to \$140 million (OECD, 2000b, p# 16).

The increase in price caused purchases and hence production dependent on lysine, to decline. It is

estimated that the lysine industry produced at least 20 per cent less in 1994 than it would have produced had there been perfect competition (Connor, 2001, p# 247). Moreover, the advent of the cartel had the effect of freezing the relative positions of the leading firms in the market, in comparison with the very fluid situation prior to the conspiracy. After the cartel broke up in late 1995, notable changes in global production shares were observed. In particular, production shares of Sewon and Cheil, the Republic of Korea cartel members, increased from 15 per cent to 18 per cent and from 7 per cent to 12 per cent respectively, at the expense of other companies' market shares (Connor, 2001, table 8.A.3).

As to the cartel's effects on developing country producers, clearly the two Republic of Korea members benefited from higher sale prices imposed by the cartel. On the other hand, potential developing country competitors were adversely affected by the market allocation agreements implemented by the larger cartel members. These were mainly achieved through price discrimination across regions so as to halt any reductions in cartel members' market shares.

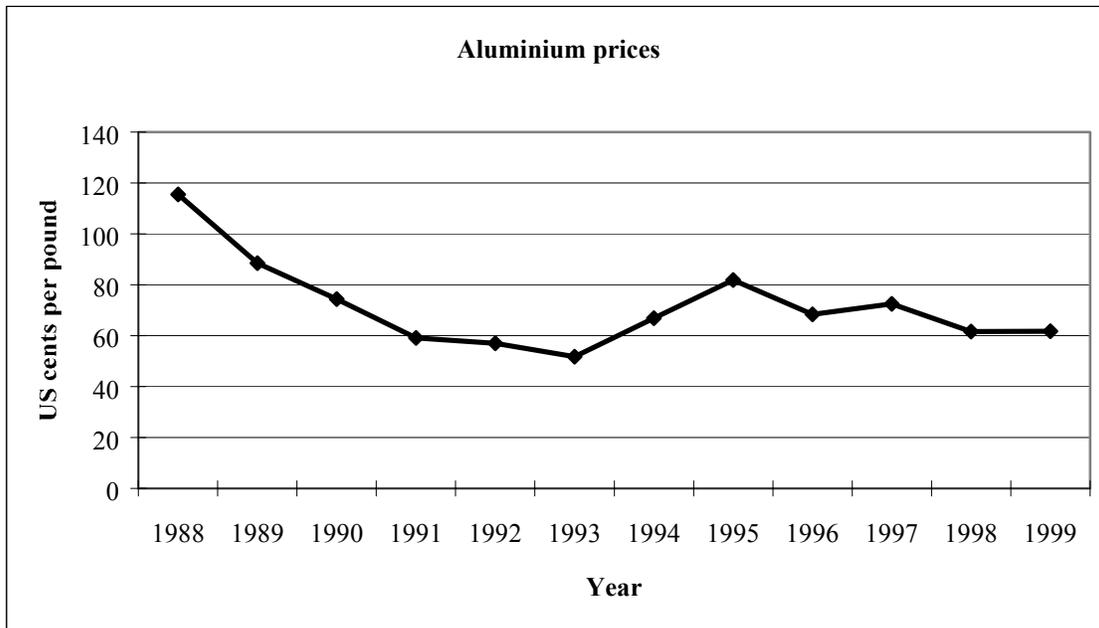
Although there were some instances of extra-cartel entry by relatively small producers during the 1990s (principally firms from Hungary, Slovakia and South Africa), most of the new entrants began production only after the lysine cartel had broken up in 1995. China seems to be the fastest growing location for new ventures in lysine manufacturing. Several joint ventures began operating in China as early as 1993, and by 2000 the productive capacity of these Chinese operations was estimated at about 13 per cent of the world total (Connor, 2001, figure 7.A.3).

The relationship between trade policy and cartel formation has another insidious dimension. In some prominent industries, the so-called unfair trade laws have been used to encourage foreign suppliers to negotiate a market-sharing or other cartel agreement. In the case of the aluminium cartel, such negotiations were actually facilitated by the United States Government in 1994 (Stiglitz, 2001). The result was to end years of falling aluminium prices, much to the detriment of purchasers such as food processing companies (see box 6). In 2001 and 2002 there was considerable concern that this misuse of trade remedy laws would be repeated in the steel industry; however, to date, the safeguards actions have not resulted in a global cartel agreement. Given that steel and aluminium are imported in large quantities by developing economies, their interests are adversely affected by these essentially government-sanctioned arrangements.

**Box 6. Trade remedies and a government-sponsored cartel in aluminium**

In the period 1988–1993 world prices of aluminium fell from a high of 116 US cents to 52 cents a pound. Some of this decline was due to the worldwide recession at the turn of the 1990s, pushing down the prices of all metals. In large part, however, it was caused by a massive increase in exports of refined aluminium by countries of the former Soviet Union, which no longer needed such metal to meet domestic demand. Rather than cut production, the Russian Federation and Ukraine sold the output on world markets, so as to earn desperately needed hard currency. The Russian Federation alone raised exports from 250,000 tons in 1989 to 1.6 million tons in 1993. Oversupply in world aluminium markets faced a low and static demand for the metal, which in turn led to large levels of stock accumulation, all of which pushed prices to a historical low. Western smelters had to cut production and lay off workers. In the face of this situation, Alcoa, a major American producer of aluminium, “turned to government for a hidden bail-out in the form of a global aluminium cartel” (Stiglitz, 2001).

Shortly after, in January 1994, 17 nations reached an accord to curb aluminium production. World production was to be slashed by 1.5 to 2 million metric tons, with 500,000 metric tons coming from the Russian Federation alone. Although actual cutbacks by the aluminium companies fell short of the amounts agreed by the government leaders, the agreement soon proved highly effective in stabilizing prices (see below). Regrettably, however, while aluminium companies and their Governments negotiated this deal, the interests of aluminium purchasers were overlooked.



The *transportation industry* is another sector where government-inspired or government-tolerated cartels are rife, in particular for ocean liner shipping conferences. These conferences involve cooperative working arrangements as well as agreements to set prices. Fink, Mattoo and Neagu (2001) estimated that ending these cosy arrangements between private shipping companies would reduce transportation prices on United States routes by 20 per cent, thus reducing the cost of exporting goods to the American market.

There is another form of State encouragement of private international cartels. Many nations appear to have taken the view that their own firms can cartelize markets – so long as those markets are abroad. In fact, numerous jurisdictions have explicitly exempted export cartels from their domestic competition laws – essentially providing some legal privileges and immunities to their own nation's firms which are members of export cartels. Table 3 lists many of the jurisdictions which have such exemptions in their competition laws (see also OECD, 1995). It is worth noting that in recent years some nations have repealed such exemptions – in part, perhaps, because they fear that if their firms get into the habit of cartelizing foreign markets, there is a greater risk that the same firms will attempt to cartelize the home market too.

Initially, such export cartel exemptions were justified on the grounds that small exporters could join together to share the allegedly substantial costs of marketing their products abroad. If these cartel exemptions were specifically to aid small firms, one might have expected the relevant legislation to be confined to these firms. Invariably, however, it is not. By encouraging domestic firms to engage in anti-competitive acts abroad, exemptions for export cartels are yet another example of the very “beggar-my-neighbour” act that enlightened policy makers have sought to discourage since the wave of retaliatory tariff increases in the early 1930s.

To summarize, throughout the 1990s developing economies imported substantial amounts of goods that were sold by privately orchestrated and privately run international cartels. If this was not bad enough, some of these cartels have used government trade policies to police adherence to cartel agreements and to shut out potential entrants – many of which come from developing economies. This suggests that international cartels have reduced developing countries' exports as well as hurting purchasers, the traditional victims of cartelization. What is even worse is that, in a small number of economically important sectors, Governments have actually taken steps towards organizing or sanctioning cartels whose purpose is to raise prices on international trade routes or in world markets. Add to this the damage done by export cartels, and it becomes clear that the 1990s have witnessed numerous external threats to competitive market outcomes in developing economies.

## V. The rationale for an international accord on cartel enforcement

Findings such as those in figure 1 and table 2 may provide a rationale for robust national cartel enforcement regimes – but do they also provide a rationale for international initiatives on cartel enforcement? In the terminology used by economists, for this question to be answered in the affirmative it is enough to show that national cartel enforcement efforts – or the absence of such efforts – create “spillovers” or knock-on effects in other jurisdictions. An international agreement, then, may be able to strengthen the positive spillovers and reduce the harm done by negative spillovers. Two arguments, borne out in the enforcement experience of the 1990s, imply that there is a case for an international accord that specifies minimum standards of cartel enforcement.<sup>21</sup>

The first spillover arises from public announcements in one nation about cartel enforcement actions that tend to trigger investigations by trading partners. For example, the Republic of Korea began investigating the graphite electrodes cartel after reading about American enforcement actions against this cartel. Likewise, Brazil initiated investigations into the lysine and vitamins cartels after United States investigations were concluded (see box 7).<sup>22</sup> Trading partners therefore benefit from active enforcement abroad – and these benefits are likely to be reinforced over time as formal and informal cooperation between competition authorities deepens.

### **Box 7. Brazilian investigations into the lysine and vitamins cartels were triggered by public announcements from abroad and benefited from informal cooperation with US agencies**

In a submission to the 2002 OECD Global Forum on Competition, Brazil stated that:

“Despite the signature of the international agreement between Brazilian and North American Antitrust authorities [in 1999], the most valuable source of international cooperation continues being informal. Particularly in three important recent cartel cases, this type of technical assistance proved to be essential.

“The first one is the Lysine International Cartel. Two months before the signature of the above mentioned agreement, in September 1999, in the International Cartel Workshop in Washington DC, the US Department of Justice presented in detail their work in the Lysine International Cartel Case. After the case went to trial, the available material became public, [which] allowed the disclosure of relevant information to Brazilian antitrust officials.

<sup>21</sup> Other arguments for international collective action against private international cartels can be found in Evenett, Levenstein and Suslow (2001).

<sup>22</sup> This is not to suggest that, at present, there is much inter-agency cooperation on cartel enforcement, with the potential exception of cooperation between US and Canadian agencies (see Waller, 2000, for an account of the latter.) This dearth of cooperation is probably a reflection of the fact that confidential information on cartel cases typically cannot be shared with foreign enforcement agencies and that, until recently, few agencies beyond Brussels, Ottawa and Washington, DC, were enforcing their jurisdiction’s cartel laws in the first place. The constraints on sharing confidential information are discussed at greater length in the next section.

Transcripts of the Lysine Cartel meetings sent to Brazilian authorities showed that Latin America and Brazil were included in the world market division set by the international cartel.”

On the vitamins cartel, the Brazilian submission states:

“The second case, the Vitamins International Cartel Case, was also discovered by the US Department of Justice. Seae [the Brazilian Secretariat for Economic Monitoring] decided to initiate its own investigations after press releases announced the prosecution of this cartel in the United States. Notwithstanding, Seae’s lack of expertise in hard core cartel investigations hindered further developments in the case.”

Concerning issues of confidentiality and informal cooperation with the US authorities, the submission states:

“...the fact that the case ha[d] not gone to trial in the United States unabled [prevented] the shar[ing] of documents because of confidentiality restraints. Hence, all the cooperation remained informal.

“Nevertheless, some important hints provided by North American authorities were essential for the analysis of Brazilian officials. One important [piece of] information received by Seae was that the Vitamins Cartel operated very similarly to the Lysine Cartel...

“The second important hint was provided by an oral statement of a former director of a large vitamin producer. The director revealed that Latin American operations of the major vitamins companies were centralised in Brazil and helped Brazilian authorities to detect the whereabouts of former Latin American regional managers.”

The submission goes on to describe how these two hints enabled the Brazilian authorities to assemble a case against the cartel members.

The second argument is based on the fact that prosecuting an international cartel almost always requires securing testimony and documentation about the nature and organization of the conspiracy. To the extent that an international cartel hides such documentation in a jurisdiction that cannot or will not cooperate with foreign investigations into the cartel’s activities, this jurisdiction’s actions have adverse effects on its trading partners’ interests. The key point is that when a nation does not rigorously enforce its cartel laws the damage done is rarely confined to its own borders. An international accord on the enactment and enforcement of cartel laws can go some way to eliminating *safe havens* for domestic as well as international cartels. Moreover, such an accord would have to be binding to prevent a national Government – for whatever reason – from failing to enact such a law.

Much has been made by the critics of a potential WTO agreement on competition policy of the need to identify spillovers as the rationale for international collective action (Hoekman and Mavroidis, 2002). The purpose of this section has been to show the difficulties in obtaining evidence and cartel-related information that underlie two such spillovers.

## VI. Towards multilateral disciplines on private international cartels?

The previous sections have pointed out the harm caused by private international cartels and to the causes of sub-optimal levels of anti-cartel enforcement, thereby providing the backdrop for a discussion on the desirability of binding WTO disciplines on cartel enforcement. Before beginning such a discussion, it is important to appreciate that there are already important non-binding international accords in place that encourage nations, individually and collectively, to tackle private international cartels.

Mention has already been made of the OECD Council's Recommendation Concerning Effective Action Against Hard Core Cartels, adopted on 25 March 1998, which enjoined OECD members to strengthen their enforcement efforts against hard core cartels.<sup>23</sup> It is worth noting in this regard, however, that the effectiveness of this Recommendation is tempered by the considerable scope it permits nations to exempt certain sectors and practices from the measures against hard core cartels, as the following quotation makes clear:

“the hardcore cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws.”<sup>24</sup>

This statement explains why, as a legal matter, export cartels are not considered to be hard core cartels in certain jurisdictions that have enacted certain legal privileges for domestic firms that cartelize markets abroad. In fairness, the Recommendation does go on to note:

“However, all exclusions and authorizations of what would otherwise be hardcore cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives.”<sup>25</sup>

This OECD initiative is *pre-dated* by the United Nations General Assembly's adoption on 5 December 1980 of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, the so-called UNCTAD Set.<sup>26</sup> The latter contains an explicit injunction to firms to refrain from many of the measures taken by private international cartels, as the following statement makes clear:

“Enterprises...should refrain from practices such as the following when, through

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<sup>23</sup> The full text of this Recommendation can be found in annex 2 of this paper.

<sup>24</sup> Quotation taken from section I.A.2.b of OECD (2000a).

<sup>25</sup> Quotation taken from section I.A.2.b of OECD (2000a).

<sup>26</sup> This Set was reviewed by UN members in 1985, 1990, 1995 and 2000. The Fourth Review Conference, held from 25 to 29 September 2000, adopted a resolution which “Reaffirms the validity of the UN Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices, recommends to the General Assembly to subtitle this set for reference as the ‘UN Set of Principles and Rules on Competition’, and calls upon all member States to implement the provisions of the Set”. This resolution is contained in UN document TD/RBP/CONF.5/15.

formal, informal, written or unwritten agreements or arrangements, they limit access to markets or otherwise unduly restrict competition, having or being likely to have adverse effects on international trade, particularly that of developing countries, and on the economic development of these countries:

- a) Agreements fixing prices, including as to exports and imports;
- b) Collusive tendering;
- c) Market or consumer allocation arrangements;
- d) Allocation by quota as to sales and production;
- e) Collective action to enforce arrangements, e.g. by concerted refusals to deal;
- f) Concerted refusal of suppliers to potential importers;
- g) Collective denial of access to an arrangement, or association, which is crucial to competition.” (UNCTAD, 2000, section IV. D.3, p.# 13).

Furthermore, the Set calls upon signatories to act individually or collectively to tackle restrictive business practices, of which international cartelization is a leading example. In the preamble to section IV, the Set states that signatories are

“Convinced of the need for action to be taken by countries in a mutually reinforcing manner at the national, regional and international levels to eliminate or to effectively deal with restrictive business practices...”

Even though the Set and the OECD Recommendation are non-binding, it is quite likely that both international initiatives have strengthened cartel enforcement in both developing and industrial economies. These measures have helped raise the public profile of cartel enforcement (and other forms of competition policy enforcement, for that matter) and have facilitated the discussion and exchange of best practices and views at regular international meetings. The question of interest here, however, is whether nations ought to go the next step and consider negotiating and adopting a binding agreement on national cartel enforcement under the auspices of the World Trade Organization (WTO). To better understand the issues involved, it might be useful to lay out precisely what some of the recent contributions by WTO members to the WTO’s Working Group on the Interaction Between Trade and Competition Policy. First, the contributions of several developing countries and are described and then the proposals of the European Community and its Member States for multilateral rules on hard core cartels are described.

A number of submissions to this Working Group have noted the harm done to developing countries by international cartels. The following remark by Thailand in representative in this regard:

“Thailand recognizes the potential damage associated with an international cartel and the urgent need to eradicate these cross-border collusive practices. We also recognize that these cartels tend to operate in countries with weak enforcement of competition laws and thus support multilateral assistance in providing mutual assistance in fighting these cartels” (Thailand 2002a, paragraph 1).

The Republic of Korea, for one, has also stated that:

“...regulations on cartels should be included in the multilateral framework on competition policy, for their negative impacts are clear and also significantly affect

international trade” (Republic of Korea, 2002, para. 4).

This Republic of Korea contribution goes on to usefully describe a number of the key components of potential multilateral disciplines on hard core cartels, namely the definition and scope of hard core cartels, obligations on WTO members to take effective enforcement action against such cartels, provisions for flexibility, and modalities for voluntary co-operation.<sup>27</sup> With respect to non-discrimination and exemptions, Thailand has proposed that export cartels be prohibited (Thailand, 2002b, para. 2.1). Moreover, India has argued for a ban on exemptions from national competition laws for export cartels, although it is envisaged that this ban would apply only to industrialized countries (Government of India, 2002, para. 3). With respect to international cooperation in the enforcement of anti-cartel laws, the Government of Thailand has made an ambitious proposal (see Government of Thailand, 2002a). Specifically, it has argued “that the *initial commitment* in multilateral cooperation in fighting *hard-core cartels* should consist of the following elements:

*Notification*, which requires authorities that are in the process of investigating and prosecuting international hard-core cartel cases to promptly alert concerned authorities in countries that the cartels may be operating. The notification should include, at a minimum, the background and preliminary analysis of the particular case. Authorities should be kept up-to-date on a regular basis with regard to the progress.

*Mandatory consultation*, which requires governments that are investigating an alleged cartel to engage in discussions with other Member countries whose interests may be affected.

*Assistance*, which requires competition authorities to co-operate in terms of providing analytical assistance, sharing of experience, suggestions concerning enforcement techniques, etc. Requests for information gathering should also be facilitated.” (Thailand 2002a, paragraph 5.)

This submission goes on to make clear that many of the above obligations would be mandatory and not voluntary. Thailand has also argued that – owing to financial constraints in developing countries – that competition agencies in developing economies should be “financially compensated for delivering requested services and be allowed to cooperate to the extent possible subject to technical and financial constraints” (Thailand, 2002a, para. 6).

The European Community and its member States have put forward perhaps the most comprehensive proposal for binding WTO disciplines on private international cartels – in a submission on 1 July 2002 (submission number WT/WGTCP/W/193).<sup>28</sup> This submission characterizes hard core cartels as:

“...cases where would-be competitors conspire to engage in collusive practices, notably

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<sup>27</sup> It should be noted that this submission does not include specific proposals from the Republic of Korea on each of these matters. Nevertheless, this submission is – in this author’s view – a particularly helpful contribution as it lays out a number of important issues that would probably have to be addressed if negotiations began on multilateral disciplines on hard core cartels.

<sup>28</sup> In Annex 1 of this paper all of the recent contributions on the subject of hard core cartels to the WTO’s Working Group on the Interaction between Trade and Competition Policy are listed.

bid-rigging, price-fixing, market and consumer allocation schemes, and output restrictions. These practices can appear in a number of shapes and combinations” (EC, 2002, p.# 1).

The submission goes on to describe EC enforcement actions against private international cartels, as well as reviewing the recent research findings on the effects of such cartels on the world economy, noting in particular research undertaken at the OECD and for the World Bank.

On the basis of this submission, the Commission envisages that a potential WTO agreement on hard core cartels could include the following provisions:

1. “a clear statement that [hard core cartels] are prohibited” (EC, 2002, p.# 5). This presumably includes domestic hard core cartels as well as private international cartels.
2. “a definition of what types of anti-competitive practices could be qualified as ‘hard core cartels’ and would be covered by the multilateral ban” (EC, 2002, p.# 5). The EC notes, in this respect, that such a definition might include a description of the permitted exceptions and exemptions to such a multilateral ban, although in this submission the EC did not take a stand on what those exemptions and exceptions might be (EC, 2002, p.# 6). It would appear that, at the time of making the proposal, the EC was not prepared to take a position on whether export cartels are a type of hard core cartel.
3. a commitment by WTO members “to provide for deterrent sanctions in their domestic regimes” (EC, 2002, p.# 6); while noting that a variety of sanctions are available.
4. on “appropriate procedures in the field of voluntary cooperation and exchange of information. Indeed, transparency is an essential element of a framework of competition. Provisions have therefore to be developed on notification, information exchange and cooperation between competition authorities. These would include provisions regarding the exchange of information and more generally, cooperation procedures, e.g. when authorities are launching parallel investigations into the same practice. Negative and positive comity instruments could also be addressed” (EC, 2002, p.# 7).

It would appear, therefore, that the Commission envisages a cartel enforcement architecture that includes strong national pillars (enforcement authorities) and a chapeau that links the pillars (information exchange and notification.) Although the EC’s submission leaves the reader in no doubt that there are many subtle parameters to be negotiated, the construction of such an architectural edifice would, in their view, constitute:

“a major step towards effectively curbing such cartel activity and eliminating their adverse impact” (EC, 2002, p.# 7).

In the light of the evidence presented in earlier sections, the EC proposal has correctly identified the importance of private international cartels as a distortion of the world trading system and has rightly located two of the policy-related causes of sub-optimal levels of enforcement: ineffective or non-existent national cartel enforcement regimes and inadequate information exchange. In assessing the Commission’s proposal it should be borne in mind that the EC is not advocating that WTO members adopt the full set of antitrust or competition laws. The EC is only advocating the enactment and effective implementation of anti-cartel legislation, which is important as fighting cartels is widely

regarded as the relatively undisputed “high ground” of competition policy.<sup>29</sup> Nor is the EC proposing that each nation – irrespective of its level of development – adopt exactly the same type of cartel law. Rather it is advocating that a cartel law, however implemented, should meet certain basic criteria. Consequently, it cannot be asserted that the EC is seeking to impose a “one size fits all” solution to the cartel problem, to use that oft-repeated and tired cliché.

One interesting issue raised in the Thai submission is the efficacy of a multilateral rule requiring the mandatory sharing of all cartel investigation-related information. Often, the argument advanced in defence of not sharing all such information is that some of it is confidential and is protected by statute. This particular argument is not very persuasive as the information needed for cartel prosecutions is often retrospective (and therefore need not concern future business plans) and typically relates to information as to when and where corporate executives met, and what illicit agreements they signed. It is not clear that national statutes should be protecting this type of information. Moreover, even if national statutes currently prevent such information from being exchanged, nothing prevents a WTO member from proposing a provision that such statutes be amended to explicitly exclude protections for documents relating to cartel activities.

There is, however, a more compelling and distinct rationale for not requiring the mandatory exchange of all information obtained in a cartel investigation. The point to bear in mind is that most of the private international cartels prosecuted in the 1990s by the EC and the US authorities resulted from information supplied through corporate amnesty programmes. The incentive of a firm that is participating in a private international cartel to furnish such information to a national competition authority is severely diminished if that information must be automatically passed on to other nations’ competition authorities, where the firm could face sanctions for its illicit conduct. Put bluntly, the mandatory sharing of information acquired during cartel investigations will result in a substantial reduction in the amount of information supplied through leniency programmes, which – on the basis of the experience since 1993 – would compromise one of the most effective weapons in the fight against private international cartels. Indeed, such considerations may account for the assurance given by the US Department of Justice of the confidentiality that can be accorded to information supplied by leniency applications (see box 8).

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<sup>29</sup> That is, the practical and conceptual arguments for attacking cartels are widely regarded as stronger than the arguments in favour of intervention in other areas of antitrust or competition policy (such as vertical restraints and mergers).

**Box 8. US Department of Justice’s position on the confidentiality of information provided during leniency applications**

In a June 2002 document entitled “Status Report: Corporate Leniency Programme,” the US Department of Justice’s Antitrust Division stated: “The Division’s policy is to treat as confidential the identity of amnesty applicants and any information obtained from the applicant. Thus, the Division will not disclose an amnesty applicant’s identity, absent prior disclosure by or agreement with the applicant, unless authorized by court order. In four cases...vitamins, graphite electrodes, fine art auctions, and marine construction – the amnesty applicants issued press releases announcing their conditional acceptance into the corporate amnesty program thereby obviating the need to maintain their anonymity.”

There are a number of responses to this conundrum. The first response<sup>30</sup> is to require some form of notification by authorities to other nations whose interests may be affected by a private international cartel or by an investigation into such a cartel – a requirement that may not actually result in much investigation-specific information being shared. The second response is to encourage the formation and operation of joint corporate leniency programmes. Such joint programmes could offer cartel members the prospect of some (or even full) leniency in a number of jurisdictions in return, of course, for information on the cartel’s activities within those jurisdictions. This may well strengthen the incentive of firms to defect from a cartel agreement but has little to offer countries that are not members of such joint programmes.

A third response is for a nation to *automatically* offer a firm that receives amnesty from another WTO member’s competition authority *no worse treatment* (in terms of reductions in fines and non-incarceration of executives) if the firm comes forward with the same information it supplied the first competition authority *and* if it supplies any additional information and assistance needed to secure a prosecution in the second jurisdiction.<sup>31</sup> This response has the advantage that a nation can implement such a provision unilaterally and does not rely on a nation finding willing partners for a regional competition enforcement body or for a joint leniency programme. Furthermore, a no worse treatment provision could be used as evidence in support of a nation’s claim that it is serious about enforcing its cartel law. Finally, such provisions would strengthen the incentive of firms to defect from their cartel agreement in the knowledge that a successful amnesty application to one jurisdiction’s authority would result in (at least) comparable treatment from some other nation’s enforcement bodies.<sup>32</sup> In sum, there are creative ways to enhance the investigation-related information while remaining consistent with the EC’s proposals.

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<sup>30</sup> This is in fact what the EC submission proposes.

<sup>31</sup> This proposal could be modified in certain ways. So as to avoid the problem of any one nation’s antitrust authority “giving away the store” (so to speak) to leniency applicants; there could be commonly agreed rules on what constitutes sufficient cooperation by a leniency applicant with an antitrust authority. Alternatively, the promise of automatic leniency might only follow if a jurisdiction with a known track record of enforcement offers leniency to an applicant.

<sup>32</sup> It should also be said that nothing prevents a nation from adopting such a provision now, in the absence of a WTO agreement.

Another important matter concerns the role of special and differential treatment in any multilateral framework on competition policy (as that term is commonly discussed in the literature on trade and competition policy (see OECD, 2001). Even though it is unclear why any Government that wanted to eliminate distortions of market forces would want to do so, proponents of a multilateral framework accept that WTO members may wish to negotiate exceptions and exemptions from the multilateral ban on hard core cartels. Furthermore, at present, these proponents do not rule out longer transitional periods for developing economies and technical assistance is often mentioned as a necessary complement to any WTO rules that require stronger cartel enforcement regimes.

In fact, the role of transitional periods and technical assistance is likely to assume greater importance as discussions intensify about the developmental consequences of a credible national cartel enforcement regime. Ever since the TRIPs debacle, developing economies have raised concerns about the implementation costs of existing and potential new WTO disciplines, and these concerns have been echoed by certain trade policy experts (see, for example, Winters, 2002). Evenett (2003) presents the available evidence on this matter and, after considering existing proposals for a multilateral framework on competition policy, concludes that, in general, fears about excessive implementation costs for developing countries are exaggerated. However, these concerns appear to be greater for the least developed countries and neither of the foregoing remarks is intended to suggest that the issue of implementation costs is irrelevant, unimportant or not worthy of further study.



## VII. Options for developing economies

In the run-up to the Fifth WTO Ministerial Conference in Cancún , Mexico, policy makers will have to weigh a number of options with respect to hard core cartels. Depending on how one interprets the Doha Declaration of WTO Ministers, at a minimum developing countries will have to – along with other WTO members – decide the modalities for negotiation of a potential multilateral framework on competition policy, which could include possible disciplines on hard core cartels. On another interpretation, WTO members in Cancún will have to decide whether any negotiations on such a framework will occur in the first place.

It would appear that developing economies have at least the following three broad options to consider in this regard:

1. Decide not to start any formal negotiations on a multilateral framework on competition policy.
2. Decide to start formal negotiations on such a framework but not on potential provisions for hardcore cartels.
3. Decide to start formal negotiations on such a framework which includes potential provisions on hard core cartels.

Stating these three broad options will help structure the subsequent discussion. No doubt there are other potential options; nevertheless, the considerations described below are likely to have some bearing on those other options. Moreover, within each of the three broad options discussed here, there is plenty of room for further clarification and the like.

What would be involved in the first option? Here, developing economies could individually or collectively argue that negotiations on competition-law-related matters should not be part of the Doha Development Round. In the absence of multilateral negotiations on competition matters, developing economies would then be free to develop their own cartel enforcement regimes (and other competition laws, for that matter). Moreover, they would be free to cooperate with other nations' enforcement agencies (if all of the parties concerned found that advantageous). And policy makers would be free to implement, for example, whatever components of the UNCTAD Set and the OECD Recommendation on hard core cartels they like.

As far as the impact on the negotiations for the Doha Development Round is concerned, there would appear to be two consequences for developing countries. One is that those countries would not have to devote some of the WTO expertise and resources to discussing a multilateral framework on competition policy – a potentially important consideration where such negotiating talent is scarce. This often-heard argument is, however, very one-sided. For sure, negotiations take time and cost resources. However, previous sections have made clear just how costly is the status quo to all customers in developing countries, including the Government, which, it should not be forgotten, is often the largest purchaser of goods and services in an economy. The case was made that, without a minimum global standard for national cartel enforcement, hard core cartels are likely to target as well as organize their conspiracies in those jurisdictions with no or weak anti-cartel measures. The issue, therefore, is not whether negotiations are “costly” – each and every type of multilateral negotiation involves incurring some costs – but whether the potential benefits exceed any costs. And those benefits depend in large part on the likely scope of the negotiations, a matter that is discussed at greater length below.

One way to think about the potential benefits is to consider the following hypothetical. Suppose that multilateral provisions on hard core cartels reduced by just 1 per cent of the share of government spending that is affected by bid-rigging, and that on that 1 per cent of purchases in the absence of bid-rigging prices are a mere 5 per cent lower.<sup>33</sup> This would imply that total government spending would fall by 0.05 per cent. In India in 2000, the central Government spent the equivalent of \$81.3 billion,<sup>34</sup> and a 0.05 per cent reduction in that budget due to less bid-rigging would generate over \$40 million a year in savings. These benefits – which ignore any benefits to other Indian purchasers affected by hard core cartels – could then be compared with the cost of negotiating and implementing provisions on hard core cartels. Admittedly, India has a large government budget. But even Zambia,<sup>35</sup> which had a government budget of \$340 million in 2000, would on the calculations above see annual savings of approximately \$0.17 million, a number that would rise as Zambia's government spending increases. Most likely, it will take only tiny reductions in the incidence of bid-rigging to make government investments in negotiating multilateral provisions on hard core cartels worthwhile.<sup>36</sup>

The other consequence of pushing competition-law-related issues off the negotiating table for the Doha Development Round is that it reduces the number of issues over which cross-sectoral trade-offs can be made. Exploiting these trade-offs is at the heart of multilateral trade negotiations and the associated give-and-take will be necessary in order to secure an overall agreement for the Doha Development Round. There can be no guarantee that some of the proponents of the so-called Singapore Issues,<sup>37</sup> including the European Union, will be willing to make concessions on market access – which is one of the central demands of developing countries – without negotiations on issues such as competition. In short, the first option is hardly risk-free or costless. Moreover, this option essentially involves maintaining the unsatisfactory arrangements for tackling hard core cartels.

The second broad option would involve starting negotiations on competition-law-related matters at the WTO but without the inclusion of provisions on hard core cartels. This option might therefore include negotiations on the application of core principles<sup>38</sup> to the enforcement of competition law, modalities for voluntary cooperation between agencies that enforce competition law, and capacity building and technical assistance. The potential consequences of negotiations on these matters is beyond the scope of this paper; however, others have recently discussed their resource implications at length (see Evenett, 2003). There is, however, one implication of such negotiations that relates to hard core cartels, namely the potential disciplines on voluntary cooperation. To the extent that such disciplines result in greater cooperation between the enforcement agencies of those jurisdictions with national cartel laws, improvements over the status quo can be expected. That said, these benefits will not accrue to all nations – as only a fraction of them have cartel laws, enforce them, and are likely to engage in cooperation. Few developing countries meet these conditions, although they might do so in

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<sup>33</sup> As noted earlier, private international cartels tend to inflate prices by 15 to 20 per cent; thus the assumption of a 5 per cent price increase is a very conservative one and stacks the analysis against finding significant gains from firm action against bid rigging.

<sup>34</sup> This figure was taken from CUTS (2003). The example developed in the text here is not found in CUTS (2003).

<sup>35</sup> Zambia was chosen because in 2000 it had the lowest total levels of central government spending in the seven countries studied in CUTS (2003). See table 7 of the latter document.

<sup>36</sup> See Clarke, Evenett, and Gray (2003) for a further empirical elaboration of this point.

<sup>37</sup> As well as competition, the three other Singapore Issues still under consideration by members of the WTO are investment, trade facilitation and transparency in government procurement.

<sup>38</sup> These core principles include transparency, procedural fairness and non-discrimination.

the future. The final observation on this second option is that, because WTO members would not be required to adopt a cartel law, the safe havens for cartels would remain.

The third broad option would include negotiations in the WTO on potential multilateral disciplines on hard core cartels. The expected benefits to developing countries of this option would depend on the scope of the negotiations. The first point to be made in this regard is that a multilateral requirement to enact and enforce a cartel law is almost certainly good for developing economies in their own right, as the proper implementation of such measures deters formation in their jurisdiction of domestic and international cartels in the first place and encourages those cartels that do form to limit price increases. That is, a multilateral requirement to enact and properly enforce a national cartel law amounts to insisting that WTO members take steps that, on economic grounds, are in their interests anyway!<sup>39</sup> From a global perspective, such a requirement would reduce the adverse knock-on effects for trading partners of a nation's decision not to enact or to enforce a cartel law.

The second point to be made here is that developing countries might take special care to ensure that the scope of the sectors and types of private cartels covered by any multilateral disciplines are as broad as possible. In particular, developing countries could insist that – along the lines that Thailand has – directly trade-related cartels should be on the negotiating table (see Government of Thailand, 2002b, paras. 2.1 and 3.2). The latter include cartels in the shipping industry (including laws governing the formation and operation of liner shipping conferences) and export cartels (in particular the legal exemptions which give members of such cartels certain legal privileges under national cartel laws). Both types of cartel have a beggar-my-neighbour aspect to them, and regulating the State measures that underlie them would fall well within the traditional domain of multilateral trade negotiations.

More generally, national policy makers should resist arguments for “flexibility” in sectoral and other exemptions, exclusions and the like from any multilateral disciplines on hard core cartels. Although political factors may lead policy makers in a different direction, from an economic point of view, there is little convincing evidence of the need for such exceptions in the first place. Indeed, “flexibility” can come at a substantial cost to purchasers that have to pay more for goods and services than otherwise. Where political sensitivities call for the creation of exemptions and the like, developing countries could insist on such exemptions being transparent, time-limited, reported to the WTO on a regular basis, and subject to regular national and (possibly even international) review for an assessment of their continuing existence. Such a hard line against exceptions and so forth will also reinforce the hand of pro-competition law enforcement officials in developing economies.

The third point to be made is that developing countries might adopt a pragmatic approach to the modalities on voluntary cooperation in hard core cartels. As argued earlier, demanding the sharing of all case-specific material is likely to compromise one of the principal sources of such information in the first place – namely, the voluntary application for leniency by members of existing conspiracies. Instead, developing countries might insist on notification requirements that ensure that the national enforcement agency responsible notifies the WTO (or some other body) after it has completed its investigation and possible prosecution of a private cartel whose actions distort foreign as well as domestic markets. This would avoid the costs and time needed to complete potentially a large number

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<sup>39</sup> Of course, the very fact that not every nation takes these steps is a probably due to the strong private sector and official interests that are opposed to vigorous cartel enforcement. Indeed, one can think of the effects of a multilateral requirement to enforce and enact a cartel law as strengthening the hand of reformers within a jurisdiction.

of bilateral notifications and would also have the advantage of creating central registers of cartel enforcement activities and of international cartels.

Some have voiced concerns about the costs associated with notification. In large part, these notification costs are dependent on the caseload of the enforcement agency. The size of the caseload, in turn, depends on the strength of a nation's deterrents to cartelization and on the investigative means at the disposal of officials. It is quite likely that a nation with strong deterrents to cartelization and effective enforcers will, over time, demonstrate its seriousness of purpose to the private sector, which will result in fewer attempts to cartelize and smaller potential caseloads. Even if notification is expected to occur frequently, it should be possible for negotiators to craft notification requirements that are straightforward to implement.

The fourth point to be made in regard to the option of negotiating a multilateral framework on competition policy is that developing countries could insist, as part of the package, on binding levels of technical assistance and capacity-building efforts in the future. The latter will help offset any implementation costs from enforcing a national cartel law, thus further increasing the net benefits of such a framework.

When comparing these three options, it is evident that the first two represent little or no advance over the status quo. This status quo has seen the cancer of private international cartels inflict billions of dollars of damage – through overcharges for customers and lost export sales for non-cartel members – on developing countries since 1990. In contrast, the third option discussed here – that is, initiating negotiations on potential provisions of hard core cartels – can help developing countries create or reinforce the national foundations for excising this cancer as well as erecting an international architecture to align national efforts towards this important goal. However, developing countries must make sure that negotiations on a multilateral disciplines on hard core cartels are as broad in their scope as possible, resisting attempts to exclude sectors and practices – in particular the directly-trade-related cartels – that adversely affect their exporters' as well as their purchasers' interests.

## **VIII. Concluding remarks**

Over the last ten years the body of evidence on the harm done to developing countries by hard core cartels has mushroomed. It is quite likely that such cartels cost consumers (including the poor), exporters and Governments in the developing world billions of dollars every year. Moreover, after the well-publicized prosecution of several global cartels, it is hard to argue that such conspiracies are inconsequential or unimportant. Developing countries are beginning to take national measures to attack these anti-competitive practices, and the question addressed here is whether such initiatives could be usefully complemented by potential multilateral disciplines on hard core cartels.

Whether developing countries will benefit from negotiations on multilateral disciplines on hard core cartels at the WTO will depend on a number of factors and no outcomes are guaranteed. However, active participation by developing countries in any such negotiations could tilt the balance in their favour. For example, developing countries could insist that negotiating modalities include all of the legal arrangements that underpin trade-related cartels, such as export cartel exemptions and liner shipping conferences. That is, developing countries can insist that a broad definition of hard core cartels is on the negotiating table. Furthermore, negotiators from developing economies could demand that a flexible approach be taken to the means by which any commitments are implemented, recognizing differences in stage of development, legal and business cultures, and the like. Moreover, developing countries could insist on enhanced capacity-building efforts during the negotiations and not after their conclusion. All of these remarks suggest that there are a number of proposals which negotiators from developing countries could advance so as to best further their individual and collective interests.



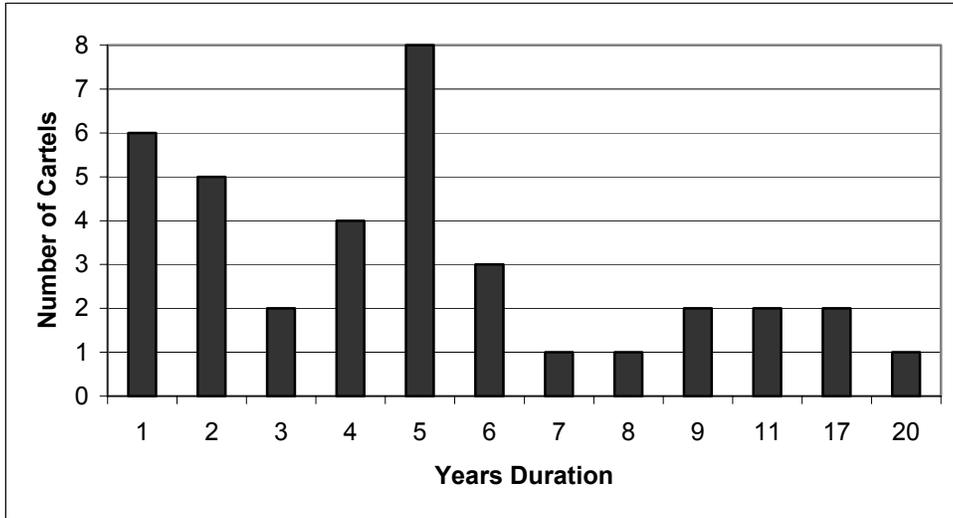
## REFERENCES

- American Bar Association (1991). Special Committee Report on International Antitrust. Washington, DC.
- Bundeskartellamt (2000). Leniency programme for exposing cartels. Berlin.
- Clarke, J. L. and Evenett, S. J. (2003). The Deterrent Effects of National Anti-Cartel Laws: Evidence from the International Vitamins Cartel. Forthcoming in the *Antitrust Bulletin*.
- Clarke, J. L., Evenett, S.J. and Gray, K. (2003). Sector Report: Competition. Sustainability Impact Assessment for the Doha Round.
- Connor, J. M. (2001). *Global Price Fixing: Our Customers are the Enemy*. Kluwer Academic Publishing, Boston, MA.
- Consumer Unity & Trust Society (CUTS) (2002). 7-up Project, Draft Phase I Synthesis Report for circulation at the 7-up Phase II Meeting 5–6 July.
- Consumer Unity & Trust Society (CUTS) (2003). Pulling Up Our Socks. February 2003.
- Dick A.R. (1992). Are export cartels efficiency enhancing or monopoly promoting: Evidence from the Webb-Pomerene experience. *Research in Law and Economics*, 14:89–127.
- European Community (2002). Communication from the European Community and its Member States to the Working Group on the Interaction between Trade and Competition Policy, 1 July. Document WT/WGTCP/W/193.
- Evenett, S.J. (2003). Interim Report on the Issues Relating to a Possible Multilateral Framework on Competition Policy. Prepared for the Secretariat of the World Trade Organization and circulated to the Working Group on the Interaction between Trade and Competition Policy.
- Evenett, S. J., Lehmann, A. and Steil, B. (eds.), (2000). *Antitrust Goes Global: What Future for Transatlantic Cooperation?* Brookings Institution Press, Washington DC.
- Evenett, S. J., Levenstein, M. C. and Suslow, V. Y. (2001). *International Cartel Enforcement: Lessons from the 1990s in World Economy*.
- Fink, C., Mattoo, A. and Neagu, I.C. (2001). *Trade in International Maritime Services: How Much Does Policy Matter?* Policy Research Working Paper Number 2522. World Bank.
- Government of India (2002). Communication from India to the Working Group on the Interaction between Trade and Competition Policy, 26 September. Document WT/WGTCP/W/216.
- Government of New Zealand (1998). *Penalties, remedies and court processes under The Commerce Act 1986*. Ministry of Commerce, Wellington.
- Government of the Republic of Korea (2002). Communication from Thailand to the Working Group on the Interaction between Trade and Competition Policy, 12 August. Document WT/WGTCP/W/200.
- Government of Thailand (2002a). Communication from Thailand to the Working Group on the Interaction between Trade and Competition Policy, 26 September. Document WT/WGTCP/W/213.
- Government of Thailand (2002b). Communication from Thailand to the Working Group on the Interaction between Trade and Competition Policy, 15 August. Document WT/WGTCP/W/205.

- Hammond, S. (2000). Lessons Common to Detecting and Deterring Cartel Activity,” speech made to the 3rd Nordic Competition Policy Conference, Stockholm, 12 September.
- Hahn, R. H. and Layne-Farrar, A. (2002). Federalism in Antitrust.
- Hoekman, B. M., and Mavroidis, P. C. (2002). Economic Development, Competition Policy, and the WTO. Working Paper. Revised July 2002.
- Kaplow, L., and Shavell S., *Economic Analysis of Law*. 1998.
- Kovacic, W. E., *Institutional Foundations for Economic Legal Reform in Transition Economies: The Case of Competition Policy and Antitrust Enforcement*. Chicago-Kent Law Review, 2001.
- Korea Fair Trade Commission (2002). Korea Fair Trade Commission imposes surcharge of US\$8.5 million on international cartel of graphite electrodes manufacturers from the U.S., Germany and Japan: First case of applying the Korean antitrust law on an international cartel. Press Release. 22 March.
- Landes, W. M. (1983). Optimal Sanctions for Antitrust Violations. *University of Chicago Law Review*, 50:2, 652–678.
- Levenstein, M. C. and Suslow, V. Y. (2001). Private International Cartels and the Effect on Developing Countries. Background Paper to the *World Development Report 2001*, Washington, DC.
- Organization for Economic Co-operation and Development (OECD) (1995). *Antitrust and Market Access: The Scope and Coverage of Competition Laws and Implications for Trade*, Paris.
- \_\_\_\_\_ (2000a). Hard Core Cartels, Annex B, as quoted in "Recommendations of the Council Concerning effective action against Hard Core Cartels" session on 24 March 1998, Paris.
- \_\_\_\_\_ (2000b). Hard Core Cartels, Paris.
- \_\_\_\_\_ (2001). The Role of Special and Differential Treatment at the Trade, Competition and Development Interface. Joint Group on Trade and Competition, Directorate for Financial, Fiscal and Enterprise Affairs. Paris.
- Prusa, T. J. (1999). On the Spread and Impact of Antidumping. National Bureau of Economic Research Working Paper Number 7404.
- Stigler, G. J. (1964). A Theory of Oligopoly. *Journal of Political Economy* 72: 44–61.
- Stiglitz, J.E.(2001). *Globalisation and its Discontents*. Basic Books.
- United Nations Conference on Trade and Development (UNCTAD) (2002). *The United Nations Set of Principles and Rules on Competition*.
- Waller, S.W. (2000). Anti-cartel Cooperation, in Evenett, S.J., Lehmann, A. and Steil, B. (eds.), *Antitrust Goes Global: What Future for Transatlantic Cooperation?* The Brookings Institution Press, Washington, DC.
- White, L. (2001). Lysine and price fixing. How long? How severe? *Review of Industrial Organization*, 18(1): 23–31.
- Winters, L. A. (2002). Doha and the World Poverty Targets. Mimeo. University of Sussex.
- World Bank (2003). *Global Economic Prospects*. Washington, DC.
- WTO (2002). Report of the Working Group on the Interaction between Trade and Competition Policy to the General Council, 9 December.

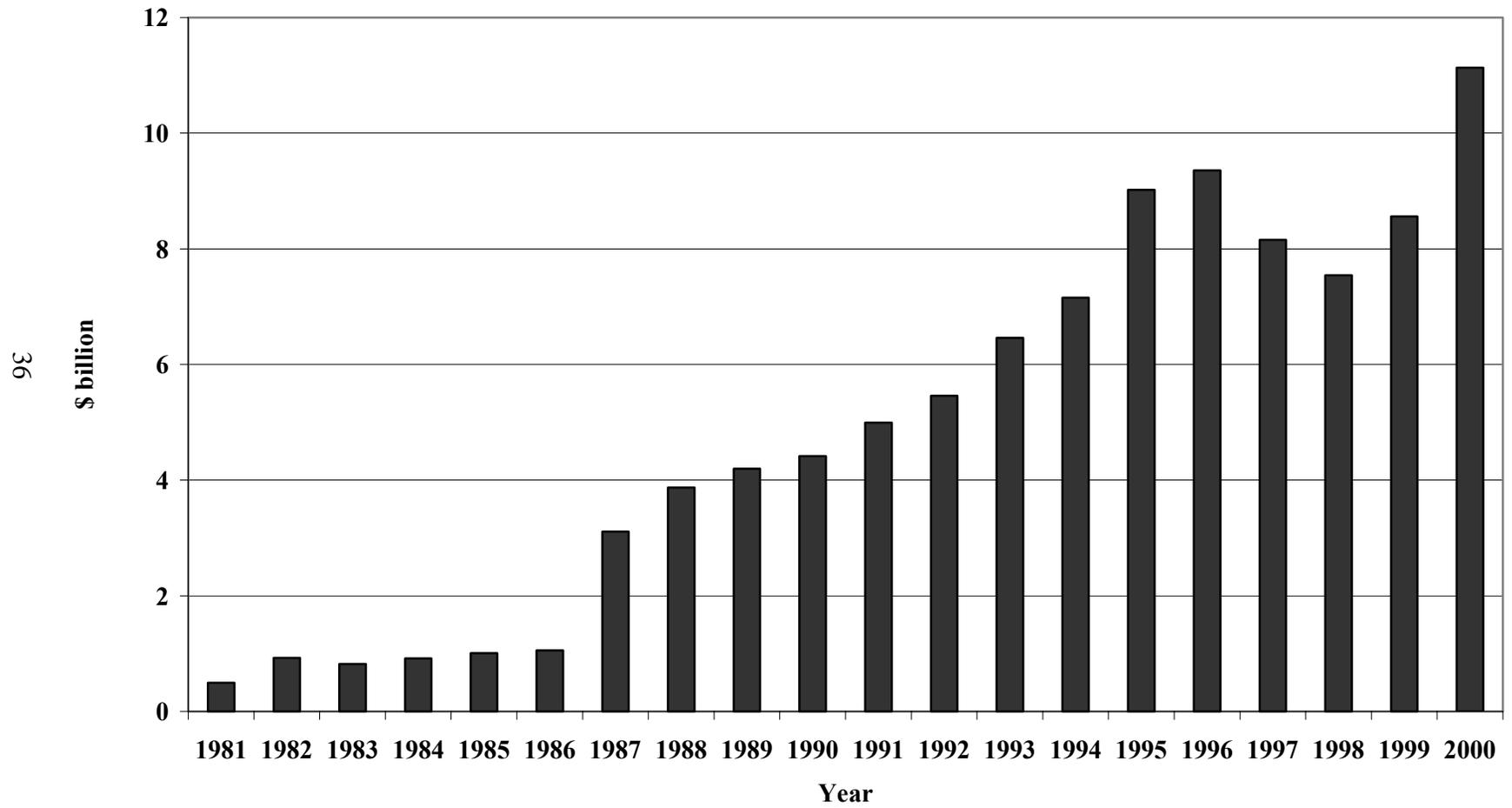
**Figure 1.**

**The duration of international cartels prosecuted in the 1990s**

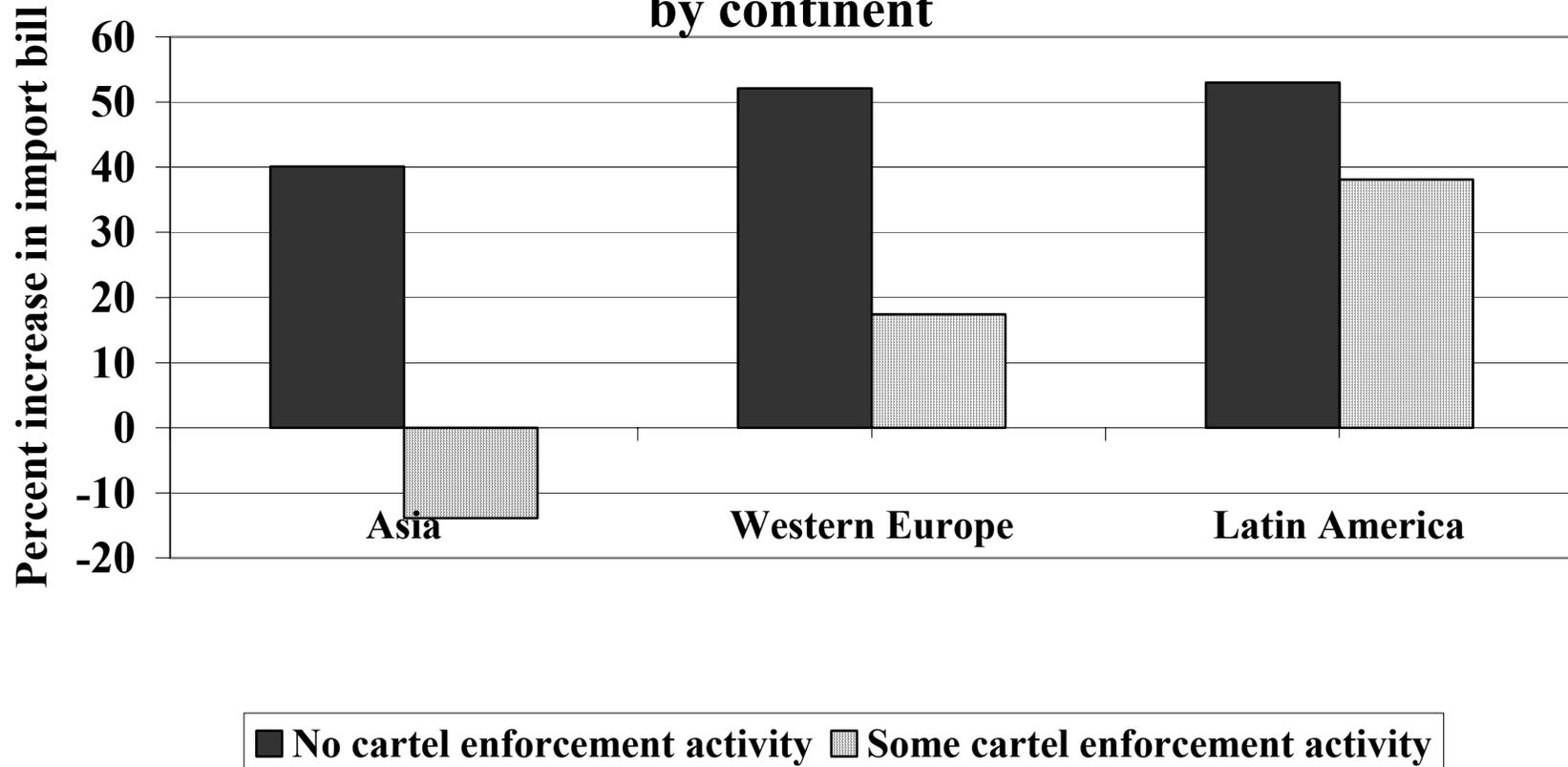


*Source:* Levenstein and Suslow (2001, table 1).

**Figure 2.**  
**Total imports of 12 twelve cartelized products by developing countries, 1981-2000**



**Figure 3. Impact of the vitamins cartel on import bills, by continent**



**Table 1**  
**Locations of the headquarters of firms that were convicted of price fixing by the United States and the European Commission during the 1990s**

Country	Cartel
Angola	Shipping
Austria	Cartonboard, citric acid, newsprint, steel heating pipes
Belgium	Ship construction, stainless steel, steel beams
Brazil	Aluminum phosphide
Canada	Cartonboard, pigments, plastic dinnerware, vitamins
Denmark	Shipping, steel heating pipes, sugar
Finland	Cartonboard, newsprint, steel heating pipes
France	<i>Aircraft</i> , cable-stayed bridges, cartonboard, citric acid, ferry operators, <i>methionine</i> , newsprint, <i>plasterboard</i> , shipping, sodium gluconate, stainless steel, steel beams, seamless steel tubes
Germany	<i>Aircraft</i> , graphite electrodes onboard, citric acid, aluminum phosphide, lysine, <i>methionine</i> , newsprint, pigments, <i>plasterboard</i> , steel heating pipes, seamless steel tubes, vitamins
Greece	Ferry operators
India	Aluminum phosphide
Ireland	Shipping, sugar
Israel	Bromine
Italy	Cartonboard, ferry operators, newsprint, stainless steel, steel heating pipes, seamless steel tubes
Japan	Graphite electrodes, lysine, <i>methionine</i> , ship transportation, shipping, sodium gluconate, sorbates, seamless steel tubes, thermal fax paper, vitamins
Luxembourg	Steel beams
Malaysia	Shipping
Mexico	Tampico fiber
Netherlands	Cartonboard, citric acid, ferry operators, ship construction, sodium gluconate, Tampico fiber
Norway	Cartonboard, explosives, ferrosilicon
Republic of Korea	Lysine, <i>methionine</i> , ship transportation, shipping
Singapore	Shipping
South Africa	Diamonds, newsprint
Spain	<i>Aircraft</i> , cartonboard, stainless steel, steel beams
Sweden	Cartonboard, ferry operators, newsprint, stainless steel
Switzerland	Citric acid, laminated plastic tubes, steel heating pipes, vitamins
Taiwan Province of China	Shipping
UK	<i>Aircraft</i> , cartonboard, explosives, ferry operators, newsprint, pigments, <i>plasterboard</i> , shipping, stainless steel, seamless steel tubes, steel beams, sugar
US	<i>Aircraft</i> , aluminum phosphide, bromine, cable-stayed bridges, cartonboard, citric acid, diamonds, ferrosilicon, graphite electrodes, isostatic graphite, laminated plastic tubes, lysine, maltol, <i>methionine</i> , pigments, plastic dinnerware, ship construction, ship transportation, sorbates, Tampico fiber, thermal fax paper, vitamins
Zaire	Shipping

Source: (Levenstein and Suslow, 2001, table 1).

Note: Products in italics were under investigation at the time this paper was written.

**Table 2**  
**Estimated overcharges from the international vitamins cartel**  
**1990–1999, in year 2000 US dollars, by importer**

Importing economy	Millions of US dollars			Importing economy	Millions of US dollars		
	Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law		Overcharges paid on vitamins imports during the conspiracy	Total value of imports during years when importer did not have a cartel law	Total value of imports during years when importer did have a cartel law
<i>Economies with evidence of cartel prosecutions in OECD documents</i>				<i>Economies with no evidence of cartel prosecutions in OECD documents</i>			
Brazil	183.37	0.00	665.19	(continued)			
Australia	154.70	0.00	333.63	Guatemala	10.41	30.05	0.00
Italy	153.78	0.00	1040.09	Nigeria	7.00	20.14	0.00
Mexico	151.98	111.33	411.38	Bangladesh	6.42	22.26	0.00
UK	147.64	0.00	998.57	Syria	5.79	20.08	0.00
Denmark	138.49	0.00	936.62	Paraguay	4.57	13.18	0.00
South Africa	99.93	173.56	39.57	Tunisia	4.45	12.80	0.00
Spain	91.89	0.00	621.47	Viet Nam	4.38	15.19	0.00
China	77.61	72.35	56.73	Costa Rica	3.82	11.03	0.00
Austria	44.22	88.34	94.16	Bolivia	3.45	9.97	0.00
Chile	38.43	0.00	139.41	Zimbabwe	3.41	9.80	0.00
Poland	31.50	0.00	213.07	Lebanon	3.11	10.77	0.00
New Zealand	29.26	0.00	63.11	Dominican Republic	3.07	8.86	0.00
Hungary	24.71	48.73	54.11	El Salvador	2.70	7.80	0.00
Sweden	23.47	36.10	75.03	Jordan	2.54	8.82	0.00
Norway	19.27	34.85	49.47	Jamaica	2.11	6.09	0.00
Romania	18.99	48.36	16.29	Kenya	1.79	5.16	0.00
Peru	18.91	3.32	64.43	Ghana	1.32	3.81	0.00
Ireland	17.76	0.00	120.10	Nepal	1.21	4.21	0.00
Finland	16.44	28.06	46.08	Nicaragua	1.20	3.46	0.00
Greece	13.73	0.00	92.83	Cote d'Ivoire	0.88	2.53	0.00
Portugal	12.77	0.00	86.39	Senegal	0.82	2.36	0.00
Bulgaria	5.04	2.87	27.47	Trinidad Tobago	0.81	2.33	0.00
Zambia	0.06	0.14	0.01	Panama	0.68	1.96	0.00
				Madagascar	0.60	1.73	0.00
<i>Economies with no evidence of cartel prosecutions in OECD documents</i>				Ethiopia	0.59	1.69	0.00
Singapore	245.22	849.93	0.00	Yemen	0.58	2.02	0.00
Hong Kong, China	178.48	618.61	0.00	Mali	0.49	1.41	0.00
Turkey	82.89	287.31	0.00	Mauritius	0.46	1.33	0.00
Thailand	78.45	271.91	0.00	Cameroon	0.39	1.12	0.00
Argentina	73.83	213.08	0.00	Cambodia	0.28	0.98	0.00
Colombia	54.95	158.60	0.00	Benin	0.22	0.63	0.00
Indonesia	48.72	168.85	0.00	Togo	0.19	0.53	0.00
Venezuela	45.32	130.81	0.00	United Rep. of Tanzania	0.16	0.46	0.00
Iran (Islamic Republic of)	44.25	153.35	0.00	Haiti	0.11	0.33	0.00
Egypt	38.49	110.66	0.00	Angola	0.11	0.33	0.00
Pakistan	36.82	127.62	0.00	Gabon	0.09	0.27	0.00
Israel	32.30	111.97	0.00	Niger	0.07	0.19	0.00
Philippines	29.58	102.53	0.00	Congo	0.06	0.19	0.00
Honduras	25.87	74.65	0.00	Burkina Faso	0.06	0.17	0.00
India	25.71	89.12	0.00	Malawi	0.05	0.13	0.00
Malaysia	22.94	79.50	0.00	Rwanda	0.04	0.12	0.00
Ecuador	14.82	42.78	0.00	Uganda	0.03	0.10	0.00
Saudi Arabia	13.11	45.43	0.00	Guinea	0.03	0.09	0.00
Morocco	12.44	35.77	0.00	People's Dem. Rep. of Lao	0.03	0.10	0.00
Algeria	11.09	31.88	0.00	Chad	0.01	0.04	0.00
				Mozambique	0.00	0.01	0.00

Notes:

1. Total value of overcharges for imports into these 90 economies is 2709.87 million US dollars.
2. This table does not include overcharges for Papua New Guinea or for the Republic of Korea.

**Table 3**  
**National exemptions to competition law for exporters**

<b>Country</b>	<b>Exemption for...</b>	<b>Reporting requirement</b>
Australia	Contracts for the export of goods or supply of services outside Australia	Submission of full particulars to the national authority within 14 days
Brazil	Joint ventures for exports, as long as there are no effects on the Brazilian market	Must be approved by the national authority
Canada	Export activities that do not affect domestic competition	None
Croatia	Agreements that contain restrictions aimed at improving the competitive power of undertakings on the international market	Prior notification of the agreement to national authority within 30 days of the conclusion of the agreement
Estonia	Activities that do not affect the domestic market	None
Hungary	Activities that do not affect the domestic market	None
Japan	Agreements regarding exports or among domestic exporters	Notification and approval of industry administrator required
Latvia	Activities that do not affect the domestic market	None
Lithuania	Activities that do not affect the domestic market	None
Mexico	Associations and cooperatives that export	None
New Zealand	Arrangements relating exclusively to exports and which do not affect the domestic market	Authorization required
Portugal	Activities that do not affect the domestic market	None
Sweden	Activities that do not affect the domestic market	None
United States	Webb-Pomerene Act: Activities that do not affect domestic competition. Export Trading Companies Act: Strengthened immunities granted by Webb-Pomerene Act.	Webb-Pomerene Act: Agreements must be filed with the US Federal Trade Commission. Export Trading Companies Act: Certificates of Review provided by US Department of Commerce.

*Sources:* Information above is drawn from OECD (1995), American Bar Association (1991), OECD (2000) and from the website [www.gettingthedealthrough.com](http://www.gettingthedealthrough.com) (accessed May 2002).

**Table 4**  
**Recent cartel enforcement activities in developing economies**

<b>Cartelized market</b>	<b>Duration of cartel</b>	<b>Effects of conspiracy and fines imposed (where available)</b>
<b>Bulgaria</b>		
Transportation on variable routes (intermediate transportation)	2000	Conspirators agreed on a price increase of approximately EUR 0.10 on transportation services. The companies were fined a total of EUR 47,000.
Phonecards sales	One year (year not specified)	A common shareholder acted as intermediary in price coordination between two conspiring companies. They were fined EUR 9,000.
Gasification	2002	Two companies agreed on a five-year contract imposing non-compete clauses. A fine of EUR 25,500 was imposed on both companies.
<b>China</b>		
Brickyard	1999	Bid-rigging conspiracy involving 5 groups of companies affecting the operation of a brickyard plant in Zhejiang Province. They were fined EUR 6,500 each.
School building	1998	Bid rigging involving 10 construction companies. The bid was declared invalid and illegal gains confiscated.
Engineering construction	1998	Bid rigging involving 2 construction companies.
<b>Estonia</b>		
Milk products	2000	Price-fixing attempt by 4 leading milk processors and 10 wholesalers. A prohibiting order was issued before an agreement was put in place.
Taxi services	1999	Three taxi companies (over 40 per cent of the taxi market) convicted of price fixing, and fined EUR 639 each.
Road transport	1999	The Association of Estonian International Road Carriers was prosecuted for participating in price fixing involving the provision of international transport services. The Competition Board issued a proscriptive order. No sanctions were applied.
<b>Indonesia</b>		
Pipe and pipe processing services	Formed in May 2000	Bid-rigging involving 4 companies. The ensuing contract was cancelled. No fines were imposed.
<b>Latvia</b>		
Aviation	1998–1999	International cartel involving one Latvian and one Russian company agreeing to cooperate in the organization of passenger flights between Riga and Moscow. The Latvian company was fined 0.7 per cent of its total 1998 turnover.
Courier post	1999	Agreement between a Latvian State-owned courier post service and an international courier services operator. No sanctions were applied, as no practical effect on competition was ascertained.
<b>Peru</b>		
Building and construction	1997	Three companies involved in bid-rigging. Fines of nearly EUR 1,800 were imposed on each of the respondents.
Taxi Tours	1999	Price fixing agreement between a number of local companies. Only one company, which did not express its willingness to cease the restrictive practices, was fined EUR 900.

<b>Cartelized market</b>	<b>Duration of cartel</b>	<b>Effects of conspiracy and fines imposed (where available)</b>
Poultry market	1995–1996	Several associations and 19 firms investigated for alleged “price-fixing, volume control, restraint of trade, and conspiracy to establish entry barriers and development of anti-competitive mechanisms to suppress and eliminate competitors, in the market of live chicken in Metropolitan Lima and Callao”. (*)
<b>Romania</b>		
Mineral water	1997	Price fixing conspiracy relating to the bottling of mineral water.
Drugs	1997–2000	Members of Pharmacists Association were convicted of participating in a conspiracy relating to market sharing in pharmaceutical distribution (approx. EUR 430 million per year) and deterring entry by other competitors. Fines were calculated as a percentage of profit of the Pharmacists Association (amount not specified).
<b>Slovenia</b>		
Electric energy	2000 (year of conviction)	Price fixing conspiracy relating to the provision of electric energy in Slovenia. The cartel was prohibited by the Office.
Organization of cultural events	2000	Two companies agreed to co-operate and prevent entry in the market. The amount of fines imposed is not specified.
<b>South Africa</b>		
Citrus fruits	1999	Conspiracy relating to the purchase, packaging and sale of citrus fruits.
<b>Taiwan Province of China</b>		
Wheat	1997–1998	The Flour Association was convicted of organising a buyers’ cartel , instituting quantity control and quota system among 32 flour producers. The association was imposed a fine of EUR 620,000.
Mobile cranes	1998	Six companies convicted of bid rigging.
Liquefied Petroleum Gas (LPG)	Not specified	27 companies, controlling most of the market share, convicted of participating in a price fixing conspiracy relating to delivery of LPG in southern Taiwan. Total fines amounted to EUR 4,123,000.
Electronic cash machines	1999	Price fixing conspiracy involving two companies. As an effect of the agreement, prices rose by EUR 1.0–2.0.
Kaolin	2000	Two competing distributors concluded a contract specifying amounts of sales of the product.
Poultry	Not specified	Two companies, the dominant producer and the largest buyer in the poultry market made agreements foreclosing competition. The agreement was declared invalid.
Oil	1997 – not specified	Nine oil-marketing companies convicted of price fixing. The cartel leaders also forced other companies to comply with standard behaviour on prices.

Source: OECD 2001.

**Table 5**  
**Estimating the average savings-per-dollar spent on competition enforcement**

Economy	Additional overcharges in the absence of a cartel law (millions of US dollars)		Annual cost of competition authority (1999–2000)	Return on each dollar spent (ratio of last two columns)	Overcharges actually paid (millions of US dollars)
	Total throughout the conspiracy	Annual average during 1990–1999			
Austria	27.96	2.80			44.22
Brazil	72.09	7.21	0.15	48.06	183.37
Chile	15.11	1.51			38.43
Denmark	278.11	27.81	8.70	3.20	138.49
Finland	13.68	1.37	3.40	0.40	16.44
Greece	27.56	2.76			13.73
Ireland	35.66	3.57	1.60	2.23	17.76
Italy	308.83	30.88			153.78
Mexico	44.59	4.46	9.70	0.46	151.98
Norway	14.69	1.47	7.70	0.19	19.27
Peru	6.98	0.70	10.05	0.07	18.91
Portugal	25.65	2.57			12.77
Spain	184.53	18.45			91.89
Sweden	22.28	2.23	7.30	0.31	23.47
United Kingdom	296.51	29.65	46.60	0.64	147.64
<i>Memorandum:</i>					
Sum of entries for EU members above	1220.78	122.08	127.50	0.96	660.19

*Note:* The cost of the European Commission's competition enforcement authority was added to the line "EU members above".

**Annex 1**  
**Contributions on the subject of Hard Core Cartels by WTO members and other parties to the Working Group on the Interaction between Trade and Competition Policy**

<b>Document Symbol: (WT/WGTCP/-)</b>	<b>Member/ Other Source</b>	<b>Paragraph/ Page Reference</b>	<b>Matters Discussed</b>
W/17	UNCTAD	para. 12 (c)	techniques of cartel control
W/21	OECD	<i>passim</i>	OECD experiences with cartels
W/23	Poland	page 1	national institutions lacking means to deal with international cartels
W/28	Singapore	para. 11, 15 (b)	implications of exemptions for import and export cartels
W/42	Canada	page 3	implications of exemptions for export cartels
W/43	Turkey	pages 3, 4, 6	necessity of suppression of cartels
W/45	European Community	page 5	analysis of horizontal restraints
		page 8	problems of developing countries with international cartels
		page 9	priority for examination of hard core cartels
W/48	United States	page 4	mentioning the OECD Recommendation on Cartels
W/51	Canada	page 19	international cartels as emerging problem for competition policy
W/56	Republic of Korea	page 2	implications of exemptions for export cartels
W/61	European Community	page 3	role of competition authorities in preventing cartels
W/62	European Community	pages 4 <i>et seq.</i>	analysis of cartel cases in European law
		pages 13 <i>et seq.</i>	proposals for WTO discussions on cartel issues
W/66	United States	<i>passim</i>	experiences with international cartels
W/70	Canada	pages 2-3	examples of enforcement action against cartels
W/71	Czech Republic	page 3	export cartels
W/72	Canada	page 5	focus of Canadian authorities on cartel cases
W/78	European Community	page 14	benefits of a WTO commitment on hard core cartels
W/95	Kenya	para. 9 (e)	significance of cartels in the informal sector
W/100	Brazil	page 1	impact of cartels
		page 2	cooperation to prevent cartels
W/104	Hong Kong (China)	para. 13	exemption of export cartels from competition law in some countries
W/108	Japan	page 2	competition policy as a tool for addressing hardcore cartels
		page 3	cooperation between national competition authorities
W/115	European Community	page 5 <i>et seq.</i>	implications of exemption of export cartels from national competition laws

Document Symbol: (WT/WGTCP/-)	Member/ Other Source	Paragraph/ Page Reference	Matters Discussed
W/116	United States	page 5	cooperation agreements and control of cartels
		page 7	reference to OECD Recommendation on Hardcore Cartels
W/117	Switzerland	para. 8 (and 16)	desirability of prohibition of hard core cartels
		para. 12	publication of anti-cartel laws
W/118	Hong Kong (China)	para. 9	implications of exemption of export cartels from national competition laws
W/119	Japan	pages 2, 4	importance of suppressing hardcore cartels
		page 4	exemption of export cartels
W/124	Korea	page 3	OECD Recommendation on Hardcore Cartels
W/126	Zimbabwe on behalf of the African Group	page 2	cartels as priority for developing countries in their approach to competition policy
W/130	European Community	page 4	need for provisions on hardcore cartels
W/133	Republic of Korea	para. 12	feasibility of common understanding on prohibition of hard core cartels
W/134	Japan	page 1-2	cartels and development (including in domestic markets)
		pages 2-3	formerly authorized cartels in Japan
W/135	Japan	<i>passim</i>	impact of cartels on international trade
W/140	European Community	page 3	impact of international cartels on developing countries
		pages 6, 8-9	cooperation in cartel cases
		page 8	need for agreement of WTO Members on hard core cartels
		pages 13 <i>et seq.</i>	cartel cases: examples
W/141	Hong Kong (China)	para. 10 (a)	relevance of differing approaches to export and import cartels among WTO Members
W/143	Trinidad and Tobago	page 3	impact of international cartels on small open economies
W/145	Japan	page 4	anti-cartel legislation as priority for competition law enforcement
W/149	India	page 2	potential advantages of cartels as reflected in some countries' industrial policies
W/151	Switzerland	pages 2, 4	anti-cartel provisions necessary on a multilateral level
W/152	European Community	page 2	importance of anti-cartel law enforcement
		pages 5, 7, 8	feasibility of a multilateral framework to address anti-competitive practices
		pages 11-12	cooperation and assistance in regard to cartels
W/154	Republic of Korea	pages 2-3	cartels as problem for the international trading system

Document Symbol: (WT/WGTCP/-)	Member/ Other Source	Paragraph/ Page Reference	Matters Discussed
W/155	Canada	page 2	importance of national rules and international cooperation
		page 4	OECD Recommendation on Hardcore Cartels
		page 6	common enforcement action as first step of cooperation
W/156	Japan	para. 3 (b)	unique added value of multilateral agreement in area of export cartels
W/160	European Community	pages 4-5	examples of EC cartel cases as argument for international cooperation
		page 7	cartel legislation as priority for developing countries and for a multilateral agreement
W/161	Romania	pages 1-2	cartels as major topic for multilateral agreement
W/164	United States	page 2	anti-cartel law enforcement as priority of antitrust agencies
W/165	Czech Republic	pages 1, 4	anti-cartel legislation as a priority for a multilateral agreement
W/168	Japan	para. 2, 5 <i>et seq.</i>	cartels as a problem for trade and development; examples
W/173	Canada and Costa Rica	page 1	provisions addressing cartels/other matters in a bilateral free trade agreement
W/175	European Community	<i>passim</i>	effects of cartels, development dimension
W/176	Japan	para. 8 <i>et seq.</i>	adverse effects of cartels on development
W/177	Japan	<i>passim</i>	status of cartel exemptions in Japan
W/179	Trinidad and Tobago	page 2	enforcing anti-cartel legislation as a priority for small developing economies in area of competition policy
W/184	European Community	page 3	importance of universal ban on hard core cartels
		page 5	exchange of information in cartel cases
		page 8	impact of cartels on developing countries
W/185	United States	<i>passim</i>	importance of anti-cartel provisions as component of national competition policy

Source: WTO (2002).

## Annex 2

### **OECD Council Recommendation Concerning Effective Action Against Hard Core Cartels**

(adopted by the OECD Council at its 921<sup>st</sup> Session on 25 March 1998 [C/M(98)7/PROV])

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organization for Economic Co-operation and Development of 14th December 1960;

Having regard to previous Council Recommendations' recognition that "effective application of competition policy plays a vital role in promoting world trade by ensuring dynamic national markets and encouraging the lowering or reducing of entry barriers to imports" [C(86)65(Final)]; and that "anticompetitive practices may constitute an obstacle to the achievement of economic growth, trade expansion, and other economic goals of Member countries" [C(95)130/FINAL];

Having regard to the Council Recommendation that exemptions from competition laws should be no broader than necessary [C(79)155(Final)] and to the agreement in the Communiqué of the May 1997 meeting of the Council at Ministerial level to "work towards eliminating gaps in coverage of competition law, unless evidence suggests that compelling public interests cannot be served in better ways" [C/MIN(97)10];

Having regard to the Council's long-standing position that closer cooperation is necessary to deal effectively with anticompetitive practices in one country that affect other countries and harm international trade, and its recommendation that when permitted by their laws and interests, Member countries should co-ordinate investigations of mutual concern and should comply with each other's requests to share information from their files and to obtain and share information obtained from third parties [C(95)130/FINAL];

Recognising that benefits have resulted from the ability of competition authorities of some Member countries to share confidential investigatory information with a foreign competition authority in cases of mutual interest, pursuant to multilateral and bilateral treaties and agreements, and considering that most competition authorities are currently not authorised to share investigatory information with foreign competition authorities;

Recognising also that cooperation through the sharing of confidential information presupposes satisfactory protection against improper disclosure or use of shared information and may require resolution of other issues, including potential difficulties relating to differences in the territorial scope of competition law and in the nature of sanctions for competition law violations;

Considering that hardcore cartels are the most egregious violations of competition law and that they injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others; and

Considering that effective action against hardcore cartels is particularly important from an international perspective -- because their distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive -- and particularly dependent upon cooperation -- because they generally operate in secret, and relevant evidence may be located in many different countries;

I. RECOMMENDS as follows to Governments of Member countries:

A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARDCORE CARTELS

1. Member countries should ensure that their competition laws effectively halt and deter hardcore cartels. In particular, their laws should provide for:

(a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and

(b) enforcement procedures and institutions with powers adequate to detect and remedy hardcore cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

(a) a “hardcore cartel” is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;

(b) the hardcore cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country’s own laws, or (iii) are authorised in accordance with those laws. However, all exclusions and authorisations of what would otherwise be hardcore cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organization annual notice of any new or extended exclusion or category of authorisation.

B. INTERNATIONAL COOPERATION AND COMITY IN ENFORCING LAWS PROHIBITING HARDCORE CARTELS

1. Member countries have a common interest in preventing hardcore cartels and should cooperate with each other in enforcing their laws against such cartels. In this connection, they should seek ways in which cooperation might be improved by positive comity principles applicable to requests that another country remedy anticompetitive conduct that adversely affects both countries, and should conduct their own enforcement activities in accordance with principles of comity when they affect other countries’ important interests.

2. Cooperation between or among Member countries in dealing with hardcore cartels should take into account the following principles:

(a) the common interest in preventing hardcore cartels generally warrants cooperation to the extent that such cooperation would be consistent with a requested country’s laws, regulations, and important interests;

(b) to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries’ mutual interest in preventing hardcore cartels warrants cooperation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and

information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;

(c) a Member country may decline to comply with a request for assistance, or limit or condition its cooperation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;

(d) Member countries should agree to engage in consultations over issues relating to cooperation.

In order to establish a framework for their cooperation in dealing with hardcore cartels, Member countries are encouraged to consider entering into bilateral or multilateral agreements or other instruments consistent with these principles.

3. Member countries are encouraged to review all obstacles to their effective cooperation in the enforcement of laws against hardcore cartels and to consider actions, including national legislation and/or bilateral or multilateral agreements or other instruments, by which they could eliminate or reduce those obstacles in a manner consistent with their important interests.

4. The cooperation contemplated by this Recommendation is without prejudice to any other cooperation that may occur in accordance with prior Recommendations of the Council, pursuant to any applicable bilateral or multilateral agreements to which Member countries may be parties, or otherwise.

II. INSTRUCTS the Competition Law and Policy Committee:

1. to maintain a record of such exclusions and authorisations as are notified to the Organization pursuant to Paragraph I. A 2b);

2. to serve, at the request of the Member countries involved, as a forum for consultations on the application of the Recommendation; and

3. to review Member countries' experience in implementing this Recommendation and report to the Council within two years on any further action needed to improve cooperation in the enforcement of competition law prohibitions of hardcore cartels.

III. INVITES non-Member countries to associate themselves with this Recommendation and to implement it.