A Multilateral Framework for Competition Policy?[1]

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EXECUTIVE SUMMARY

1. The 1990s saw a considerable increase in the number of jurisdictions adopting competition laws. Many of these jurisdictions joined others and began enforcing competition laws, targeting the anti-competitive practices of domestic and foreign firms. A surge in international cartel enforcement has also taken place since 1993, after changes in the enforcement practices of certain industrialised countries. At the World Trade Organization's (WTO) Ministerial in Cancun, Ministers are supposed to decide whether, and upon what terms, negotiations on a potential multilateral framework on competition policy should take place; negotiations that could lead to new multilateral disciplines that, in turn, might reinforce the impetus for reform described above.

2. The goal of this chapter is to describe and assess the proposals for a multilateral framework on competition policy. To put this policy-related discussion in its appropriate context, the central economic issues are identified before the analysis of the proposals. Moreover, the proposals for such a framework—and critiques of them—are stated in considerable detail. In addition, wherever possible, empirical evidence is brought to bear on the discussion. This is not to suggest that the legal matters arising from the negotiation of a multilateral framework are unimportant, rather that they are only part of the relevant analysis. The chapter concludes with recommendations for policymakers.

3. When assessing the consequences of adopting a possible multilateral framework on competition policy, it is worth bearing the following economic issues in mind: the beneficial role, if any, that the enforcement of competition law can play in improving national economic performance in general and economic development, in particular; the extent to which national reform programmes can be shaped by so-called competition advocacy (that is, by having a government agency that is prepared to comment on and monitor proposals for reform); the extent to which the benefits of lower trade barriers and open borders are undermined by private anti-competitive corporate practices, and the measures that states can take against them; and the extent to which the enforcement, under-enforcement, or non-enactment of national competition laws creates economic knock-on effects (or spillovers) in other jurisdictions. The first part of this chapter presents some empirical evidence on these matters, so setting the scene for subsequent discussion.

4. National and international competition enforcement matters have received far more attention from policymakers in the 1990s than in previous decades. The second part of this chapter describes the developments that have taken place outside of the WTO. A number of non-binding initiatives have been pursued in the Organisation for Economic Cooperation and Development (OECD) and in the International Competition Network (ICN), joining a long-standing initiative by the United Nations Conference on Trade and Development

(UNCTAD); and these are described here. An important question is whether these non-binding approaches—in their current form or once reformed—can substitute for new measures at the WTO. The finding here is that in one case (the ICN and its emphasis on merger reviews) the non-binding initiative focuses on matters that are not being discussed at the WTO and that in other cases (such as the UN Set and the OECD's Recommendation on Hard Core Cartels) beneficial improvements have only occurred in piecemeal and incomplete manner. Moreover, in either case there is not any compelling evidence to suggest that these trajectories will change in the future. The chapter then turns to an assessment of the proposals advanced at the WTO for a multilateral framework on competition policy.

5. Part III of this study describes the key submissions made by WTO members on the desirability and content of a potential multilateral framework on competition policy. These submissions address the following matters: transparency, non-discrimination, and procedural fairness of national competition laws; potential provisions on hard core cartels; modalities for voluntary cooperation; and Special and Differential Treatment for developing countries. The discussion in this part attempts to clarify what potential disciplines are being proposed and what matters are left to one side.

6. Turning now to economic analysis and political-economy matters, part IV of this chapter assesses different conceptual arguments for international collective action on competition policy; focusing on the case for collective action against hard core cartels. Here it is argued that the non-enforcement or under-enforcement of laws against cartels can create safe havens for international cartels, whose adverse effects are often felt by trading partners. In other words, a nation's decision not to enact or properly enforce an anti-cartel law has adverse consequences that spill over national borders. This argument provides a conceptual argument for a binding minimum standards agreement on the effective enforcement of cartel laws; a central component of the proposals for a multilateral framework on competition policy.

7. The fifth part of this chapter identifies several lines of causation through which the adoption of a multilateral framework on competition policy can affect key economic and social indicators. Empirical evidence is then marshalled to assess the strength of each link. Interestingly, the evidence that developing countries are likely to gain from the adoption of such a framework is stronger than for the least developed countries; suggesting that special attention may have to be given to the latter's interests if, and when, any multilateral disciplines are drafted.

8. The final part of the study offers recommendations for policymakers as well as some notes of caution. It is argued that, on the basis of the available evidence, there is a strong case for starting negotiations on a multilateral framework on competition policy along the lines currently advocated—especially if any future disciplines force the repeal of export cartel exemptions in national laws and, more importantly, sectoral exemptions on cartels and cartel-like arrangements in domestic and international transportation sectors. Another important consideration arises out the experience with implementing competition laws in transition and developing countries and that is that many factors determine the nature and magnitude of the benefits that can accrue to societies from effective enforcement of competition laws. Likewise, the effect of implementing a multilateral framework on competition policy will vary considerably across nations and will be a function of certain nation-specific characteristics (such as availability of expertise and the capacity to train such expertise; and the presence of supportive groups in civil society) and other matters where assistance from industrialised countries can be very beneficial (such as the technical assistance provided by long-term advisers in a nascent competition enforcement agency.)

INTRODUCTION

One of the questions at the centre of the debate over the future course of the world trading system is the whether greater market access alone can sustain the momentum for multilateral trade reform, or whether new "rules" should be added to the negotiating agenda. The Singapore meeting of WTO Ministers identified four such rules that might be well suited for the development of multilateral disciplines: investment policies, competition policies, transparency in government procurement, and trade facilitation. Since that Ministerial meeting, working groups and other bodies in the WTO have been deliberating on the scope, if any, for further multilateral commitments in these areas. Meeting in Doha in 2001, Ministers provided further clarification on the mandate for these deliberations and the following three paragraphs of the so-called Doha Declaration are devoted to the interaction between trade and competition policies:

> "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 organisations, 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." (WTO 2001)

Of particular note is the text in paragraph 24 which states that, although WTO Members recognise the case for a multilateral framework on competition policy, a decision on whether to proceed with negotiations on such a framework will be made in Cancun on the basis of "explicit consensus"; with the latter term having no widely accepted definition. Some have interpreted this paragraph as saying that negotiations will commence after the Cancun WTO Ministerial, and that all that needs to be agreed is the scope and other terms of the negotiation. Others have argued that no decision has been taken yet on the more fundamental question of whether negotiations will take place after Cancun. Whichever interpretation is correct, an analysis of current proposals for a multilateral framework would appear to be pertinent to the decisions to be taken in Cancun.

Another important point about the Doha Declaration is that paragraph 25 indicates that the WTO's Working Group on the Interaction Between Trade and Competition Policy should focus on matters that do not directly address the market access consequences of the multilateral rules on national competition law. This marks a substantial shift in emphasis on discussions on competition policy in international trade circles. Discussions from the mid-1980s to the mid-1990s tended to be couched in terms of the consequences for market access of various inter-firm agreements—principally vertical restraints—and of government measures that could influence these agreements. Now, the only substantive area of competition law being discussed is hard core cartels; a point which is of note as many developing countries have long been concerned about the detrimental effects of so-called restrictive business practices.

The principal objective of this chapter is to assess the proposals for a multilateral framework on competition policy which have been advanced in the WTO's Working Group on the Interaction Between Trade and Competition Policy (WGTCP). This assessment departs from others by providing a comprehensive overview of those proposals and the concerns raised about them in the Working Group; by assessing these proposals in the light of recent developments in national and international fora (such as the ICN, OECD, and UNCTAD), and by drawing upon empirical analyses that shed light on the magnitudes involved. In doing so, this chapter also examines the strengths and weaknesses of various arguments for international collective action on competiton-policy related matters.

This chapter is organised as follows: part I describes the principal economic issues concerning the operation of national competition policies in a world of integrating markets and summarises the major changes in competition policy in the 1990s. Part II discusses developments in competition policy-related maters in fora outside of the WTO. The leading submissions on the content and efficacy of a multilateral framework on competition policy are summarised in part III, and part IV analyses the different conceptual arguments for international collective action on competition policy. An empirical assessment of the proposals for a multilateral framework is presented in part V. Policy recommendations are given in the final part of the chapter.

Part I

THE ENFORCEMENT OF NATIONAL COMPETITION LAWS: KEY ISSUES AND STATE OF PLAY

Although discussions on WTO-related matters tend to focus on negotiating matters, proposed or actual legal provisions, enforcement concerns and the like, it is important not to lose sight of the important economic issues at hand. In the context of competition law and policy (terms which are defined in section I.1 below), the following economic issues are germane:

1. What role, if any, can the enforcement of competition law play in improving national economic performance and, in the context of non-industrialised economies, in promoting economic development?
2. To what extent can certain competition policy instruments—such as competition advocacy (again defined below)—shape government reform programmes?
3. To what extent are the benefits of lower trade barriers and open borders undermined by the operation of anti-competitive corporate practices? And to what extent is the effectiveness and deterrent value of national measures against such practices attenuated by the fact that often the persons and evidence needed to secure prosecutions can be located abroad in another jurisdiction?
4. To what extent does the enforcement, under-enforcement, or outright non-enactment of competition law in one jurisdiction have consequences for prices, consumers' welfare, and producers in other jurisdictions?

These questions might be borne in mind when assessing the potential implications of current proposals for a multilateral framework on competition policy. Arguably, the importance attached to each question may differ across policymakers and experts; with the first question likely to be of paramount importance to those concerned with policymaking in developing economies. The fact that these questions can be stated in no way implies that the evidence available allows for a comprehensive and unanimous answer to them; or for a particularly extensive assessment of the effects of a potential multilateral framework on competition policy on the outcomes (economic performance, prices, etc) of interest. As will become clear later in this part and elsewhere in this chapter, the body of available evidence is growing significantly but it has certainly not reached a size comparable to that relating to long-standing trade policy instruments, such as tariffs.

This part begins with a description of the various objectives and instruments of competition policy, and clarifies the distinction between competition law and competition policy. Then certain important elements of the enforcement record in those jurisdictions that enforced competition laws in the 1990s are summarised. Two developments of particular importance are the increased enforcement actions against hard core cartels and the growth of bilateral and regional agreements between official agencies on competition policy matters.

I.1 Objectives and instruments of competition policy

There has been an evolution in the importance given to different objectives of competition or antitrust policy over the past 100 years. Initially, protecting market processes and rights to engage in commerce were accorded a high priority, as the following quotation from a joint World Bank and OECD study points out:

> "While many objectives have been ascribed to competition policy during the past hundred years, certain major themes stand out. The most common of these objectives cited is the maintenance of the competitive process or of free competition, or the protection or promotion of effective competition. These are seen as synonymous with striking down or preventing unreasonable restraints on competition. Associated objectives are freedom to trade, freedom of choice, and access to markets. In some countries, such as

Germany, freedom of individual action is viewed as the economic equivalent of a more democratic constitutional system. In France emphasis is placed on competition policy as a means of securing economic freedom, that is, freedom of competition" (World Bank-OECD 1997, page 2).

This quotation suggests that protecting economic freedom and competitive processes as well as fairness have historically been seen as objectives of competition policy in many countries. In a similar vein, the new competition law of India refers, in its preamble, to the objectives of preventing practices having adverse effects on competition, promoting and sustaining competition in markets, protecting the interests of consumers and ensuring freedom of trade carried on by other participants in markets in India.

Only after competition laws were enacted did a school of thought develop that justified certain competition laws on the grounds that they resulted in improvements in economic efficiency. In fact, the logic of static analyses of efficiency in markets and the rhetoric of "protecting the competitive process" as well as a focus on consumer welfare often went hand in hand. Posner (1976), for example, was to argue in his seminal treatise on US antitrust law that its "fundamental objective" is "the protection of competition and efficiency" (Posner 1976, page 226). This perspective gained considerable currency and accounts for the role that static economic efficiency still plays in the implementation of competition policy.

More recently, a wide range of opinion has stressed the importance of dynamic efficiency as an objective of competition policy. For example, Singh (2002) argues that competition policy in developing economies should support the overall development path of an economy. He points to:

> "the need to emphasise dynamic rather than static efficiency as the main purpose of competition policy" (Singh 2002, page 22).

Audretsch *et al*. (2001), Baker (1999), Baumol (2001), and Posner (2001) argue that the nature of technologies or consumer preferences in certain industries, or the fast pace of innovation in some industries, call for a reassessment of the weight given to static efficiency as an objective of competition policy. Indeed, in many jurisdictions with active competition regimes the promotion of innovation or dynamic efficiency gains has become an important goal of competition policy, and the application of competition law explicitly takes account of this objective.

A distinct and important matter is that many states have explicitly introduced other objectives into their national competition laws. For example, the Competition Act of 1998 in South Africa states that:

> "The purpose of this Act is to promote and maintain competition in the Republic in order-
>
> (a) to promote the efficiency, adaptability and development of the economy;
>
> (b) to provide consumers with competitive prices and product choices;
>
> (c) to promote employment and advance the social and economic welfare of South Africans;
>
> (d) to expand opportunities for South African participation in world markets and recognise the role of foreign competition in the Republic;
>
> (e) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the economy; and
>
> (f) to promote a greater spread of ownership, in particular to increase the ownership stakes of historically disadvantaged persons" (Chapter 1, article 2).

This multiplicity of goals reflects the fact that:

> "A fundamental principle of competition policy and law in South Africa thus is the need to balance economic efficiency with socio-economic equity and development" (Introduction, web page of the South African Competition Commission,
>
> http://www.compcom.co.za/aboutus/aboutus_intro.asp?level=1&desc=7).

This example demonstrates that competition law need not be directed towards a single objective.

Turning now to the instruments of competition policy, it is important to recognise that such policy is concerned both with private anti-competitive practices and with government measures or instruments that affect the state of competition in markets. For example, trade barriers, barriers to foreign direct investment, and licensing requirements (amongst others) can influence the extent of competitive pressures in markets.

In many jurisdictions, the anti-competitive effects of government measures are addressed through an instrument known as competition advocacy. In a report to the International Competition Network, its Advocacy Working Group defined this instrument as follows:

> "Competition advocacy refers to those activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationship with other governmental agencies and by increasing public awareness of the benefits of competition" (ICN 2002, page i).

The potential contribution of competition advocacy activities to national economic performance has been discussed extensively in international fora. An overview of the different types of competition advocacy and some claims about its effectiveness is provided in Box 1.

Box 1: Competition advocacy

The growing importance attached to competition advocacy is described by Anderson and Jenny (2002).

"Apart from the potential benefits for developing countries of appropriate competition law enforcement activities, discussions in the WTO Working Group on the Interaction between Trade and Competition Policy and other fora such as the OECD Global Forum on Competition Policy have called attention to the importance of so-called competition advocacy activities. These may include public education activities, studies and research undertaken to document the need for market-opening measures, formal appearances before legislative committees or other government bodies in public proceedings, or "behind-the-scenes" lobbying within government. These, it has been suggested in the Working Group, may be among the most useful and high payoff activities undertaken by agency staff" (page 7).

Anderson and Jenny (2002) go onto to discuss the particularly strong link between competition advocacy and regulation:

"The importance of competition advocacy activities arises partly in relation to regulation. Of course, in both developed and developing economies, regulation can and often does serve valid public purposes. For example, it is well-established that regulation can be an efficient response to market failures such as imperfect information, the existence of a natural monopoly (a situation in which a market is most efficiently supplied by a single firm) and other such problems. Nonetheless, it is important to recognize that, notwithstanding its avowed aims, regulation often thwarts rather than promotes efficiency and economic welfare. This is likely to be the case, for example, where it imposes restrictions on entry, exit and/or pricing in non-natural monopoly industries. In fact, experience in both developed and developing countries shows that, in many cases, rather than having regulation imposed on them for the public benefit, incumbent firms have often sought regulation for their own benefit, for the purpose of limiting entry into the industry and helping them to enjoy higher prices for their products. Recognition of the significance of such conduct as a formidable barrier to economic development dates back at least to Krueger (1974), and is affirmed in recent analyses by the World Bank and other development-related agencies. In the light of this, efforts to remove inefficient regulatory restrictions and related interventions can be central to the establishment of healthy market economies in developing and transition economies" (page 7).

Notwithstanding the importance attached to competition advocacy in both national competition regimes and the work on competition policy in international organisations, another instrument—namely competition law—is at the centre of competition policy in many countries. Audretsch *et al*. (2001) describe competition law as follows:

> "Competition (or antitrust) law lays down the rules for competitive rivalry. It comprises a set of directives that constrain the strategies available to firms" (page 614).

Hoekman and Holmes (1999) add more specificity by defining national competition law:

> "as the set of rules and disciplines maintained by governments relating either to agreements between firms that restrict competition or to the abuse of a dominant position (including attempts to create a dominant position through mergers)" (page 877).

UNCTAD (2002) provides a list of firms' actions that can fall within the purview of competition law. Although there is no agreed list of the elements of competition law, The following five figure prominently in most accounts of such laws:

1. Measures relating to agreements between firms in the same market to restrain competition. These measures can include provisions banning cartels as well as provisions allowing cartels under certain circumstances.
2. Measures relating to attempts by a large incumbent firm to independently exercise market power (sometimes referred to as an abuse of a dominant position).
3. Measures relating to firms that, acting collectively but in the absence of an explicit agreement between them, attempt to exercise market power. These measures are sometimes referred to as measures against collective dominance.
4. Measures relating to attempts by a firm or firms to drive one or more of their rivals out of a market. Laws prohibiting predatory pricing are an example of such measures.
5. Measures relating to collaboration between firms for the purposes of research, development, testing, marketing, and distribution of products.

This list of five instruments is not supposed to be exhaustive, nor is it meant to suggest that each element is given the same weight or referred to in the same terms in each country that has enacted a competition law.

An important point is that there are many types of competition law and that there are many types of government laws and policy that fall outside the domain of competition law but within the definition of competition policy. This point will become even more significant later because, as will be discussed in section III.8 below, many of measures that are traditionally regarded as competition policies will fall beyond the reach of the disciplines of a multilateral framework on competition policy, as currently articulated by proponents of such a framework.

I.2 Selected recent experience in jurisdictions with competition laws

The decade of the 1990s saw considerable changes in the priority given to competition law in many jurisdictions. Perhaps the single biggest change is in the number of countries that have enacted such laws. Although counts vary, all point to the fact than many countries have adopted competition laws for the first time (Palim 1998, ICPAC 2000, and White & Case 2001). Table 1 presents data on the number of jurisdictions that adopted some form of competition law in the 1990s and is based on an cross-country survey by a well-regarded international law firm (White & Case 2001). The principal finding is that 38 jurisdictions adopted some type of competition law since 1990 taking, according to this source, the total number of jurisdictions with such laws to above 80. Also of interest is that 27 of the 38 jurisdictions were developing countries and that no least developed country appears to have adopted a competition law from 1990 to 2001, when this survey was published.

Two other points are noteworthy in this regard. First, as there are at present 145 members of the WTO, the factual record (Table 1 and the above paragraph) suggests that dozens of WTO members have not enacted any form of competition law. Second, one of the first competition laws that jurisdictions tend to enact are those that include provisions against the cartelisation of markets; which is important as discussions at the WTO on competition law and policy have given a prominent role to hard core cartels.

Table 1: Just under forty countries enacted competition laws in the 1990s

Countries adopting their first competition law after 1990				
Total	of which ... are EU Member States	of which ... are non-EU developed countries	of which ... are developing countries	of which ... are Least Developed Countries
38	8	3	27	0

Source: White & Case, *Worldwide Antitrust Merger Notification Requirements*, 2001 Edition.

I.3 Enforcement actions against cartels[3]

[3] 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.

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, so harming the customers—who can be consumers, other firms (whose competitiveness is thereby harmed), or governments.

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, the definition requires an *explicit* agreement between firms, which distinguishes cartelisation from collusion. 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.

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 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 cartelise markets abroad. (This interpretation is not surprising as many nation's laws give specific exemptions from national antitrust laws to those cartels that only affect commerce abroad.) However, in principle, an export cartel could include firms headquartered in more than one economy.

As noted in the body text another term is prominent in the discussions on private cartels, namely, *hard core cartels*. This term has acquired a special significance since the Organisation for Economic Cooperation and Development (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 markers by allocating consumers, suppliers, territories, or lines of commerce."

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". 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 large enough cost reductions that prices paid by purchasers actually fall. 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 distinguished from cartels in that the former do not involve a formal agreement between the firms concerned.

An important aspect of the enforcement of competition laws in the 1990s has been the actions taken against cartels.[4] Policy discourse tends to focus on so-called hard core cartels, which the OECD has defined as follows:

> "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.[5]"

Table 2 summarises several of the prominent enforcement actions against cartels in industrial and developing economies. This table was assembled by the OECD and interestingly, Mexico, Korea, and the Slovak Republic have joined higher-income OECD members in initiating enforcement actions against hard core cartels. The evidence presented in table 2 is noteworthy in two other respects. First, it appears that cartels are not confined to a small number of sectors; which tends to favour an economy-wide approach to cartel enforcement rather than a sector-specific approach. Second, the fines levied by many jurisdictions are only a fraction of the estimated harm done by these cartels, which raises the question whether previous—and perhaps even current—enforcement practices had sufficiently strong deterrents to cartelisation.

Table 2: Selected cartels prosecuted in the 1990s: affected commerce, estimated harm, and sanctions applied

Country or enforcement agency	Good	Affected commerce (national currency or euros in eurozone countries)	Estimated harm (value in local currency or percentage price increase)	Sanctions (including damages to private parties where applicable)	Fines as % of affected commerce	Fines as % of estimated harm
EU Member States						
Denmark	Electric wiring services	NA (many billions over "several decades")	20-30%	Some cases pending; largest find to date DKK 3.2 million	NA	NA
European Commission	Graphite electrodes	More than 2 billion	Up to 50%	218.8 million	11%	22%
European Commission	Lysine	NA	NA	110 million	NA	NA
European Commission	British sugar	NA	NA	50.2 million	NA	NA
European Commission	Pre-insulated pipe	More than 2 billion	NA	92.210 million	5%	NA
Finland	Purchases of raw wood	NA	NA	1.5 million	NA	NA

[4] Another significant form of competition law enforcement in the 1990s was merger review and reflects the scale of domestic and cross-border mergers and acquisitions wave of 1995-2000. As proposals for a multilateral framework on competition policy have not concerned policies towards mergers directly, then the scope, nature, and operation of this important policy instrument are not discussed here. See Evenett (2003a) for an overview of the cross-border mergers and acquisitions wave of the late 1990s.

[5] Organisation for Economic Cooperation and Development (2002). This definition was proposed when the members of the OECD reached an accord—technically a Recommendation—on hard core cartels in 1998.

Country or enforcement agency	Good	Affected commerce (national currency or euros in eurozone countries)	Estimated harm (value in local currency or percentage price increase)	Sanctions (including damages to private parties where applicable)	Fines as % of affected commerce	Fines as % of estimated harm
Germany	Ready-mix concrete	2.5 billion	220 million (9% of affected commerce)	300 million	12%	136%
Germany	Road markings	More than 750 million	"Hundreds of millions" (more than 13% of affected commerce)	25.6 million	3%	NA
Germany	Power cables	Many billions	As much as 50%	249.5 million	NA	NA
Spain	Hotel association	1 billion	30 million (3% of affected commerce)	1.1 million	Less than 1%	3.30%
The Netherlands	Veterinary products	58.5 million	NA	10.5 million	18%	NA
Non-EU Industrialised Countries						
Australia	Distribution Transformers	320'505'000	NA	1.5 million (incomplete at time of response)	NA	NA
Australia	Frozen foods, Tasmania	NA	10 – 12% price increase	1.245 million	NA	NA
Australia	Installation of fire protection devices	More than 500 million	5-15% price increase	15.386 million	3%	31%
Canada	Lysine	89 million	NA	17.57 million	19.74%	NA
Canada	Citric acid	104.6 million	NA	11.575 million	11%	NA
Canada	Sorbates	37 million	NA	7.39 million	19.97%	NA
Canada	Vitamins	Up to 750 million	NA	91.475 million	12.70%	NA
Canada	Graphite electrodes	440 million	90% price increase	24 million (incomplete at time of	NA	NA

Country or enforcement agency	Good	Affected commerce (national currency or euros in eurozone countries)	Estimated harm (value in local currency or percentage price increase)	Sanctions (including damages to private parties where applicable)	Fines as % of affected commerce	Fines as % of estimated harm
				response)		
Japan	Ductile iron pipe	NA	NA	230 million	NA	NA
Norway	Hydro-electric power equipment	1.6 billion	140 million (9% of affected commerce)	75 million	5%	54%
Developing Countries						
Korea	Military fuel	USD 548.3 million	NA	USD 14.6 million	3%	NA
Korea	Graphite electrodes	USD 553 million	USD 139 million	USD 8.5 million	2%	6%
Mexico	Lysine	NA	NA	1.699 million	NA	NA
Slovak Republic	Flour	NA	200-300/ton	2.24 million	NA	NA
Slovak Republic	Beer	4 billion	NA	.1 million	Less than 1%	NA

Source: OECD (2003).

In addition to national enforcement actions against national cartels, since 1990 officials in the United States and the European Commission (EC) have taken over 40 enforcement actions against international cartels made up of private firms. Twenty four (sixty percent) of these cartels lasted four or more years, suggesting that this latest set of private international cartels did not tend to collapse quickly under the weight of the own incentive problems or in response to increased shipments or imports by firms outside of these cartels (Evenett, Levenstein, and Suslow, 2001).

Table 3 lists the countries whose firms were found to be members of these international cartels; again the impression is given that such anti-competitive acts are not a localised or insignificant phenomenon. In fact, private international cartels are found to have raised prices between 15 and 40 percent (Levenstein and Suslow 2001) and are estimated to have inflicted billions of dollars of overcharges per year on customers in developing economies (Evenett and Ferrarini 2002). A single international cartel, which lasted ten years in the vitamins industry, was estimated to have inflicted nearly two and three quarter billion dollars of overcharges on vitamins imports by to 90 countries (Clarke and Evenett 2003). Moreover, the same study found that jurisdictions in Asia, Latin America, and Western Europe with active cartel enforcement regimes tended to suffer much smaller overcharges than those jurisdictions that do not (Clarke and Evenett 2003). This finding is evidence of the deterrent value of active cartel enforcement regimes; not just deterring the formation of cartels in the first place but reducing the damage done by those cartels that do have the audacity to form. Finally, it is worth bearing in mind that these international cartels take advantage of the very open borders that the multilateral trading system has sought for decades to achieve. This speaks to the important matter of whether private anti-competitive practices have eroded the benefits of prior trade reforms.

Table 3: Economies whose firms were found to be engaging in cartelisation by the US and the EC during the 1990s

Economy	Cartel
EU member states	
Austria	Cartonboard, citric acid, newsprint, steel heating pipes
Belgium	Ship construction, stainless steel, steel beams
Denmark	Shipping, steel heating pipes, sugar
Finland	Cartonboard, newsprint, steel heating pipes
France	*Aircraft*, cable-stayed bridges, cartonboard, citric acid, ferry operators, *methionine*, newsprint, *plasterboard*, shipping, sodium gluconate, stainless steel, steel beams, seamless steel tubes
Germany	*Aircraft*, graphite electrodes onboard, citric acid, aluminum phosphide, lysine, *methionine*, newsprint, pigments, *plasterboard*, steel heating pipes, seamless steel tubes, vitamins
Greece	Ferry operators
Ireland	Shipping, sugar
Italy	Cartonboard, ferry operators, newsprint, stainless steel, steel heating pipes, seamless steel tubes
Luxembourg	Steel beams
Netherlands	Cartonboard, citric acid, ferry operators, Ship construction, sodium gluconate, Tampico fiber
Spain	*Aircraft*, Cartonboard, stainless steel, steel beams
Sweden	Cartonboard, ferry operators, newsprint, stainless steel
UK	*Aircraft*, cartonboard, explosives, ferry operators, newsprint, pigments, *plasterboard*, shipping, stainless steel, seamless steel tubes, steel beams, sugar
Non-EU industrialised countries	
Canada	Cartonboard, pigments, plastic dinnerware, vitamins
Japan	Graphite electrodes, lysine, *methionine*, ship transportation, shipping, sodium gluconate, sorbates, seamless steel tubes, thermal fax paper, vitamins
Norway	Cartonboard, explosives, ferrosilicon
Switzerland	Citric acid, laminated plastic tubes, steel heating pipes, vitamins
US	*Aircraft*, aluminum phosphide, bromine, cable-stayed bridges, cartonboard, , citric acid, diamonds, ferrosilicon, Graphite electrodes, isostatic graphite, laminated plastic tubes, lysine, maltol, *methionine*, pigments, plastic dinnerware, Ship construction, ship transportation, sorbates, Tampico fiber, thermal fax paper, vitamins
Developing countries	
Brazil	Aluminum phosphide
India	Aluminum phosphide
Malaysia	Shipping
Mexico	Tampico fiber
Singapore	Shipping
South Africa	Diamonds, newsprint
South Korea	Lysine, *methionine*, ship transportation, shipping
Least Developed Countries	
Angola	Shipping
Unclassified	

Economy	Cartel
Israel	Bromine
Taiwan	Shipping
Zaire	Shipping

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

Note: Products in italics were under investigation at time of publication of Evenett, Levenstein, and Suslow (2001).

Yet more evidence on cartel enforcement is available. Table 4 summarises the information presented to the OECD by 11 developing economies and one least developed country on 28 recent enforcement actions against cartels. These twelve economies differ markedly in their stages of development and yet they were all affected by the detrimental effects of cartels. Furthermore, the number of big rigging cases reported (six) suggest that the private sector is not the only victim of cartelisation—governments (and by extension taxpayers) are too. In fact, the three cartel cases described by the Chinese authorities were all bid rigging examples.

Table 4: Cartel enforcement cases in 11 developing economies and one least developed country

Economy engaging in enforcement action	Cartelised market	Duration of cartel	Summary of conspiracy and any fines imposed
Developing countries			
Bulgaria	Transportation on variable routes (intermediate transportation)	2000	Conspirators agreed on a price increase of approximately EUR 0.1 on transportation services. The companies were fined a total of EUR 47,000.
	Phone cards sales	One year (year not specified)	A common shareholder acted at as intermediary in price co-coordination between two conspiring companies. Both were fined of EUR 9,000.
	Gasification	2002	Two companies agreed on a five-years contract with non-compete clauses. A fine of EUR 25,500 was imposed on both companies.
China	Brickyard	1999	Bid rigging conspiracy involving five 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 ten construction companies. The bid was declared invalid and illegal gains confiscated.
	Engineering construction	1998	Bid rigging involving two construction companies.
Estonia	Milk products	2000	Price-fixing attempt by four leading milk processors and ten wholesalers. A prohibiting order was issued before an agreement came in place.
	Taxi services	1999	Three taxi companies (over 40% 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

Economy engaging in enforcement action	Cartelised market	Duration of cartel	Summary of conspiracy and any fines imposed
			participating in price fixing involving the provision of international transport services. The Competition Board issued a proscriptive order. No sanctions were applied.
Indonesia	Pipe and pipe processing services	Formed in May 2000	Bid rigging involving four companies. The ensuing contract was dissolved. No fines were imposed.
Latvia	Aviation	1998-1999	International cartel involving one Latvian and one Russian company agreeing to co-cooperate in the organisation of passenger flights between Riga and Moscow. The Latvian company was fined 0.7% of its total turnover of 1998.
	Courier post	1999	Agreement between a Latvian state-owned courier post services and an international courier services operator. No sanctions were applied, as no practical effect on competition was ascertained.
Peru	Building and construction	1997	Three companied 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 their commitment to cease the restrictive practices, was fined EUR 900.
	Poultry market	1995-1996	Several associations and 19 firms investigated and subsequently prosecuted for price-fixing, volume control, restrain of trade, for a conspiracy to establish entry barriers and for the development of anti-competitive mechanisms to suppress and eliminate competitors, in the market of live chicken in Metropolitan Lima and Callao.
Romania	Mineral water	1997	Price fixing conspiracy relating to the bottling of mineral water. Fines not specified.
	Drugs	1997-2000	Members of the Pharmacists Association were found to be participating in a conspiracy relating to market sharing in pharmaceutical distribution (approx. EUR 430 million per year) and to be deterring entry by other competitors. Fines were calculated as a percentage of profit of the Pharmacists Association (amount not specified).
Slovenia	Electric energy	2000 (year of enforcement decision)	Price fixing conspiracy relating to the provision of electric energy in Slovenia. The cartel was prohibited.
	Organisation of cultural events	2000	Two companies agreed to co-operate and prevent entry in the market. The amount of

Economy engaging in enforcement action	Cartelised market	Duration of cartel	Summary of conspiracy and any fines imposed
			fines imposed is not specified.
South Africa	Citrus fruits	1999	Conspiracy relating to the purchase, packaging, and sale of citrus fruits. Fines not specified.
Ukraine	Electronic cash machines	1999	Price fixing conspiracy involving two companies. As an effect of the agreement, prices rose by EUR 1.0–2.0. The sanctions applied, if any, were not specified.
	Kaolin	2000	Two competing distributors concluded a contract specifying amounts of sales of the product. The sanctions applied, if any, were not specified.
Least Developed Countries			
Zambia	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. The sanctions applied, if any, were not specified.
Unclassified			
Taiwan	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. No fines specified.
	Liquefied Petroleum Gas (LPG)	Not specified	Twenty seven 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.
Source: Assembled from national submissions to the First and Second OECD Global Fora on Competition.			

I.4 Other types of competition law enforcement in developing economies

As the number of developing economies adopting competition laws rises over time, more evidence of anti-competitive practices is emerging from the enforcement records of national competition authorities. Many such authorities have their own websites, where annual reports and press releases are posted. In addition, numerous developing economies have reported on significant enforcement actions in submissions or notifications to the OECD, to UNCTAD, and to the WTO. The evidence reported in this section was assembled from such sources.

Developing economies' enforcement actions are not confined solely to cartels. Firms with sizeable market shares may individually or collectively raise prices and take other measures to distort market outcomes. Such corporate acts are said to be abuses of a dominant position and are regularly the target of developing economy competition policy enforcement. In their last annual reports to the OECD on competition enforcement, Hungary, Korea, Mexico, Russia, and Turkey took steps against abuses of dominant positions (see Table 5).

Table 5: Findings of anti-competitive conduct in selected developing economies

Economy	Year	Findings of horizontal agreements, cartels, and concerted agreements	Findings of abuse of a dominant position
Hungary	1997	0	8
	1998	2	5
	1999	7	7
	2000	11	19
Korea	2000	38	0
Mexico	1999	41	
	2000	63	
Russia	2000	9	438
Turkey	2000	12	-

Source: Named countries' annual reports to the OECD on the enforcement of their national competition laws.

The factual record on competition policy enforcement in Eastern Europe is particularly well developed (see Kovacic 2001 and Neven and Mavroidis 2000). This reflects the fact that many of these economies have been preparing to accede to the European Union and that the European Commission has in recent years published annual reports on (amongst other matters) the status of each applicant's competition policy enforcement regime. The latest reports published in 2002 refer to the enforcement record in 2001 and perusing these reports reveals that many of these Eastern European nations have active competition authorities and that they are increasingly targeting anti-competitive practices. It would appear that the fact that these economies' competition enforcement agencies have been established only recently has not prevented some of them from taking a relatively aggressive stance against private anti-competitive practices; suggesting that nations need not wait long before investments in competition enforcement begin to bear fruit. This is not to say that all of these economies' competition authorities are up to full strength as the European Commission's adverse commentary on the resources and personnel available to the Latvian and Slovenian competition authorities demonstrates. Similar quantitative and qualitative evidence for these and other developing countries can be found in Evenett (2003b, part III).

I.5 International agreements and cooperation on competition matters

The 1990s saw a number of jurisdictions sign bilateral agreements on competition law and policy matters with other nations. These agreements differ markedly in their content and legal status; ranging from Mutual Legal Assistance Treaties (such as the one treaty between Canada and the United States) to more informal arrangements between enforcement agencies.

The extent of cooperation between enforcement agencies varies across different types of competition law, with cooperation on merger reviews tending to be greater than cooperation on cartel enforcement cases (Jenny 2002). Moreover, cooperation between enforcement agencies is predominantly between industrialised countries, and only recently has evidence of cooperation between industrialised countries and counterparts in developing countries come to light (see, for example, Brazil 2002). Of course, this may well change in the future as expertise and experience on competition enforcement matters deepens in developing countries. Finally, there are many different types of cooperation including notifications to other countries when their interests are affected,

discussions about specific industries or about the so-called theory of a case, close collaboration on the analysis of a case (where permitted by national law) and joint enforcement actions, such as dawn raids.

While precise measures of the extent of bilateral cooperation on competition law-related matters are hard to come by, the public record does include those international agreements between national enforcement agencies. Figure 1 portrays graphically which nations have signed bilateral or trilateral agreements; and it is immediately evident that many pairs of nations do not have any formal cooperative machinery in place. This is important as bilateral cooperation is much less likely to occur without a formal agreement to structure the nature and content of such cooperation.

Figure 1: Bilateral and trilateral cooperation agreements on competition law enforcement

-	USA	EC	Ger.	Aus.	Fra.	NZ	Can.	Chi.	Rus.	Taiwan	Isra.	Jap.	Kaz.	Bra.	PNG	Mx.	Ice.	Nor.	Den.	Chil.
USA	-	1991 and 1998	1976	1982 and 1997			1995				1999	1999 and 1999		1999		2000				
EC	1991 and 1998	-					1999 and 2000													
Germany	1976		-		1984															
Australia	1982 and 1997			-		1994 and 2000 **	2000 **			1996					1999					
France			1984		-															
New Zealand				1994 and 2000 **		-	2000 **			1997										
Canada	1995	1999 and 2000		2000 **		2000 **	-									2001				2001
China								-	1996				1999							
Russia								1996	-											
Taiwan				1996		1997				-										
Israel	1999										-									
Japan	1999 and 1999											-								
Kazakhstan								1999					-							
Brazil	1999													-						
Papua New Guinea				1999											-					
Mexico	2000						2001									-				
Iceland																	-	2001 **	2001 **	
Norway																	2001 **	-	2001 **	
Denmark																	2001 **	2001 **	-	
Chile							2001													-

Shaded boxes/entries implies no cooperation agreement. White entries indicate a cooperation agreement exists. Date that the agreement was signed is also indicated. Key: ** indicates a tripartite agreement. Source: UNCTAD (2002).

Part II

DEVELOPMENTS IN INTERNATIONAL FORA AND ELSEWHERE

> "It can be said that competition law is national, while markets are increasingly global. Yet there is no international antitrust code. The key question is how to deal with transnational competition issues in a global economy. How can competition authorities manage marketplace conduct that takes place in one nation, but has a harmful effect in another?" Konrad von Finckenstein (2001)

The quotation above, made by Canada's top competition law enforcer, highlights the tension between the desire to maintain national enforcement of competition laws and the need to prosecute cross-border anti-competitive practices such as international hard core cartels. A distinct but related matter arises in merger reviews, where many jurisdictions can exercise their rights to evaluate a proposed merger involving firms located abroad. Competition enforcement officials increasingly recognised that the effects of their actions and foreign counterparts' actions spilled over national borders. Enforcement may well be national, but their effects need not be. The realisation of this fact lead to a number of initiatives by policymakers in the 1980s and 1990s, only some of which strengthened the link between trade policies and competition policies.

II.1 Unilateralism

In recent years, the first of a series of initiatives that linked trade and competition policies arose out of concerns that anticompetitive vertical restraints were blocking foreigners' market access, in particular in Japan (ICPAC 2000, Lawrence 1993, Saxonhouse 1993). Here it is asserted that the non-enforcement of Japan's law had implications for market access and some went so far as to advocate reducing the access of Japanese goods to foreign markets in retaliation (see Tyson 1992 for an overview of arguments on both sides). The United States became increasingly critical in the late 1980s and early-to-mid 1990s of what it perceived as Japanese unwillingness to enforce its own competition laws. Moreover, bilateral consultations rarely produced the results the US was looking for and eventually the US government brought a high-profile dispute settlement case to the WTO. The Consumer Photographic Film and Paper case, colloquially referred to as the "Kodak-Fuji case", concerned complaints that Fuji's close relationship with its distributors in the Japanese market had adversely affected Kodak's ability to sell film and other consumer products in Japan. The United States cited Articles III, (national treatment), X (transparency), and XXIII (nullification and impairment) in its argument that Japan had breached its GATT obligations. A Panel of the WTO's Dispute Settlement Body found in favour of Japan in this case, which has led some to argue that new multilateral practices are needed to tackle private anti-competitive practices. Moreover, this ruling took the wind out of the sails of those who wanted to use trade sanctions to strengthen national incentives to enforce their competition laws; admittedly much to the relief of many practitioners of competition law (and others) who felt that this was an unwise course of action. Indeed, the reasons advanced at the time for taking the Kodak-Fuji case to the WTO go a long way to explain the long-standing and still prevalent hostility of many competition lawyers to linking trade policy and competition law enforcement.

II.2 Bilateralism

Since the Kodak-Fuji decision, in the US the unilateralist approach has given way to what might be termed bilateralism. In 1994, the US Congress granted the USDOJ explicit authority to negotiate bilateral agreements with foreign competition enforcement agencies under the International Antitrust Enforcement Assistance Act (the "IAEAA"). Bilateralism was thought to be a means of allowing for custom-tailored solutions to specific cross-

border antitrust issues while permitting differences in markets, legal traditions and other aspects to be tolerated (Klein, 1996).

Bilateralism was borne in part out of the frustration faced by antitrust officials in their attempts to prosecute foreign companies for anticompetitive behaviour. The so-called GE/De Beers case was a good example of the problems faced by US antitrust authorities in the absence of international accords on competition. Joel Klein, former Assistant Attorney General for Antitrust at the USDOJ, summed up the dilemma of US prosecutors in a speech he gave at Chatham House in 1996:

> "Unfortunately, we have directly run up against this problem. For example, a couple of years back in the GE/DeBeers case, we filed criminal antitrust charges against a U.S. company, General Electric, a Swiss affiliate of DeBeers, and two foreign nationals, for conspiring to raise the price of industrial diamonds. Much of the alleged conduct relating to the cartel took place in Europe, and much of the evidence was located overseas and consequently beyond the Justice Department's reach, although we did seek and received some assistance from the government of Belgium. The case proceeded to trial, but in December 1994, the court entered a judgment of acquittal, observing that much of the "missing" evidence presumably was located outside the U.S., beyond the reach of U.S. prosecutors.
>
> In addition to the problem of not being able to obtain the necessary evidence located abroad, our efforts to cooperate effectively with other antitrust authorities can be stymied by the absence of arrangements that allow the sharing of our own evidence with those authorities. In criminal investigations, for example, our rules of criminal procedure are very strict in protecting the secrecy of grand jury proceedings." (Klein 1996, page 4)

And later,

> "…our ability under current law to share such information with countries who are not parties to cooperation agreements is very limited." (page 5)

In the same speech, he outlined his enthusiasm for the bilateralist approach. "We believe," he said,

> "that bilateral, or what are generally referred to as "positive comity" agreements are the best way to ensure effective enforcement. Under such agreements, the antitrust agency of the country that believes its companies are being closed out of another country as a result of private restraints makes a preliminary determination that there are reasonable grounds for an investigation of the matter, perhaps under its own law but, in any event, under the law of the country in which the restraint operates. It then refers the matter, along with its preliminary analysis, to the competition authority in the country whose home market is directly affected and that authority conducts the investigation and then reports back to, and consults with, the initial country as to the nature of its investigation, its findings, and any remedy it is considering. The referring country can accept these conclusions, or seek to modify them, or it can subsequently conduct its own investigation and take actions that it thinks are appropriate." (Klein, 1996)

The first such Antitrust Enforcement Assistance Act (IAEAA), for example, was signed with Australia in 1997; a jurisdiction with an advanced antitrust infrastructure. The IAEAA with Australia, though being heralded as a "critical contribution to antitrust enforcement" was, in reality, limited to providing only non-public information and the reciprocation of investigatory assistance (United States Federal Trade Commission, Press Release, April 17 1997). Even this agreement pales compared to the Canada-United States Mutual Legal Assistance Treaty (MLAT) which covers competition matters and has been used with considerable effect in prosecuting cross-broder cartels (Waller 2000).

It is worth noting that the US Congress placed a number of provisos on the bilateral agreements that the USDOJ could sign with foreign governments. Agreements between the US and other nations were subject to the condition that the reciprocating nations have comparable authority to provide assistance. Moreover, concerns about the need to protect confidential business and investigative information led Congress to require that foreign parties to such agreements have laws adequate to protect materials provided in confidence from unauthorized public disclosure. This may well account for the fact that few such bilateral agreements have been signed by the

US and developing nations; with obvious implications for the degree of bilateral cooperation and the capacity of firms with international operations to evade the reach of US enforcement authorities.

II.3 International initiatives for policy convergence

With bilateralism not delivering as much as perhaps was originally hoped, in the late 1990s the United States and other jurisdictions began to press for international initiatives for convergence of enforcement practices. It is worth stating that convergence in practices is quite distinct from harmonisation, although the former may well—when carried to the limit—result in the latter. Moreover, at present no government appears to be advocating harmonisation of competition laws in *any* international fora.[6] Initiatives to promote convergence in laws and enforcement practices are, however, quite another matter.

In 2000, an advisory committee to the US government recommended that bilateral initiatives be coupled with a Global Competition Initiative to foster best practices and to encourage dialogue between enforcement officials. This advisory committee envisaged policy convergence as one of the goals of this Initiative:

> "Indeed, the Advisory Committee recommends that the United States explore the scope for collaborations among interested governments and international organizations to create a *new* venue where government officials, as well as private firms, nongovernmental organizations (NGOs), and others can exchange ideas and work toward common solutions of competition law and policy problems. The Advisory Committee calls this the "Global Competition Initiative."
>
> "A Global Competition Initiative should be inclusive and foster dialogue directed toward greater convergence of competition law and analysis, common understandings, and common culture. Such a gathering also could serve as an information center, offer technical expertise to transition economies, and perhaps offer mediation and other dispute resolution capabilities." (ICPAC 2000)

After considerable deliberation by the leading competition enforcement bodies, this initiative led to the creation of the International Competition Network (ICN). Currently the ICN has approximately sixty competition enforcement bodies as members. The philosophy of the ICN stresses dialogue, cooperation, and discussion, rather than binding commitments, enforcement, and linkages to other policy domains (Janow 2002). Interestingly, trade policy officials—indeed trade-related thinking—appears to play no role in the deliberations of the ICN. As such, the ICN can be seen as an attempt to further separate trade and competition policy matters.

The inaugural ICN conference in 2002 covered a number of competition enforcement-related issues. Statements were received from senior officials dealing with competition policy in their member countries and some resolutions were adopted. For example,

> "There was consensus on the proposed Guiding Principles for Merger Notification and Review, and members officially adopted them. The eight principles are: sovereignty, transparency, non-discrimination on the basis of nationality, procedural fairness; efficient, timely and effective review; coordination; convergence; and confidentiality."

And, in addition to four existing working groups on mergers, competition advocacy, funding, and membership, at the inaugural conference

> "The members established a new working group on Capacity Building and Competition Policy Implementation…"(Fox, 2002 page 10)

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[6] Indeed, the Secretary and Chairman of the WTO's Working Group have noted that:

> "…the Working Group has shown little or no interest in the international "harmonization" of competition law, if by harmonization is meant an insistence on uniform approaches to competition law and policy at the national level. Indeed, the observation that "one size does not fit all" in the field of competition law and policy has become a staple of the dialogue in the Working Group" (Anderson and Jenny 2003, page 560).

which is obliged to report back to the ICN membership at its next conference.

Given this chapter's focus on the proposals for a multilateral framework on competition policy, it is perhaps worth noting that international cartels are not a topic that the ICN appears to be devoting much attention to. Moreover, it is unclear what role, if any, nations without competition laws—many of whom hail from the developing world—can play in an organisation that requires such laws a pre-requisite for membership. This is not to say that the ICN offers no promise, just that the limitations in its scope and membership should be appreciated.

The emphasis on a number of international tracks for addressing competition policy-related matters remains US policy. The current Acting Assistant Attorney General, R. Hewitt Pate, speaking before the American Bar Association in 2003, outlined the following policy towards international competition policy matters:

> "As valuable and productive as our relationships with the EU and other foreign governments are, we cannot accomplish everything that we should in international antitrust through bilateral relationships." (Pate 2003)

Moreover, he argues:

> "…if we are to achieve true global convergence and cooperation, multilateral efforts must supplement existing bilateral ties. " (Pate 2003)

In addition,

> "By focusing here on ICN, I do not mean to dismiss the extremely important work going on in the OECD, WTO and UNCTAD." (Pate 2003)

Indeed, like the ICN, UNCTAD and the OECD have developed non-binding initiatives on competition enforcement related matters; however, the focus of the latter has been less on mergers and more on anti-competitive corporate practices such as hard core cartels. The contributions of UNCTAD and of the OECD are discussed below.

II.3.1 The UNCTAD Set

In 1980, the United Nations General Assembly adopted The Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (UNCTAD, 1980). Like the OECD recommendation of 1967, this contribution from UNCTAD recognised that restrictive business practices could adversely affect international trade. This initiative, which has become popularly referred to as the 'UN Set', was propagated in the hope that by doing so the United Nations could contribute to "the establishment of a new economic order to eliminate restrictive business practices." (UNCTAD, 1980 page 7)

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.[7] 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 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:

---

[7] This Set has been reviewed by UN members in 1985, 1990, 1995, and 2000. The Fourth Review Conference, held on 25-29 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.

(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. page 13).

Furthermore, the Set calls upon signatories to act individually or collectively to tackle restrictive business practices, of which international cartelisation 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…"

Having said this, the UNCTAD remains a non-binding statement of principles; like the OECD Recommendation on Hard Core Cartels which was to follow.

II.3.2 OECD Recommendations

The OECD was the first international organisation to formally adopt an accord (technically a "Recommendation" of the OECD's Council) in regard to cooperation on competition policy enforcement through a Council Recommendation in 1967. More recently, the OECD has undertaken a sustained programme of research, policy dialogue, and dissemination of best practices on the matter of hard core cartels; amongst other issues. A more recent and oft-cited contribution is the 1998 Recommendation of the Council Concerning Effective Action Against Hard Core Cartels. In this Recommendation hard core cartels are said to be the "most egregious violations of competition law" and recommended that the governments of OECD member countries ensure that their competition laws effectively halted and deterred hard core cartels (OECD, 1998 page 58).

This Recommendation notes that

> "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" (OECD 1998, article I.A.1).

Moreover, the Recommendation speaks to the issue of cooperation in the fight against hard core cartels:

> "Member countries have a common interest in preventing hardcore cartels and should co-operate 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" (OECD 1998, article B.1).

Like the UN Set, this OECD Recommendation makes use of hortatory language and is non-binding. Moreover, although the OECD encourages non-members to adhere to the Recommendation, there is nothing to compel non-

members to do so. That is not to say that the increased attention given to hard core cartels, and to the other competition policy matters raised by the OECD and by UNCTAD, have had no positive effects; in fact, these non-binding agreements have probably increased the spread and tempo of enforcement of competition law around the globe. Rather, these non-binding agreements have not assured minimum standards of competition law enforcement around the globe; nor has any compelling evidence been presented that suggests they might do so in the near to medium term.

Part III

NATIONAL SUBMISSIONS TO THE WTO'S WORKING GROUP ON THE INTERACTION BETWEEN TRADE AND COMPETITION POLICY

Since the Doha Ministerial meeting, many WTO members have made submissions to this Working Group on the following subjects: core principles (including transparency, non-discrimination, procedural fairness), hard core cartels, modalities for voluntary cooperation, capacity building, and Special and Differential Treatment. The purpose of this part is to describe in detail the principal submissions on each of these matters. However, before doing so, the Chairman and the Secretary of the Working Group provide some context for the following sections. These gentlemen have remarked that:

> "First, the Working Group, in its work over the past five years, has eschewed a narrow approach to the "trade and competition interface", concerning itself not only with practices that can disrupt the *flow* of trade (e.g., vertical market restraints) but also, very much, with practices that undermine the benefits that are intended to flow from trade liberalization (e.g., international cartels). In addition to the role of competition law enforcement, attention has been given to the benefits of effective competition advocacy work. Second, the Group has had a major focus in its work on the importance of and the challenges involved in implementing competition policies in developing countries. Indeed, in our view a major contribution of this work has been to raise awareness of the harm caused to developing countries by international cartels and other anti-competitive arrangements, thereby promoting interest in modern approaches to competition policy among developing country Members and reinforcing related consciousness-raising efforts in other fora such as the OECD, UNCTAD and the ICN.
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> "Third, and perhaps contrary to the expectations of some, the Working Group has shown little or no interest in the international "harmonization" of competition law, if by harmonization is meant an insistence on uniform approaches to competition law and policy at the national level. Indeed, the observation that "one size does not fit all" in the field of competition law and policy has become a staple of the dialogue in the Working Group. On the other hand, central to the dialogue in the Group have been two more basic concerns: (i) a recognition that, for political-economic reasons, developing countries often suffer from an under-investment in competition policy institutions relative to the harm caused to them by anti-competitive practices; and (ii) a belief that sound application of competition law and policy in ways that promote trade, investment and development - particularly in countries where such law is only recently established or that lack an entrenched "competition culture" - could be facilitated by explicit commitments in the WTO regarding application of the fundamental principles of non-discrimination, transparency and procedural fairness in this area" (Anderson and Jenny 2003, pages 3 and 4).

III.1 Transparency

The Annual Report of the Working Group in 2002 describes the potential elements of a provision on transparency as follows:

> "In the field of competition policy, a transparency commitment would apply to laws, regulations, and guidelines of general application. There would be an obligation upon WTO Members to ensure the publication of such laws, regulations and guidelines in a comprehensive and timely manner. This might be done either in print in an official gazette, journal or the like, or possibly on a publicly accessible website" (WTO 2002, page 6).

Transparency has other facets as Janow (2002) notes:

> "Transparency in the competition context would also require notification of exemptions and exclusions from competition laws. But transparency could not reasonably be an unbounded obligation—the reasons why a competition agency may decide to pursue an individual enforcement action or decide against such an action could rely on confidential information that cannot be disclosed." (Janow 2002)

The country submissions on the merits of potential provisions on transparency fall into three main groups. The first group is supportive of transparency provisions and advocates means by which it could be realised in a future multilateral framework on competition policy. A second group of submissions are characterised by caution about the extent and nature of any transparency provisions and a third group argue for flexibility in the design of any transparency provisions.

Submissions to the Working Group from Australia, Switzerland, the European Community and Canada fall into the first group; that is, those submissions that are broadly supportive of transparency provisions.

The European Community states that

> "…a transparency commitment would obviously apply to laws, regulations, and guidelines of general application. The obligation would be for WTO members to ensure public availability in a comprehensive and timely manner – be it in print or on a publicly accessible web site – of all laws, regulations and guidelines of general application." (EC WT/WGTCP/W/222 2002)[8]

Canada and Switzerland broadly support these provisions stating, respectively, that

> "The EC has identified the need for transparency commitments in terms of laws, regulations and guidelines of general application. We agree that it is clearly important for these items to be transparent, through publication and notification." (Canada WT/WGTCP/W/226 2003)

and,

> "We would find it appropriate for WTO Members to make publicly available, in a timely manner and subject to protection of confidential information, the following: relevant laws including exceptions and exemptions, and including procedural rights and obligations, as well as procedures for investigations, and important case decisions including reasoning and facts." (Switzerland WT/WGTCP/W/214 2002)

Consequently, these countries go beyond mere expressions of support for the provisions on the core principle of transparency to suggest practical steps toward their implementation.

Support for flexibility in the implementation of transparency provisions seems to be uncontroversial. The European Community, for instance, notes that developing countries have the right to progressive and flexible implementation criteria; arguing that

> "… certain elements may need to be introduced progressively and be identified as a priority for technical assistance programmes." (EC WT/WGTCP/W/222 2002)

Canada makes similar remarks as do the Swiss, which support a progressive and flexible approach,

> "…adaptation to the circumstances will be necessary; and the principles should be applied in a flexible, different manner, comparable to the way the principles are applied across the WTO agreements being tailored to the respective agreement and adapted to the context to which the agreement applies." (Switzerland WT/WGTCP/W/214 2002)

The second group of submissions to the Working Group on transparency provisions can be best described as cautious, and include contributions from the USA and Hong Kong, China. The latter's submission demands that the scope of the transparency requirement be identified so that developing countries can better determine their stance towards it, arguing that

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[8] In this part of the chapter the references to a WTO Member's submissions to the Working Group on the Interaction Between Trade and Competition Policy are of the form (X Y Z), where X refers to the WTO Member, Y to the WTO document number associated with the submission, and Z to the year of the submission.

> "…the problems of developing a "competition culture", weak enforcement capabilities and court systems as well as markets that may be characterised by high degrees of concentration and histories of state intervention." (Hong Kong, China WT/WGTCP/W/224 2003)

These characteristics are inimical to the requirements set down by the more ambitious proposals from the EC and others. Hong Kong, China argues that the scope of the transparency obligation will have very different implications for different members and implies that its final opinion on the transparency requirement will be made only upon the receipt of further information.

The US adopts a more neutral position to potential transparency provisions and voices some scepticism. Rather than making any specific proposals, it uses its submission to question the legality of several aspects of the transparency requirement under GATT law and draws the attention of WTO Members to the possible ramifications of a binding commitment on transparency.

> "Transparency is important to the sound application of antitrust law and maintaining the effectiveness, impartiality and credibility of such law. However, a number of questions remain concerning the application of transparency principles in a potential WTO Competition agreement. As in the non-discrimination context, these concerns generally arise at the point at which WTO rules and fundamental principles are discussed as applying to individual enforcement actions." (USA WT/WGTCP/W/218 2002)

The third broad theme to emerge from the submissions, represented most forcefully by the Chinese, Thai, and Indian contributions, is the insistence that flexibility be integral to any transparency provision. It should be noted that none of these countries specifically opposes the inclusion of transparency commitments in a future multilateral framework; rather, they make the case for a more gradual phase-in of these requirements. The Indian submission states, in opening, that

> "Both transparency and procedural fairness are no doubt desirable qualities that any administrative or judicial process must ensure." (India WT/WGTCP/W/215 2002)

And goes on to say,

> "Developing countries cannot be expected to adhere to the same standards as more developed ones in terms of transparency and procedural fairness." (India WT/WGTCP/W/215 2002)

While the Chinese take a less strident approach,

> "China stands for the inclusion of the principle of transparency in a future multilateral framework on competition policy, provided Members could reach explicit consensus on modalities before the Cancún Ministerial Conference for the negotiations on such a framework." (China WT/WGTCP/W/227 2003)

Before proceeding to argue that developing countries require a longer phase-in period before a transparency obligation would come into effect.

> "China therefore strongly supports the point made by Thailand in its submission (WT/WGTCP/W/213) that developing countries should be given enough time to build up their transparency and procedural fairness mechanisms progressively." (China WT/WGTCP/W/227 2003)

III.2 Non-discrimination

Before describing the submissions on non-discrimination, a few introductory observations may help clarify matters. First, the objectives of a policy are to be further distinguished from the *instruments* that a government has at its disposal to secure those objectives. These instruments include measures that a state, court, or their delegated representatives are empowered to take.

Second, such instruments are said to be *discriminatory* if they result in foreign entities being treated differently from otherwise identical domestic entities. The discrimination may be incorporated into the relevant legal provisions empowering a government to act or in to the stated means of implementing those provisions, in which

case the discrimination is said to be *de jure*. An example of de jure discrimination in competition policy might be a requirement to evaluate foreign take-overs of domestic newspapers more strictly than domestic take-overs. Discrimination that results from uncodified practices or uncodified norms of implementation is called *de facto discrimination.*

Third, generally, in international trade law the term non-discrimination has two facets: most-favoured nation treatment (MFN) and national treatment (NT). The two concepts are broadly similar in the sense that aim to equate the treatment of different suppliers of the same good or service. MFN treatment is enshrined in Article I of the GATT and sets out the principle that all foreign trading partners should be accorded equal treatment in the application of laws and regulations. National treatment in found in Article III of the GATT and requires that regulations are not imposed in a manner that treats imports from overseas producers worse than comparable products sold by domestic firms.

Furthermore, Janow (2002) notes

> "The tendency now in some WTO Article III:2 national treatment/nondiscrimination cases to consider whether products are directly competitive or substitutable also borrows a conceptual leaf from economics and its influence on competition policy analysis. The WTO jurisprudence of national treatment/nondiscrimination has clarified that equality of competitive opportunity (not outcome) underpins this concept, a perspective that is also congenial with competition policy norms."

Turning now to the submissions, a number of issues are identified. Few submissions are as strongly supportive of disciplines on non-discrimination as Korea,

> "… in principle, there should be no problem in applying National Treatment and Most-Favoured Nation Treatment in a straightforward way to competition policy." (Korea WT/WGTCP/W/212 2002)

Korea's submission, however, emphasises that non-discrimination can only practicably be applied to de jure treatment:

> "Korea believes that a possible multilateral framework on competition policy should focus on *de jure* discrimination: discrimination that is written into the law and is based solely on nationality." (Korea WT/WGTCP/W/212 2002)

The EC also raises the issue of the application of any disciplines to de jure and de facto discrimination. On this matter, the EC has taken perhaps the most explicit stance:

> "…we are *only* suggesting a binding core principle as regards *de jure* discrimination in the domestic competition law framework, i.e. the treatment accorded to firms according to the wording of the laws, regulations and guidelines of general application. The main reason for limiting WTO provisions to *de jure* discrimination is that, when transposed to a competition context, the concept of *de facto* discrimination could raise complex questions about the enforcement policies, priorities and prosecutorial discretion of competition authorities, including how competition law is being applied to individual cases.
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> Moreover, we propose to define *de jure* discrimination *exclusively* in relation to the domestic competition law regime. We are <u>not</u> proposing that a competition agreement should seek to introduce an absolute standard of national treatment to be applied to *any form* of government law or regulation." (EC WT/WGTCP/W/222 2002)

The USA adopts a neutral tone. Its submission is initially characterised by broadly supportive language,

> "The US experience has been that antitrust rules and their application are supportive of and consistent with the WTO's basic non-discrimination principles… discrimination on the basis of nationality, in favor of an individual competitor or group of competitors, is inconsistent with the purpose of antitrust rules." (USA WT/WGTCP/W/218 2002)

However, this neutrality is later tempered by questions about the application of disciplines on non-discrimination to bilateral cooperation agreements and to sectoral exemptions.

Australia's submission refers to its own domestic programme of exemptions and seems to indicate a willingness to tolerate similar exemptions in a multilateral framework. Australia notes:

> "Australia's competition law also allows for legislated exemptions from provisions of the TPA. However, where an exemption may have the effect of restricting competition, it must be demonstrated that this restriction is in the public interest." (Australia WT/WGTCP/W/211 2002)

Some have called into question the appropriateness of disciplines on non-discrimination for developing countries, as evidenced by the following quotation from a Thai submission:

> "In Thailand's view on non-discrimination, a competition law should not *discriminate between export and non-export firms…* We believe that the use of export cartels as a strategic trade policy to extract "rents" from foreign countries is unacceptable." (Thailand WT/WGTCP/W/213 2002)

Simultaneously Thailand makes the case that some flexibility should be maintained for developing nations which may otherwise be victimised by large multinational corporations from the industrialised world.

> "…developing countries should be allowed to: … exempt national and international export cartels. This is because most developing countries' exporters or importers are mainly small scale and may need to bind together to counter the bargaining power of larger buyers or sellers from industrialized countries..."(Thailand WT/WGTCP/W/213 2002)

India's submission amplifies the point made by Thailand and argues vigorously for special and differential treatment for developing countries on the matter of national treatment:

> "It is important in this regard to point out that a competition policy that ostensibly applies to all members equally is likely in practice to discriminate against firms in developing countries… domestic producers will in practice bear the brunt of a competition law that enshrines the NT principle, while allowing foreign producers to get away with similar infractions…In the context of meeting the needs of developing countries, it is more appropriate to adopt the concept of non-discrimination in terms of the need to treat different countries with different capacities in a differential manner, and of the need and responsibility to provide assistance, positive measures and affirmative action to local firms and institutions in developing countries to ensure their viability and development so that they can become increasingly efficient and competitive." (India WT/WGTCP/W/216 2002)

By far the most popular concern expressed in the submissions to the Working Group relate to exceptions and exclusions from an obligation on non-discrimination in so far as it relates to bilateral cooperation arrangements between nations. Japan and the EC both argue that such arrangements should be allowed to maintain their preferential status under a multilateral framework on competition policy:

> "…if the same definition of non-discrimination as that stipulated in the existing WTO Agreement is also used in the multilateral framework on competition policy, there could arise some misunderstanding whereby such bilateral agreement is contrary to the principle of non-discrimination. To avoid any misinterpretation, the bilateral agreement should thus be indicated as an exception to the non-discrimination." (Japan WT/WGTCP/W/217 2002)

> "…It is in the light of this that the EC has been proposing flexible modalities for international cooperation as explained in detail in previous submissions, most notably WT/WGTCP/W/184." (EC WT/WGTCP/W/222 2002)

III.3 Procedural fairness

The relevance of procedural fairness and the potential components of a provision on this subject are described in the Annual Report of the Working Group in 2002 in the following terms:

> "With regard to the principle of procedural fairness, the view was expressed that a common feature of all effective competition policy regimes was that they included guarantees that the rights of parties facing

adverse decisions and sanctions would be recognized and respected. Such guarantees could vary both in content and in form, because they reflected the tools of the legal system and the traditions that had generated the competition regime. Four broad categories of guarantees were relevant. First, there should be guarantees relating to access to the system. For example, this could involve the right of firms to have notice that a formal investigation by the competition authority was pending against them, and what the authority's objections to their conduct were. A second basic guarantee related to the defence of the firms involved. Firms should have the opportunity and the time to make their views known to the authority in writing or by participating in hearings, by submitting evidentiary proof or documents, and by having an opportunity to introduce testimony from witnesses who might corroborate their views on the facts. These types of guarantees would typically include some right of access to the authority's file. A third guarantee was the right of firms involved in competition proceedings to have decisions affecting them reviewed by an independent judicial body. Finally, the protection of confidential information, including business secrets, should also be guaranteed. (WT/WGTCP/6, 9 December 2002)

The submissions of WTO members reflect these points. The submissions from Australia and Canada, for example, are very supportive of the concept of due process. Australia suggests that the list of factors developed by the OECD Joint Group on Trade and Competition is essential in ensuring procedural fairness in the final multilateral framework (Australia WT/WGTCP/W/211 2002). This approach has also been taken by the EC:

"Such "rights of defence" in favour of firms involved in administrative proceedings before a competition authority could include for instance:

(i) the right for parties to proceedings under the domestic competition law to have access to the agency or court applying the law and to be informed of the objections of the authority to their conduct.

(ii) the right for such parties to express their views within a fair and equitable procedure in advance of an adverse decision addressed to them.

(iii) the right to be notified of a reasoned final decision detailing the grounds on which such a decision is based.

(iv) the right to appeal such administrative decisions by competition authorities and to have them reviewed by a judicial body." (EC WT/WGTCP/W/222 2002)

Korea takes the TRIPS agreement as a model for procedural fairness in a future multilateral competition framework and notes that:

"Korea believes that the TRIPS Agreement provides a good reference for demonstrating procedural fairness in competition enforcement because the TRIPS Agreement includes the minimum provisions necessary for procedural fairness, such as the following:

(a) All processes pertaining to competition law enforcement should apply equally to foreign and domestic persons (natural and legal) in a fair and transparent manner.

(b) All parties have the right to appeal against an unfavourable decision made by a competition authority or court.

(c) Both domestic and foreign individuals or firms should be guaranteed the right to appeal to and to request remedy measures from competition authorities or courts against anti-competitive practices.

(d) The proceedings must proceed in a timely fashion in order to ensure prompt measures to protect rights and prevent uncertainty or excess costs resulting from undue delays."(Korea WT/WGTCP/W/212 2002)

Canada is also broadly supportive, though less ambitious than Australia and the EC, and argues that less stringent characteristics could be sufficient:

"We would concur with other delegations that a notice of charges, fair and equitable administrative proceedings, and an appeal process, could provide the required checks and balances to the claims of

relevant parties. Clearly, we recognize that Members will differ in the implementation of these elements to reflect their different legal traditions." (Canada WT/WGTCP/W/201 2003)

The European Community has raised the following concerns about the exchange of confidential information.

> "What is important to a competition authority is to provide adequate protection for the business secrets and other confidential information provided by companies, physical persons and public authorities involved or co-operating in proceedings under domestic competition rules. Failing to provide adequate protection would seriously impair the effectiveness and credibility of a competition regime, may make firms in that jurisdiction hesitant to provide it with the information it needs to carry out its tasks and could even expose a competition authority – in certain legal systems – to claims for damages." (EC WT/WGTCP/W/222 2002)

This sentiment is echoed by Thailand,

> "…we agree that rights to appeal and to have private confidential information protected are crucial. However, each country should design its own appeal process and confidential information protection schemes that are consistent with the local legal, political and institutional environment." (Thailand WT/WGTCP/W/213/Rev.1 2002)

Korea's approach to confidential information is less concerned with the needs of the business community and focuses instead on the need for government to acquire information for prosecutions. It argues that,

> "While these procedures should be made available to protect the rights of the involved parties, they should also ensure that governments will be able to obtain the necessary information and documentation for a competition investigation." (Korea WT/WGTCP/W/212 2002)

Thailand, China and Hong Kong, China are all concerned that they be allowed to tailor the concept of due process to suit the local needs of their different judicial systems. China's submission puts the issue directly,

> "As far as the position of China is concerned, we hold that each and every Member of the WTO is entitled to design, establish and maintain its own procedural system that is suitable to its specific national conditions and in accordance with its level of development." (China WT/WGTCP/W/227 2003)

The US also signals some support for an approach which would allow countries to tailor the obligations of any future agreement with the exigencies of each Member's existing law.

> "…devising detailed provisions on procedural fairness that would not lead to interminable arguments on the comparable merits of various legal systems would be a difficult exercise because notions of fundamental fairness differ greatly from legal system to legal system. What may be considered a sound and fair policy in one jurisdiction may not be transferable or even necessary in another. On the other hand, a bare-bones framework on procedural fairness may not provide enough guidance to WTO Members or the general public on what meets minimum standards, and any Member's system could become subject to challenge with unpredictable results." (USA WT/WGTCP/W/219 2002)

At the same time, Thailand is concerned about progressivity issues in the sense that it desires a longer time period for the phase in of the due process requirement:

> "…gradually introduce greater transparency and due process in the administration and enforcement of competition law." (Thailand WT/WGTCP/W/213/Rev.1 2002)

III.4 Hard core cartels

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 WT/WGTCP/W/205 2002 paragraph 1).

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" (Korea WT/WGTCP/W/225 2002 paragraph 4).

This Korean contribution goes on to usefully describe a number of the key components of potential multilateral disciplines on hardcore cartels; namely, the definition and scope of hardcore cartels, obligations on WTO members to take effective enforcement action against such cartels, provisions for flexibility, and modalities for voluntary co-operation.[9]

With respect to non-discrimination and exemptions, Thailand has proposed that export cartels should be prohibited (Thailand WT/WGTCP/W/213 2002 paragraph 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 only apply to industrialised countries (India WT/WGTCP/W/216 2002 paragraph 3). With respect to international co-operation in the enforcement of anti-cartel laws, Thailand has made an ambitious proposal (see Thailand WT/WGTCP/W/205 2002). Specifically, Thailand 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 WT/WGTCP/W/205 2002, paragraph 5.)

This submission goes onto make clear that many of the above obligations would be mandatory and not voluntary. Thailand has also argued that—due to financial constraints in developing countries—that competition agencies in developing economies be

"financially compensated for delivering requested services and be allowed to cooperate to the extent possible subject to technical and financial constraints" (Thailand WT/WGTCP/W/205 2002, paragraph 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). This submission characterises hardcore cartels as:

'…cases where would-be competitors conspire to engage in collusive practices, notably bid-rigging, price-fixing, market and consumer allocation schemes, and output restrictions. These practices can appear in a number of shapes and combinations' (EC WT/WGTCP/W/193 2002, page 1).

The submission goes on to describe EC enforcement actions against private international cartels as well as reviews 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.

[9] It should be noted that this submission does not include specific proposals from Korea on each of these matters. Nevertheless, this submission is 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.

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

1. 'a clear statement that [hardcore cartels] are prohibited' (EC WT/WGTCP/W/193 2002, page 5). This presumably includes domestic hardcore cartels as well as private international cartels.

2. 'a definition of "what types of anti-competitive practices could be qualified as "hardcore cartels" and would be covered by the multilateral ban' (EC WT/WGTCP/W/193 2002, page 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 WT/WGTCP/W/193 2002, page 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 hardcore cartel.

3. a commitment by WTO members 'to provide for deterrent sanctions in their domestic regimes' (EC WT/WGTCP/W/193 2002, page 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 WT/WGTCP/W/193 2002, page 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 WT/WGTCP/W/193 2002, page 7).

III.5 Modalities for voluntary cooperation

The proponents of a provision on voluntary co-operation in a multilateral framework on competition policy have argued that it should contain four "tools," which are described in the passage below.

> "The point was made that the tools for voluntary co-operation that, according to this proposal, would be included in a multilateral framework were practical instruments which had come from experience with co-operation at the bilateral level. A first essential tool was notification, whereby one country would inform another of certain cases which affected the other country's important interests. Second, there was the exchange of information other than notifications to facilitate enforcement activities on either side. A third tool involved the provision of mutual assistance in the enforcement process. Finally, the proposed agreement would provide for: (i) traditional or negative comity, meaning that one country would take into consideration the important interests of other affected countries when taking a decision on a case; and (ii) positive comity, which would involve a country taking enforcement action upon a request from another country which suffered from anti-competitive practices originating in the territory of the requested country. All these tools were already found in the bilateral agreements to which some Members were party; regrettably, however, for the most part, developing countries were excluded from the benefit of such agreements" (WT/WGTCP/6 2002 page 24).

The submissions of WTO members in regard to voluntary cooperation are broadly supportive of a multilateral initiative in this area. Differences between the submissions hinge upon a few particulars regarding the possible future framework. The EC, Canadians and the Koreans, for example, are advocates of a Competition Policy

Committee which would be structured in a way that enabled it to monitor all notifications and transactions between separate Member states.

> "Canada takes the view that a WTO Competition Policy Committee should be established. Such a Committee could play a significant role in enhancing exchanges between Members and serve as a forum for Members to learn about each other's practices and policies. This type of dialogue would be distinct from the case-specific cooperation, such as exchange of notifications or coordination of investigations, that occurs under bilateral arrangements." (CanadaWT/WGTCP/W/202 2002)

> "If a multilateral framework on competition policy comes into being under the WTO, it would be desirable to set up a Competition Policy Committee that will enhance exchanges between Member countries and assist efficient implementation of the framework."(Korea WT/WGTCP/W/225 2003)

The EC's detailed outline of the functions of such a committee includes: contact points, experience exchanges, peer reviews and periodic reports on competition developments (EC WT/WGTCP/W/184 2002). Moreover, the EC has raised the following concern:

> "…bilateral cooperation agreements are the result of a long-standing, continuously evolving relationship between competition authorities with regard to the application and enforcement of their respective competition law regimes. Extending the provisions of such agreements to countries not originally parties to such agreements would not only defeat the underlying foundation for such agreements, i.e. the evolving relationship, but could also place considerable burdens on developing countries in administrative and financial terms. " (EC WT/WGTCP/W/222 2002)

Australia echoes the sentiment of the EC in so far as it would like to see a more formal system, especially in regards to the transfer of confidential information between nations (Australia WT/WGTCP/W/199 2002).

Thailand, the only developing nation to submit an extensive proposal on voluntary cooperation, believes that voluntary cooperation is one way of ensuring that developing countries are not targeted by the industries of industrialised countries for anticompetitive practices.

> "Thailand believes that the bilateral co-operative arrangements that are currently in place are helpful in enhancing capacity, but are not sufficient to protect developing countries from international cartels because countries with more advanced competition regimes would see no benefit from cooperating with countries whose enforcement of competition law is considered inadequate." (Thailand WT/WGTCP/W/205 2002)

Thailand takes the additional step of suggesting that members be *required* to cooperate in sharing of certain information and in investigations. As noted earlier, in the context of investigations into hard core cartels, Thailand calls for:

> "<u>Mandatory consultation,</u> which requires governments that are investigating an alleged cartel to engage in discussions with other Member countries whose interests may be affected." (Thailand WT/WGTCP/W/205 2002)

Hong Kong, China however, remains wary of voluntary cooperation and asserts that members need more information on this requirement before committing to it. Also, Hong Kong, China is concerned that voluntary cooperation commitments may place 'terrible burdens' on developing nations.

> "Voluntary cooperation, while voluntary in nature, nonetheless causes resources and capacity concerns to developing Members…There are also worries that certain developing Members are frequently required or targeted to provide cooperation assistance to developed Members, thus creating tremendous burden to the former." (Hong Kong, China WT/WGTCP/W/224 2003)

III.6 Capacity building

Capacity building typically involves an industrialised nation assisting in the creation and strengthening of the so-called competition policy infrastructure in developing countries. Capacity building may take the form of funds or expertise. Moreover, capacity building is generally taken to mean a long-term commitment on the part of the donor.

The submissions below are supportive of technical assistance and capacity building. The EC sees a role of international organisation in the provision of technical assistance.

> "The European Communities remains convinced that the WTO can make an important contribution towards the development of a reinforced and better co-ordinated approach to technical assistance in the competition field (as in other areas). As regards competition, it is clear that such a role should be undertaken in close cooperation with other relevant international organisations such as UNCTAD, the World Bank and bilateral donors and could only complement the primary role of the WTO, namely that of establishing binding rules and multilateral cooperation modalities." (EC WT/WGTCP/W/184 2002)

The US emphasises that differences between member states should be respected.

> "Our experience suggests, and much of the literature on the topic agrees, that technical assistance programs must take into account the country and culture, local concerns and conditions, and the body of domestic law." (USA WT/WGTCP/W/185 2002)

Japan makes similar remarks (see Japan WT/WGTCP/W/186 2002). Egypt and Thailand are also concerned that capacity building should take place within the framework of a country's specific needs, and preferably in the local language.

The USA is of the view that political and social considerations in the member state are also important. However, the most important aspect of capacity building is to ensure that the competition infrastructure is resistant to shocks, independent of government influence, supported by other independent institutions and long-lived. In relation to technical assistance for merger reviews, for instance, the US states:

> "…most new competition agencies do review mergers, so in those cases we suggest sensitivity to whether competition concerns rather than political and social concerns inform the analysis. All too often, a proposed acquisition is seen as a threat to incumbent firms or employment, rather than something that might enhance efficiency, increase consumer welfare, and expand output in the long run. Concerns about employment or the closing of antiquated facilities may be a political reality, but sound competitive analysis is essential in all merger reviews." (USA WT/WGTCP/W/185 2002)

III.7 Special and Differential Treatment

In the context of trade and competition policy, special and differential treatment generally refers to longer (delayed) phase-in times, opt-out provisions, specially-tailored safeguard clauses, and reduced obligations for developing countries (Fox 2002, Nottage 2003).

The submissions on special and differential treatment typically describe the particular challenges faced by developing countries. Hong Kong, China, notes

> "…developing countries face special challenges in establishing effective competition laws and policies. This is often attributable to the problems of developing a "competition culture", weak enforcement capabilities and court systems as well as markets that may be characterised by high degrees of concentration and histories of state intervention." (WT/WGTCP/W/224 2003 page 2)

China, in a similar vein, asserts

> "…adequate and effective special and differential treatment should be accorded in *all related aspects* to developing countries including the least developed countries. In this regard, we fully share the concerns

> shown by Thailand in its submission (WT/WGTCP/W/213) and similar concerns expressed by other developing Members." [emphasis mine] (WT/WGTCP/W/227 2003 page 3)

India declares that the special challenge it faces is a bias in favour of foreign suppliers, which works against developing countries. This bias, asserts India, justifies its claims for special and differential treatment.

> "In the context of meeting the needs of developing countries, it is more appropriate to adopt the concept of non-discrimination in terms of the need to treat different countries with different capacities in a differential manner" (WT/WGTCP/W/216 2002 page 3)

The perceived scope of special and differential treatment varies across the submissions. India's proposal is concerned with the application of special and differential treatment to transparency and procedural fairness only. China, on the other hand, takes a much broader approach, insisting that special consideration should be given to developing members across all aspects of a potential multilateral framework on competition policy. Thailand, like China, goes so far as to argue that special and differential treatment should be a distinct core principle of a multilateral framework on competition policy; arguing as follows:

> "…in compliance with the spirit of the Doha Declaration, various needs and constraints faced by developing countries will have to be taken into account. We, therefore, propose that "special and differential treatment" constitutes the fourth element of the core principles for competition policy." (WT/WGTCP/W/213/Rev.1 2002 page 1)

III.8 Further commentary on and summary of proposals for a multilateral framework for competition policy

Before offering any comments on the above submissions, it may be useful to summarise what appears to be the major elements of the proposals for a multilateral framework on competition policy, to be implemented under the auspices of the WTO. For purposes of this section, the authors have relied on the various elements that are set out in paragraph 25 of the Doha Ministerial Declaration and on related proposals by the proponents of a multilateral framework and clarifications that have been offered in the WTO's Working Group on the Interaction Between Trade and Competition Policy. These sources suggest that a multilateral framework might have the following elements:

1. A commitment by WTO Members to a set of core principles relating to the application of competition law and policy, including transparency, non-discrimination, and procedural fairness in the application of competition law and policy.
2. A parallel commitment to the taking of measures against hardcore cartels.
3. The development of modalities for cooperation between WTO members on competition policy issues. These would be of a voluntary nature, and could encompass cooperation on national legislation, the exchange of national experience by competition authorities, and aspects of enforcement.
4. A commitment to support the introduction and strengthening of competition laws and related institutions in developing countries, in a framework agreed at the WTO but in cooperation with other interested organisations and national governments.[10]

It should be appreciated that, to the extent that the eventual contents of any framework differ from the foregoing elements, the conclusions below might have to be qualified or revised.

Further analysis of these proposals provides answers to a number of potentially important questions. First, would a multilateral framework on competition policy be directed at government measures that restrain competition, or would it focus on anti-competitive acts of enterprises and their treatment under national competition laws? A

[10] For a similar compilation of the possible contents of a multilateral framework, see Anderson and Jenny (2001) or Anderson and Holmes (2002), page 35.

related question is: would a possible framework apply only to competition law and its enforcement as such, or to other policy instruments, such as industrial policies?

The proposals of proponents of a multilateral framework on competition policy indicate that the focus is on private anti-competitive practices, in particular on hardcore cartels. Furthermore, the proponents have argued that intergovernmental or state-to-state arrangements would not likely be covered by a WTO agreement on competition policy. The observation could be taken to mean that arrangements such as OPEC would not be affected by a multilateral framework.

Specifically, the adoption of such a framework would—the proponents note—require the enactment of one type of competition law; namely, an anti-cartel law. Moreover, the proponents have argued that WTO members need not create a separate state body to enforce this law (WTO 2002, page 39).

With regard to the second question above, the EC's contribution on core principles focuses on the implications of potential provisions for competition law and not for other policies—such as industrial policy. In the case of the proposed provision on non-discrimination, the EC states that:

> "In other words, what would be at issue would be the *treatment accorded to firms pursuant to the terms of domestic competition laws* as such, and <u>not</u> the treatment accorded to firms under a range of other policies" (EC WT/WGTCP/W/222 2002, page 4).

Moreover, in the specific context of national treatment, the EC has stated that:

> "We are <u>not</u> proposing that a competition agreement should seek to introduce an absolute standard of national treatment to be applied to *any form* of government law or regulation" (EC WT/WGTCP/W/222 2002, page 4).

With regard to the ability to define freely the objectives of national competition laws, at this point in time no proposal has been put forward to constrain the objectives that would be incorporated in relevant national laws. The following excerpt from the Annual Report of the Working Group for 2002 is also germane to this point:

> "the proponents also affirmed their belief that the proposed multilateral framework could and should preserve adequate "policy space" for developing countries to pursue economic and social policies they deemed necessary for their own development. It is perfectly legitimate for a government to decide that there were policy goals which overrode the need to protect competition" (WTO 2002, page 15).

With regard to the ability to tailor the application of competition law so as explicitly to take into consideration possible implications for innovation and other determinants of long-run economic performance, it is worthwhile to ask what implications, if any, would potential provisions on core principles have for the factors that a nation can take into account when it enforces its competition law? Two related questions are: would these provisions prevent a nation from taking into account non-economic factors and evidence when implementing its competition law? And would these provisions prevent a nation from taking into account long term or dynamic factors and evidence when implementing its competition law?

In answer to these questions, nothing in the proposals would seem to rule out tailoring the application of competition law to promote innovation or long run economic performance. Indeed, as already noted, the current proposals do not seek to limit the criteria to be employed in the application of national competition law. Moreover, in principle, nothing prevents the potential provisions on core principles from being drafted in such a way that non-economic factors, short-term factors, and long-term factors are stated as permissible considerations during the enforcement of competition law.

One aspect of the proposals that could have implications for certain application of competition law for industrial policy-related purposes is the proposed obligation concerning national treatment. If a nation has a merger review law and the proposed provisions on non-discrimination apply, then without some kind of sectoral exemption, it would be obliged to evaluate any proposed merger involving one or more foreign firms in the same way that it evaluates a merger between two domestic firms, for example.

However, a nation that wants to discriminate in this manner *without violating the proposed provisions on non-discrimination* in a multilateral framework on competition policy might be able to do so through the application of its laws on foreign investments. This possibility is stated without endorsement or criticism, and highlights the fact that there exist mechanisms other than competition law through which discrimination can be conducted. Therefore, with careful choice of policy instruments, it would seem that the goal of creating so-called national champions need not fall foul of a multilateral framework on competition policy.

With regard to the ability to implement relevant exceptions, exemptions and exclusions in national competition law, the following excerpt from the Annual Report of the WTO's Working Group on the Interaction Between Trade and Competition Policy for 2002 is pertinent:

> "With regard to the relevance of exceptions and/or exemptions from national competition laws and/or from a multilateral framework as a tool for managing any conflicts with national industrial policies, the view was expressed that given the diversity in stages and patterns of economic development among Members, sufficient flexibility had to be incorporated in any possible framework to make it workable among all WTO Members. A multilateral framework on competition had to provide for the possibility of appropriate exemptions or exclusions in two respects. First, many Members – including LDCs and other developing countries, but also some industrialized countries – wished to provide greater flexibility for small and medium-sized enterprises than for other firms under their competition laws. The proposed framework should permit this kind of flexibility. Second, as mentioned above, national interests might be safeguarded simply by providing for exclusion of sensitive economic sectors altogether from the substantive provisions of a multilateral framework, or from some of the core principles. Provisions for exemptions and exceptions would provide greater flexibility for WTO Members to achieve other national objectives such as industrial and economic development. Exceptions and exemptions must, however, be subject to appropriate transparency procedures, in order that firms trading with a Member or investing in a Member's economy would know where they stood. The suggestion was also made that the ability to implement exemptions should not be phased out over time, or be subject to periodic review" (WTO 2002, page 15).

Moreover, one leading proponent of a multilateral framework has recognised the importance of this issue and proposed that a flexible approach be taken to it. Specifically, the delegation of the European Community and its member States argues:

> "The issue of sectoral exclusions and exemptions from the scope and application of competition law is of great importance from both a competition and a trade perspective. At the same time it must be acknowledged that it constitutes a question of great sensitivity and complexity both among developing countries as well as several OECD members, including the EC. Some countries have made the point that, in order to gather consensus for the introduction of competition legislation, it has proved necessary to introduce certain sectoral exclusions and exemptions, but that these have then been limited over time. When analysing the recent developments, the trend has clearly been to eliminate such exclusions or to define them in increasingly narrow terms. We suggest that a flexible approach would be to focus - at this stage - on the essential question of transparency and its application to sectoral exclusions and exemptions, as well as their review over time. For instance, the Working Group could also usefully examine the experience of WTO Members who have phased out exemptions and exclusions (including the reasons for and the timing of such phasing out), as well as the domestic processes employed to enact such exemptions and exclusions" (EC WT/WGTCP/W/222 2002, page 7).

On the basis of the foregoing remarks, the principal elements of a multilateral framework on competition policy are taken to be:

1. A commitment to enact and enforce a national cartel law.
2. A commitment to apply a set of core principles (including non-discrimination) to whatever competition laws a nation already has on the statute books.

3. The development of a set of modalities on voluntary cooperation between competition agencies and such cooperation need not be limited to cartel enforcement actions.
4. A framework of measures that support the introduction and strengthening of competition policy-related institutions.

Given the earlier analysis of the current statements by proponent of their proposals, it might be useful to state that a multilateral framework on competition policy need *not*:

1. Require the creation of a new enforcement agency.
2. Require the enactment of any competition law other than a cartel law.
3. Require the abandonment of pro-development objectives for competition law.
4. Require the abandonment of existing exclusions, exemptions, and exceptions to national competition law.
5. Prevent the creation of so-called national champions, so long as those champions were nurtured using measures outside of a nation's competition law regime.

It should be stressed the foregoing remark in no way commends or condemns any of the five policy options listed directly above. These five points are important, however, as they reduce the number of factors that need to be considered in evaluating the impact of a multilateral framework on competition policy. (In the absence of the fourth point, for example, an analysis of current proposals for a multilateral framework would have to include the impact of eliminating exclusions, exemptions, and exceptions to national competition laws; a sizeable undertaking as these clauses differ markedly across nations.)

Part IV

WHAT IS THE CASE FOR INTERNATIONAL COLLECTIVE ACTION ON MATTERS RELATING TO NATIONAL COMPETITION ENFORCEMENT?

The case for binding international collective action in the area of competition policy differs from that in traditional reform, such as cutting tariffs and reducing quotas. For a long time, multilateral initiatives on the latter have been seen as necessary to overcome domestic opposition to reform. Specifically, simultaneous liberalisation at the international level offers the promise of greater access to foreign markets. This galvanises domestic export interests that now are prepared to support multilateral trade reform to a greater extent than they were prepared to support unilateral trade reform. In other words, domestic import-competing interests are no longer the only producers that have a strong interest in the outcome of trade reforms. (On this view, domestic consumers are thought to be too numerous and have too little at stake to bear the costs of organising collective action in the domestic political arena.) And so, multilateral trade reform is said to be more politically feasible than unilateral trade reform.

When the above arguments are applied to reforms to competition policy they tend to break down. As far as unilateral measures to strengthen competition enforcement are concerned, and assuming again that personal consumers are—by and large—too small to effectively organise, then it must be recognised that firms are *both* buyers of materials, energy, labour, and services as well as sellers of goods or services. This can produce conflicting interests for individual firms as the desired intensity of competition law enforcement, because a firm may well be engaged in anti-competitive conduct as a buyer or as a seller. The result is a fragmentation of producer interests on the desirability of strengthening competition laws, preventing the creation of wide-ranging and united producer lobbies in favour of (and for that matter, against) strengthening competition law and enforcement.

The arguments in the last paragraph apply to the unilateral strengthening of competition law enforcement as well as to international initiatives to simultaneously raise the tempo of such enforcement[11] or to introduce a minimum standard for competition law enforcement. Firms, for sure, have an interest in the manner in which competition laws are enforced abroad. That is not to say, however, that a nation's exporters have a common interest in how intensely those laws are enforced, in contrast to the case of tariff reductions where exporters' interests are aligned. Therefore, international initiatives on competition policy are unlikely to break any bottlenecks to domestic or unilateral reform, as is the case of multilateral initiatives on tariff reductions.

Although political-economy considerations do not provide a case for international collective action on competition policy matters, other arguments hold more promise—especially when they relate to hard core cartels. Findings such as those reported in part I 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 there is a case from an international accord that specifies minimum standards of cartel enforcement.[12]

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[11] Note also, that in contrast to cutting tariffs and reducing quotes, there is no general presumption that every increase in the tempo of competition law enforcement will improve the allocation of resources.

[12] Other arguments for international collective action against private international cartels can be found in Evenett, Levenstein, and Suslow (2001).

The first spillover arises from public announcements in one nation about cartel enforcement actions tend to trigger investigations by trading partners. For example, 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 US investigations were concluded (see Box 7).[13] 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.

The second argument is based on the fact that prosecuting an international cartel almost always requires securing testimony and documentation about the nature and organisation 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 their 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.

The reader may well respond to the above arguments by noting that they only provide a case for binding minimum standards for national anti-cartel enforcement—rather than a case for a multilateral framework on competition policy that includes other elements such as core principles (transparency, non-discrimination, and procedural fairness) and voluntary cooperation. However, as the discussions in part II and the submissions in part III made clear, effective hard core cartel enforcement is likely to depend on the adoption of provisions on voluntary cooperation and on core principles. Thailand and the United States, amongst others, forcefully made the case that cooperation between enforcement agencies is essential if evidence is to be secured from abroad to prosecute cross-border cartels. Moreover, the adoption of core principles will ensure that foreign firms are aware of their legal obligations, of their procedural rights, and that they will be treated on a comparable basis as domestic firms. Indeed, without the latter assurances, a firm may well be more reluctant to supply a nation's markets if it feels that there is now a greater chance of being unfairly targeted in a cartel-related enforcement action. In sum, for minimum binding standards on cartel enforcement to be *effective* other multilateral disciplines on voluntary cooperation and core principles are required. The disciplines in the proposed multilateral framework on competition policy are an inter-related package.

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 (see, for example, Hoekman and Mavroidis 2002). The purpose of this discussion has been to show the difficulties in obtaining evidence and cartel-related information underlie two such spillovers.

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[13] 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, D.C., were enforcing their jurisdiction's cartel laws in the first place.

Part V

AN ECONOMIC ASSESSMENT OF THE PROPOSALS FOR A MULTILATERAL FRAMEWORK ON COMPETITION POLICY

V.1 Identifying the key lines of causation

Unlike many trade policy reforms—which involve the reduction of a continuous variable, such as a tariff—the reforms considered here involves a number of discrete—and in many cases, binary—changes. For example, the decision to enact a cartel law is a binary choice. The discrete nature of the components of a multilateral framework on competition policy do not lend themselves to the traditional tools used to evaluate trade policy changes. However, a number of causal links can be traced out that, in some cases, lend themselves to quantification.

The principal lines of causation are as follows:

1. The effect of more vigorous cartel enforcement on the prices paid by consumers, including, but not limited to,
    i. the poor and
    ii. governments.
2. The effect of more vigorous cartel enforcement on the intensity of competition in markets more generally, and its knock-on effects for dynamic economic performance.
3. The effect of more voluntary cooperation on the effectiveness of national competition law, including the strength of any deterrents contained in those laws.
4. The effect of more vigorous cartel enforcement on the environment.
5. The effect of greater technical assistance and capacity building on the effectiveness of national competition law and enforcement and on government budgets in developing economies and in the least developed economies.

With respect to the first line of causation, box 2 provides a detailed overview of the incentives supplied by effective anti-cartel laws to firms that are members of, or are contemplating being members of, a cartel. Effective enforcement creates two types of deterrents: deterrents to the formation of cartels in the first place and strong disincentives to raise prices in cartels that do form. Customers—who may be the poor, other firms, or the government—are the principal beneficiaries of stronger deterrents to cartelisation. In the case of imported goods, in the presence of strong deterrents import prices will be lower than otherwise; which, in turn, improves the terms of trade. In the important case of the poor, the prices of necessities will tend to be lower in jurisdictions where the disincentives to cartelisation are stronger, holding all else equal.

Box 2: The economics of cartel enforcement

The purpose of this box is to describe—from a traditional "law and economics" perspective—the incentives supplied to firms by national anti-cartel enforcement regimes.[14]

From a law and economics perspective, the objective of anti-cartel laws should be to deter, and where necessary punish, firms who engage in cartelisation.[15] 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.[16]

A group of firms will be *collectively* deterred from cartelising 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 cartelisation 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 cartelisation.[17] 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.[18]

Interpreting existing enforcement practices in the light of the above conceptual considerations

Anti-cartel enforcement officials have exploited the "incentive compatibility" problems faced by cartels through the introduction of corporate leniency programs. These programs—which offer reduced penalties to firms that come forward with evidence of cartel conduct—induce members to "defect" from cartel agreements. These programs have also been motivated by the observation that the successful prosecution of cartels typically requires evidence supplied by at least one co-conspirator.[19]

The US corporate leniency program, last revised in 1993, can be rationalised 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 US authorities.[20] A second

[14] For a recent exhaustive survey of the law and economics literature, see Kaplow and Shavell (1998). The discussion in Box 2 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.

[15] 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 box. See Ministry of Commerce, Government of New Zealand (1998).

[16] These forms of cheating are sometimes referred to as chiseling.

[17] 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.

[18] 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 cartelisation too.

[19] At the core of such leniency programs 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*, June 3, 2001, section 3, pages 1ff.

[20] The German Bundeskartellant (Federal Cartel Office) revised their corporate leniency program in April 2000 to include such a provision. Dr. Ulf Boge, President of the Bundeskartellant, 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 Bundeskartellant (2000).

feature is that even if a firm is not the first to approach the US authorities, such a firm 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 in whether they impose criminal penalties in cartel cases. In particular, few jurisdictions allow the incarceration of business executives responsible for cartelisation.[21] However, US officials strongly believe that criminal penalties including the threat of incarceration are essential deterrents to cartelisation.[22] How does a law and economics approach assess this claim? First, incarceration involves costly losses of 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, then incarceration would be for sure 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 industrialised 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 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. In these circumstances, the incarceration of executives may serve two purposes: first, to create a clean break with the past and second to act as a threat to incoming senior executives not to attempt re-cartelisation. When considering the merits of incarcerating executives, the advantages of stronger deterrents might be weighed against the higher levels of evidence that are required 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 effectiveness of national anti-cartel laws against international cartels

The law and economics perspective explains why national enforcement efforts may be particularly ineffective in deterring international cartels. First, the ability of executives to organise 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 cartelising the market for industrial diamonds, collapsed with the trial judge citing the inability of US enforcement authorities to secure the necessary evidence from abroad.[23] Second, constraints on the

[21] Although the criminality of cartel behaviour has considerable implications for international cooperation and evidence sharing, the role of these sanctions as a deterrent is issue here.

[22] 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." Mr. 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 in 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 due to participating in a cartel.

[23] See Waller (2000).

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 cartelisation. In sum, supplying the right deterrent is more difficult when conspirators can hatch and execute their plans abroad. Both of these arguments imply that a nation which under-enforces its anti-cartel laws can effectively become a "safe haven" for international cartels, so creating adverse knock-on effects that harm its trading partners. **Indeed, the case for an international agreement that includes minimum standards for national cartel laws and enforcement is that it will help eradicate safe havens for private international cartels.**

Finally, the effectiveness of national leniency programs 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: Substantially adapted from Evenett, Levenstein, and Suslow (2001).

The effect on the government budget of enacting and enforcing a cartel law *for the first time* is ambiguous. The stronger deterrents will reduce the propensity of bidders for government contracts to rig bids and the like. The associated reduction in the prices paid by the government will enable government outlays to fall or will permit greater quantities to be purchased. (To the extent that any price reductions free up funds that enable a government to spend more on social safety nets, education, and health services, then improvements in social well-being are likely to result.) The potential reduction in the levels of government spending are to be weighed against the cost of effectively enforcing a cartel law. As far as the latter is concerned, holding all else equal, these costs are likely to be lower in those jurisdictions with stronger deterrents to cartelisation because the case load of the enforcement authority will be smaller in the first place. Consequently, it is misleading to state that implementing a cartel law must be a net burden to the national treasury (see Evenett 2003b for a further elaboration of this and associated remarks.)

With respect to the second line of causation, it should be noted that many experts have pointed out four ways in which greater rivalry between firms enhances dynamic economic performance. And to the extent that cartel enforcement promotes such rivalry—by deterring firms from engaging in price-fixing and the like—then the enactment and effective enforcement of cartel law will further promote economic development. The four channels identified by experts (and described and analysed at greater length in Evenett 2003b, part I) are as follows:

1. Greater inter-firm rivalry is said to focus managers' attention on raising productivity, so as to reduce the probability of bankruptcy or to increase current or expected future profits.
2. Greater inter-firm rivalry helps to ensure that the dynamic benefits of trade and investment reforms are not reduced or eliminated by private anti-competitive practices.
3. The enforcement of competition law improves the business climate in a nation and enhances its attractiveness as a destination for foreign direct investment.
4. Greater inter-firm rivalry in product markets sharpens firms' incentives to innovate.

If these causal links are valid, then one would expect to see in the data the enforcement of competition law positively contribute—along with many other factors—to measures of dynamic economic performance, such as economic growth.

With respect to the third line of causation, greater voluntary cooperation between enforcement agencies can result in stronger deterrents to anti-competitive acts by firms. In the case of cartels, the disincentive to price fix will be stronger if potential conspirators know that a nation's competition enforcement agency may receive assistance from another enforcement body in searching for evidence, interviewing witnesses, and conducting dawn raids.

Furthermore, with more extensive provisions on voluntary cooperation, a nation may be willing to launch investigations into a cartel that has been prosecuted abroad, if the former anticipates receiving considerable assistance from the agencies that have already prosecuted the cartel. As a result, greater voluntary cooperation is likely to have the same *eventual* consequence as the first line of causation discussed above; namely, lowering prices paid by customers. These gains are to be set against any increase in enforcement costs that come from requests for cooperation from abroad. Having said that, requests for cooperation from abroad can also reduce domestic enforcement costs (as resources spent on evidence collection may, for example, be less); so the net effect of cooperation on total enforcement costs is ambiguous.

With respect to the fourth line of causation, there are likely to be a number of distinct effects of greater cartel enforcement actions on the environment. First, to the extent that cartelisation is deterred and firms no longer curb output so as to keep prices high, then increased production levels may result in greater resource use, environmental pollution, and the like. In the opposite direction, to the extent that cartels take steps to impede the introduction of more environmentally-friendly products by new entrants, or to slow the introduction of such products by cartel members, then more vigorous enforcement actions against cartels will improve environmental outcomes. (For accounts of the means by which cartels block the entry of new firms and slow innovation, see Levenstein and Suslow 2001). Moreover, to the extent that enforcement of competition policy leads to price reductions of environmental services, this could encourage the use of such services, to the benefit of the environment.[24] In sum, then, the respective strength of these three lines of argument will determine whether or not greater cartel enforcement improves the environment.

With respect to the fifth line of causation, greater technical assistance and capacity building are likely to improve the enforcement of competition law in developing economies and in the least developed economies, but probably not immediately after signing a multilateral framework on competition policy. To the extent that such improvements increase the deterrent effects of national cartel law, then the benefits identified earlier—namely, lower prices for consumers—can be expected to follow.

To summarise, these lines of causation suggest that the likely effects of adopting a multilateral framework on competition policy are to:

1. Strengthen the deterrent to cartelisation, which reduces the prices paid by customers, including the poor, importers, other firms, and the government.

2. Reduce bid rigging for government contracts, freeing up funds for other government purchases including expanded social programmes.

3. Potentially necessitate additional expenditures on cartel enforcement, the magnitude of which will depend in large part on the case load of the enforcement agency, and therefore on the strengths of the deterrents of cartelisation.

4. Foster inter-firm rivalry more generally, which improves dynamic economic performance.

5. Expand production which can lead to greater resource use and pollution; but also to lower prices and larger sales of environmentally-friendly products.

V.2 Empirical assessment of the above lines of causation

Drawing upon publicly available data sources and existing studies, this section presents evidence that may be pertinent to an assessing the adoption of a multilateral framework on competition policy. This section is broken down into five substantive parts, each considering a separate line of causation identified above and the related empirical evidence.

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[24] For a recent example of how environmental factors have been taken into account in the enforcement of competition law within Europe, see http://europa.eu.int/rapid/start/cgi/guesten.ksh?p_action.gettxt=gt&doc=IP/01/850|0|AGED&lg=EN&display=

V.2.1 Effects on macroeconomic performance

A growing body of research supports the proposition that competition laws enhance macroeconomic performance in industrial and developing economies. Such research has drawn upon recent collections of large cross-country datasets of the factors which impede or facilitate competition in national markets, including measures of the strength of national competition or antitrust policy. The Global Competitiveness Report 2001-2002[25], for example, reports the average responses of business leaders in over 70 economies to two important competition-related questions. Each business leader was asked to grade on a seven point scale their responses to the following statements:

> "Anti-monopoly policy in your country is (1=lax and not effective at promoting competition, 7=effectively promotes competition)."

> "In most industries, competition in local markets is (1=limited and price cutting is rare, 7=intense and market leadership changes over time)."

The first statement refers to the effectiveness of one form of competition policy and the second to the extent of competition in a nation's market. Figure 2 plots the values of these two measures for all of the countries together. Table 6 presents summary statistics on these two measures in three of the four country groupings considered in this chapter. It is clear that both measures are substantially higher in the industrialised countries than in the developing economies, suggesting that the degree of intensity of competition and the vigour of anti-monopoly policy is weaker in the latter. However, in all three groupings the measure of the strength of anti-monopoly policy is strongly and positively correlated with the intensity of competition in national markets and is suggestive of—but does not prove—a causal link between the former and the latter.[26] If there is such a link, then to the extent that implementing a multilateral framework on competition policy strengthens national anti-monopoly policies, then the benefits of greater inter-firm rivalry should follow in the three country groupings found in table 6.

[25] This report is published annually by the World Economic Forum and is listed in the references as World Economic Forum (2002).

[26] In principle, there could be some (as yet unidentified) third variable that determines both of the measures reported in the text.

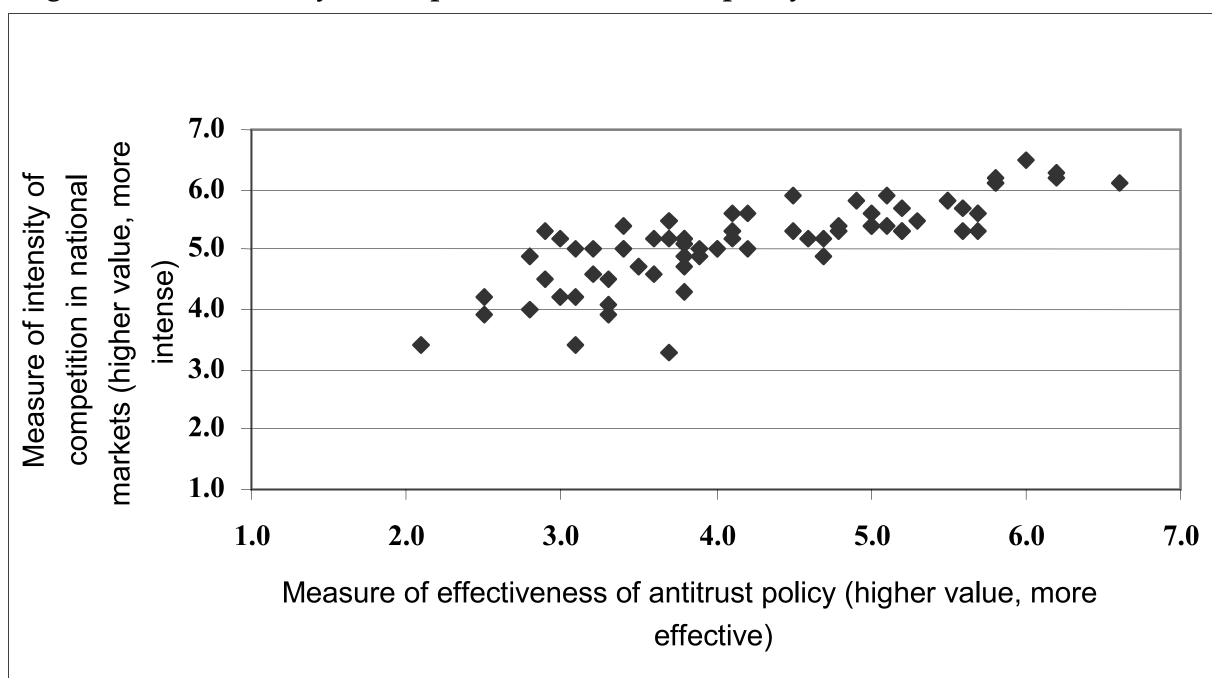
Table 6: Summary indicators of the rigour of competition in national markets and of competition policy, by country groupings

Grouping of countries	Intensity of Local Competition	Effectiveness of Anti-Trust Policy	Correlation coefficient	Number of countries
	In most industries, competition in the local market is (1=limited and price-cutting is rare, 7=intense and market leadership changes over time)	Anti-monopoly policy in your country (1=is lax and not effective at promoting competition, 7=effectively promotes competition)		
EU member states	5.79	5.46	0.79	14
Non-EU developed countries	5.65	5.46	0.72	8
Developing countries	4.87	3.68	0.63	50

Source: *Global Competitiveness Report 2001-2.*

Note: Data for only one least developed nation (Bangladesh) is reported in the *Global Competitiveness Report 2001-2*. For Bangladesh the reported value of the "intensity of local competition" measure is 4.5 and the reported value of the measure of "effectiveness of anti-trust policy" is 2.9.

Figure 2: Intensity of competition and antitrust policy



Other studies have examined the impact of competition law and policy on different measures of national economic performance. These studies invariably employ econometric techniques to strip out—or to "control for" in language of researchers—the variation caused by other pertinent factors, so enabling the analyst to isolate the impact of competition law and policy on the measure of economic performance being studied. Dutz and Hayri (1999) found that, after controlling for the many determinants of economic growth, national output grew faster in economies that took more strenuous steps to promote competition and to attack market power.

More ambiguous results on the effectiveness of competition law can be found in Hoekman and Lee (2003). Using data from 28 industries in 42 countries for the years 1981 to 1998, they first estimate the price-cost mark up in each industry in each country. They then show that these estimated mark ups tend to be smaller in economies with greater import penetration and lower domestic barriers to entry. They further show, using a dichotomous indicator of whether a country has a competition law or not, that such laws have no direct independent and statistically significant impact on the estimated price-cost margins. However, once they take account of the fact that nations choose whether to enact a competition law, they find that:

> "…industries that operate under a competition law tend to have a larger number of domestic firms, suggesting that in the long run, competition laws may have an indirect effect on domestic industry markups by promoting entry" (Hoekman and Lee 2003, page 4).

Although these authors would prefer to stress the importance of barriers to entry, this latter finding is also consistent with the view that the enforcement of competition law discourages incumbent firms from taking steps to frustrate the entry of new firms.

On the basis of these findings Hoekman and Lee (2003) conclude:

> "While competition law is potentially an important component of a pro-active competition policy, the analysis in this paper suggests that dealing with trade barriers and government regulations that restrict domestic competition by impeding entry and exit by firms may generate a higher rate of return" (page 23).

This carefully crafted conclusion should be interpreted with caution. Hoekman and Lee (2003) do not calculate the rates of return on trade reform, investment liberalisation, and measures to reduce barriers to entry, as one might expect given the strength of their conclusion. The costs of relevant reforms—which in the case of tariff reductions would include the potential loss of tariff revenues—are not considered in their paper, even though they ought to be part of any cost-benefit analysis of this issue. Although tariff reductions would normally be considered welfare-enhancing, in developing or least developed countries it may be difficult to make up any resulting revenue loss. At best, this paper has illuminated one set of factors that are central to any such analysis (the effects of different policy instruments on price-cost margins).

The effects of competitive policies have also been traced through to firm behaviour. In a study of Eastern European and other transitional economies, Dutz and Vagliasindi (2000) found that enhanced enforcement (not merely enactment) of competition policies facilitates the growth of higher productivity firms in an industry—that is, inefficient firms cannot be cushioned by the profits acquired through the exercise of market power.[27]

Carlin *et al.* (2001) used survey data on 3,300 firms in 25 countries to examine whether the degree of competition that a firm's manager perceives he or she is up against has a positive effect on a number of dimensions of performance. They found that the more rivals a firm perceives itself as having and the more sensitive to price a manager perceives the demand for its products to be, the better was the firm's record at improving productivity, cutting costs, and the greater the rate at which it developed new products and improved existing products.

Given the positive correlation between the intensity of competition in national markets and the strength of anti-trust policy discussed earlier (recall figure 2) and the findings of the Carlin *et al.* (2001) survey, the evidence suggests that by attacking anti-competitive practices, stronger antitrust policies stimulate competition in domestic markets. Moreover, as was reported earlier, greater inter-firm rivalry triggers a number of improvements in firm performance over time—such as innovation and increases in productivity—some of which may get passed on to

[27] This paper was also circulated at the OECD's Global Forum on Competition in February 2002.

their customers. These firm-level effects are in addition to the effects on economic growth identified earlier by Dutz and Hayri (1999).

To summarise, there is a nascent but growing empirical literature which has identified positive effects on macroeconomic performance of stronger enforcement of national competition laws in developing economies. This research complements the large body of evidence on the beneficial impact on the long term performance of firms and customers of greater rivalry, which can be enhanced by the appropriate enforcement of competition law.

V.2.2 Effects on government budgets

As discussed in section V.1, the effect of enforcing a cartel law on a government's budget is, in principle, ambiguous. However, in many developing countries the size of government purchases are now so large that only small reductions in the amount of bid rigging on state contracts would more than cover the likely costs of cartel enforcement.

Table 7: Estimated savings to governments through a reduction in bid rigging on just one percent of government contracts

Country	Conservative estimate of reduction in government spending in 2000, millions of US dollars		Budget of competition authority in 2000, millions of US dollars	Ratio of estimated savings to cost of competition agency	
	15 percent price reduction	20 percent price reduction		15 percent price reduction	20 percent price reduction
India	121.96	162.61	0.72	169.39	225.85
Kenya	4.85	6.46	0.24	20.19	26.92
Pakistan	20.34	27.12	0.33	61.64	82.18
South Africa	34.91	46.54	7.74	4.51	6.01
Sri Lanka	5.09	6.79	0.10	50.93	67.90
Tanzania	1.52	2.02	0.16	9.47	12.63
Zambia	0.51	0.68	0.19	2.68	3.58

Source: Data on central government spending and on the budget of the competition enforcement agency taken from CUTS (2003).

Table 7 provides some evidence of the magnitudes involved. The table reports data for seven developing economies that have competition enforcement agencies. Assuming either a 15 or 20 percent price increase caused by bid rigging, the table reports the savings to each respective national government if stronger cartel enforcement deterred bid rigging in just one percent of the value of state contracts. Those savings (reported in the second and third columns of table 7) are compared to the current outlays on the national competition enforcement agency (see the last two columns of table 7).

For countries with large government expenditures, such as India, a one percent reduction in bid rigging on state contracts would save the national treasury a sum equivalent to at least 16939 percent of the cost of its competition enforcement agency! This means that India could increase the expenditures on this agency by a hundred fold and still come out ahead—so long as the additional expenditures ensured that bid rigging on state contracts fell by at least one percent. Even for countries, such as Zambia, that have lower levels of government spending a one percent reduction in the extent of bid rigging would yield savings between 268 and 358 percent of the annual cost of running the competition enforcement agency in 2000. In short, the size of government expenditures in most developing countries are large enough that the savings on government purchases which result from less bid rigging is likely to easily offset any additional outlays needed to rigorously enforcing national cartel laws.

V.2.3 Effects on customers more generally

More rigorous cartel enforcement will not just benefit state purchasers; all customers can in principle benefit. To highlight this point, consider a recent analysis of the overcharges imposed on customers by the decade-long international vitamins cartel. Clarke and Evenett (2003) showed that in Latin America (and Asia and Western Europe for that matter) those jurisdictions that did not enforce their cartel laws (or did not enforce such laws once enacted) suffered greater overcharges than those nations that actively enforced their cartel laws.[28] In Table 8 the overcharges paid by each economy in Latin America that did not have an active cartel enforcement regime is reported along with the estimated reduction in those overcharges had active cartel enforcement occurred. On this one international cartel alone, Honduras would have paid US $5million less in overcharges throughout the duration of the cartel (that is, from 1990 to 1999) had it actively enforced a cartel law. This table, therefore, provides an indicator of the savings to customers in Latin America that would have flowed from national investments in cartel enforcement measures; investments that that implementation of a multilateral framework on competition policy would probably necessitate in most developing countries and least developed economies.

Table 8: More vigorous cartel enforcement in Latin America in the 1990s would have reduced the amount of overcharges paid on vitamins imports

Economy	Overcharges (millions of US dollars)	
	Paid during the vitamins cartel (1990-1999)	Estimated reduction in overcharges had their been vigorous cartel enforcement in this jurisdiction
Developing countries		
Argentina	73.83	15.09
Colombia	54.95	11.23
Venezuela	45.32	9.26
Honduras	25.87	5.29
Ecuador	14.82	3.03
Guatemala	10.41	2.13
Paraguay	4.57	0.93
Costa Rica	3.82	0.78
Bolivia	3.45	0.71
Dominican Republic	3.07	0.63
El Salvador	2.70	0.55
Jamaica	2.11	0.43
Nicaragua	1.20	0.25
Trinidad Tobago	0.81	0.16
Panama	0.68	0.14
Least developed country		
Haiti	0.11	0.02

Source: Derived from estimates in Clarke and Evenett (2003).

[28] See Clarke and Evenett (2003) and Evenett (2003b, part III) for a more general discussion of the costs and benefits of enforcing national anti-cartel laws. The available empirical estimates suggest that the reduction in overcharges incurred in jurisdictions with active cartel enforcement regimes from *only one* major international cartel in the 1990s would have gone a long way to pay for the entire state outlays of Brazil's, Mexico's, and several European Union member states' on their respective competition law enforcement regimes.

More generally, data on the magnitude of national imports and government consumption expenditures can be employed to gauge the likelihood that investing in cartel enforcement will be beneficial for developing countries and for the least developed countries. Table 9 includes data on 26 developing countries for which we could find no record in OECD documentation of active cartel enforcement in the 1990s. The purpose of Table 9 is to estimate the minimum percentage reduction in cartelisation on different purchases that would have to follow from a US $10 million investment in cartel enforcement for this outlay to pay for itself or to more than pay for itself.[29] In the case of a nation's imports, and assuming very conservatively that cartels raise prices by 15 percent, this amounts to asking what reduction in the percentage of imports that are cartelised is needed to generate savings of US$10 million? For these 26 countries, the mean reduction in cartelisation on imports necessary to justify an investment of this magnitude was 1.25 percent. For 12 of these countries, the reduction of cartelisation needed on imports was less than 1 percent.

Table 9: Very little of a developing country's imports and government spending need to be affected by cartelisation to justify a $10 million outlay on the enforcement on competition law

Developing country where there is no record to date of active cartel enforcement	Given a 15 percent price increase on cartelised products, what percentage of a nation's [see column headings below]….would have to be cartelised to justify spending US$10 million on the enforcement of competition law?		
	Imports in 2001	Government consumption expenditure in 2001	Imports plus government consumption expenditure in 2001
Algeria	0.58	0.95	0.36
Cameroon	3.06	7.98	2.21
Costa Rica	1.06	3.28	0.80
Cote D'Ivoire	2.28	8.12	1.78
Ecuador	1.25	4.27	0.97
Egypt	0.35	0.77	0.24
Ghana	2.05	9.30	1.68
Guatemala	1.34	7.16	1.13
India	0.10	0.15	0.06
Indonesia	0.16	0.71	0.13
Iran	0.23	0.42	0.15
Jordan	1.24	3.61	0.92
Kenya	2.05	6.92	1.58
Lebanon	1.09	2.50	0.76
Malaysia	0.09	0.72	0.08

[29] The US$10 million figure is almost certainly larger than the outlays necessary to implement a cartel law in a small or middle sized developing economy. It is worth noting in this regard that South Africa—whose competition enforcement agencies and practices are well regarded—currently spends less than US$8 million of taxpayers' money.

Mauritius	2.71	13.09	2.25
Morocco	0.63	1.25	0.42
Pakistan	0.61	1.13	0.40
Philippines	0.20	0.76	0.16
Senegal	4.41	16.50	3.48
Syria	1.38	3.32	0.98
Thailand	0.11	0.71	0.09
Tunisia	0.80	2.80	0.62
Turkey	0.16	0.39	0.12
Venezuela	0.35	0.77	0.24
Zimbabwe	4.09	4.40	2.12
Mean	**1.25**	**3.92**	**0.91**
Minimum	**0.09**	**0.15**	**0.06**
Maximum	**4.41**	**16.50**	**3.48**

Notes:

1. The assumptions underlying these calculations are very conservative. For instance, the assumption of a 15 percent price increase due to cartelisation is at the lower end of estimates of the price impact of cartels (see, for example, the case studies in Levenstein and Suslow 2001).
2. Moreover, the US$10 million price tag for the enforcement of national competition law is in excess of what the South African government spends each year on the enforcement of all of its competition laws, not just cartel law. The South African experience is pertinent as it is widely regarded as having an effectively enforced set of competition laws.
3. The underlying data on imports and government consumption expenditures were taken from the World Development Indicators Online.

The third column of Table 9 reports the comparable percentage reduction in state contracts needed to generate US$10 million in savings to the national treasury. These percentages are larger than those for imports and reflect the fact that government consumption expenditures are smaller than the value of imports. Even so, the mean reduction in state contracts affected by bid rigging needed to generate US$10 million in savings In these 26 countries is less than four percent.

Table 10: For the least developed countries more of their nation's imports and government spending would need to be affected by cartelisation to justify a $10 million outlay on the enforcement on competition law

Least developed country where there is no record to date of active cartel enforcement	Given a 15 percent price increase on cartelised products, what percentage of a nation's [see column headings below]….would have to be cartelised to justify spending US$10 million on the enforcement of competition law?		
	Imports in 2001	Government consumption expenditure in 2001	Imports plus government consumption expenditure in 2001
Bangladesh	0.73	3.64	0.61
Benin	11.62	27.11	8.13
Burkina Faso	11.02	21.17	7.25
Chad	8.41	56.76	7.33
Congo	5.81	23.55	4.66
Ethiopia	3.84	7.25	2.51
Guinea	7.46	43.89	6.38
Madagascar	4.96	24.88	4.14
Malawi	10.08	24.84	7.17
Mali	6.98	22.48	5.33
Mozambique	4.47	17.62	3.56
Nepal	4.37	13.63	3.31
Niger	16.33	30.83	10.67
Rwanda	17.81	33.13	11.58
Tanzania	3.26	8.62	2.36
Togo	12.17	65.04	10.25
Uganda	4.48	10.81	3.17
Yemen	2.26	5.87	1.63
Mean	**7.56**	**24.51**	**5.56**
Minimum	**0.73**	**3.64**	**0.61**
Maximum	**17.81**	**65.04**	**11.58**

Notes:

1. The assumptions underlying these calculations are very conservative. For instance, the assumption of a 15 percent price increase due to cartelisation is at the lower end of estimates of the price impact of cartels (see, for example, the case studies in Levenstein and Suslow 2001).
2. Moreover, the US$10 million price tag for the enforcement of national competition law is in excess of what the South African government spends each year on the enforcement of all of its competition laws, not just cartel law. The South African experience is pertinent as it is widely regarded as having an effectively enforced set of competition laws.
3. The underlying data on imports and government consumption expenditures were taken from the World Development Indicators Online.

Turning to the least developed countries, the comparable percentages to those calculated in Table 9 for developing economies are reported in Table 10. Taken at face value, the percentages reported in Table 10 suggest that recovering US$10 million in savings would be less likely in the poorest nations than in developing countries more generally. Having said that, the least developed countries would probably need to spend less than US$10 million to properly enforce any cartel laws. Moreover, nothing in the current proposals for a multilateral framework for competition policy prevents these nations from creating a regional competition enforcement agency; which may help spread some of the costs across a number of regional partners. Even so, these calculations may well suggest that the least developed countries are in greater need of budgetary support (as well as other forms of capacity building) than the less poor group of developing countries.

It is important to appreciate that the greater the extent of any sectoral or general exemptions from a multilateral provision banning hard core cartels the smaller the overall benefits of adopting such a provision. Moreover, such exemptions may have a beggar-thy-neighbour aspect to them; as is likely to be the case in certain international transportation sectors. In particular, government-inspired or government-tolerated cartels are rife in ocean liner shipping conferences. These conferences involve cooperative working arrangements as well as agreements to set prices. Fink, Mattoo, and Neagu (2001) estimate that ending these cosy arrangements between private shipping companies would reduce transportation prices on US routes by 20 percent, so reducing the cost of exporting goods to the American market.

There is another form of state encouragement of private international cartels.[30] Many nations appear to have taken the view that their own firms can cartelise 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 that are members of export cartels. For example, such export cartels are exempted from US law under the Webb-Pomerene Act and the Export Trading Companies Act. At least 14 jurisdictions have such exemptions in their competition laws (see Evenett 2003c and OECD 1995), although data on the extent to which such laws are actually used by firms is hard to obtain. 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 cartelising foreign markets then there is a greater risk that the same firms will attempt to cartelise 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, then one might have expected the relevant legislation to be confined to these firms. Invariably, 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-thy-neighbour act that enlightened policymakers have sought to discourage since the wave of retaliatory tariff increases in the early 1930s. Whether these exemptions become an important topic for negotiation or discussion remains to be seen; but their capacity to erode the benefits of a multilateral framework on competition policy are clear.

[30] The use of antidumping investigations and orders to "police" international cartel arrangements also constitutes another state encouragement to fix prices in global markets (see Pierce 2001, Levenstein and Suslow, 2001, and Evenett 2003c). Moreover, Stiglitz (2001) has argued that certain governments went so far as to establish what was effectively a cartel in aluminium in the mid-1990s after leading US producers began to suffer from substantial losses.

V.2.4 Effects on the poor and the environment

Recalling the discussion in section V.1 above, the effect of more rigorous cartel enforcement is likely to have a number of beneficial effects for the poor and possibly for the environment also. However, the available evidence here is sparse, to say the least. Much more research is needed here to ascertain these particular consequences of adopting a multilateral framework on competition policy.

As cartels are almost always secret conspiracies, researchers, experts, and other commentators cannot observe the entire set of currently cartelised markets and so comprehensive estimates of the likely social and environmental consequences of breaking up those cartels cannot be generated. However, past enforcement actions can provide a guide to the types of non-economic effects that are likely to follow from the implementation of a multilateral framework on competition policy and the anticipated increase in cartel enforcement actions. Table 11 summarises a number of those effects from recent cases in developing economies, which include direct effects of cartels on the price of foodstuffs consumed by the poor (the case of poultry in Peru) and on the price and access to medicines (the case of pharmacists in Romania).

Table 11: Selected prosecuted cartels with effects on sustainable development in developing countries

Country in which cartel operated	Details of cartel	Effects on the poor, the environment, inequality, development
Egypt	Bid rigging on USAID projects to build sewage facilities in Cairo, 1989-1995	Fewer of the poor served by resulting more costly projects; making the reduction in disease and environmental degradation fall below levels that would have been achieved in the absence of the cartel.
China	Bid rigging on school building contracts, 1998	Fewer schools build or built over a longer time horizon; retards development of human and social capital of children. Absence of school opportunities may also contribute to higher levels of child labour, especially in rural areas.
Estonia	Price fixing of milk products, 2000.	Milk is a staple food product for the poor.
Peru	Poultry market, 1995-1996	Chicken is the staple source of protein for poor Peruvians. Price of live chickens (the preferred way in which Peruvians buy this meat) rose 50 percent during the cartel. Cartel has clear distributional consequences, reducing the standard of living of the poor.
Romania	Members of the Pharmacists Association were involved in practices to restrict entry, 1997-2000	Detrimental impact on access to medicines with attendant implications for health over the three to four years of the cartel.
South Africa	Distribution of citric fruits, 1999	Reduced access to a key source of vitamins, necessary for warding off disease.

V.2.5 Effects of voluntary cooperation on the enforcement of national competition laws

The effect of potential multilateral provisions on voluntary cooperation will depend in part on whether those provisions are subsequently used. Here it is important to recognise that jurisdictions with a track record for active cartel enforcement are much more likely to be asked to provide assistance to or to cooperate with another jurisdiction. (For example, a nation is unlikely to receive a request for cooperation in discussing the so-called theory of a case if it has not been active in enforcing similar cases in the past.) Given that most enforcement actions against international anti-competitive practices have been undertaken by the industrialised countries, then developing countries and the least developed countries are unlikely to bear the brunt of most requests for cooperation should multilateral provisions on voluntary cooperation be agreed. In fact, the opposite is more likely with competition officials from the developing world seeking assistance from their more experienced counterparts in the industrialised countries. The recent experience of Brazil (see box 3 below) is instructive in this regard. It would seem, therefore, that if anything the implementation of multilateral provisions for voluntary cooperation would initially intensify such cooperation among industrial countries and less wealthy nations would probably be net demanders for such cooperation in the near term. As the latter gain more experience with enforcing competition laws, then requests for voluntary cooperation will increasingly flow in both directions.

Box 3: 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.

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 onto describe how these two hints enabled the Brazilian authorities to assemble a case against the cartel members.

V.2.6 Summary

This part has presented quantitative and qualitative evidence of the likely consequences of adopting the proposed multilateral framework on competition policy for various economic, social, and environmental indicators. With the possible exception of some of the least developed countries, for each country grouping the reduction in cartelisation and overcharges needed to justify increased outlays on cartel enforcement is very small. This finding alone suggests that the net impact on a national treasury of adopting the provisions of a proposed multilateral framework on competition policy is likely to be positive; in stark contrast to the fears about the implementation costs of adopting multilateral rules on the so-called "new issues" in the world trading system. These benefits for the government budget and for customers more generally are in addition to the positive impact on macroeconomic performance of greater rivalry between firms. Moreover, recent enforcement actions in developing countries suggest that there are also social and environmental benefits from greater enforcement of national cartel laws, although the evidentiary record here is far less developed.

Part VI

RECOMMENDATIONS FOR POLICYMAKERS AT CANCUN AND BEYOND

This chapter has presented an assessment of the potential consequences of adopting a multilateral framework on competition policy. This assessment may be of interest to policymakers as they decide whether to launch negotiations on competition policy at the WTO Ministerial in Cancun and, should negotiations be launched, afterwards. Moreover, as competition policy disciplines are increasingly being incorporated in to regional trading agreements, the issues and evidence described here will have some bearing on those matters too.

A feature of the analysis presented here is that it attempts to draw out implications of a multilateral framework on competition policy for key economic issues. Moreover, the available empirical evidence is marshalled to assess the strength of these linkages. This focus on the empirical record—and on what has and has not actually been proposed—underlies the following policy recommendations.

First, negotiations over the provisions of a multilateral framework on competition policy—as currently proposed—do not contain any traps for WTO members. Even the implementation costs of adopting such provisions are likely to be more than offset by savings that result from reductions in bid-rigging on government contracts; and plenty of evidence is available to suggest that bid-rigging is a significant concern for WTO members of all types. Moreover, the proponents of such a framework have explicitly recognised the need to preserve development-related policies—indeed, few of the policies that are typically associated with industrial policy would fall under the remit of a multilateral framework on competition policy.[31]

Second, launching negotiations on a multilateral framework on competition policy will not prevent WTO members from taking independent steps to enact or reform national competition law and enforcement practices; and so no domestic options are being foreclosed by the Ministerial decision in Cancun. Moreover, launching multilateral negotiations in an of itself will not constrain ongoing regional negotiations on competition policy provisions or developments in other international fora, such at the International Competition Network or at the Organisation for Economic Cooperation and Development.

Third, given the dozens of international cartels prosecuted since 1993, it is quite likely that adoption of a multilateral framework will result in a reduction in overcharges on international commerce of billons of dollars. As discussed in part IV of this chapter, the current proposals for a multilateral framework sensibly include provisions on voluntary cooperation and core principles that are central to ensuring that the provisions on hard core cartels are effective, while at the same time providing exporters with greater assurances of equal treatment in any enforcement actions.

Fourth, the benefits from adopting such a framework will depend in large part on the sectors covered and the prevalence of exclusions, exemptions, and the like. Nations with sizeable export interests might want to take a very hard line against those that wish to exclude government-sponsored cartels in national and international transportation sectors. Moreover, it is difficult to see an argument for retaining beggar-thy-neighbour legal provisions such as exemptions from national competition laws for export cartels.

Fifth, while scarcity of resources (financial, human, and other) may justify longer phase-in times for developing countries to comply with the provisions of a multilateral framework, it is hard to justify blanket carve outs to these provisions, including provisions against non-discrimination. Arguments for flexibility and progressivity should be based on identifiable and quantifiable constraints faced by developing countries, be reviewed on a periodic basis to see if the constraints are still binding, have a sound basis in fact and in economic logic, seek only that policy discretion which cannot be obtainable any other legal means.

[31] For a further elaboration of this point see Evenett (2003b, part I).

Sixth, the effective participation of all WTO members in negotiations for a multilateral framework for competition policy will require continued technical assistance and capacity building. These needs are, of course, likely to intensify should any meaningful framework be negotiated.

Finally, there is a strong case on conceptual and evidential grounds for launching negotiations on a multilateral framework on competition policy. That is not to say that these negotiations will necessarily bear fruit or that the evidentiary base is as detailed as one might like. But given the size of the overcharges that hard core cartels have inflicted on customers—firms, governments, as well as private consumers—over last few years, the question really ought be asked as to whether WTO members can afford not to launch a comprehensive negotiating effort to attack these pernicious anti-competitive practices that are eating away at the very benefits created by the world trading system.

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Appendix: WTO Member Submissions to the Working Group on the Interaction Between Trade and Competition Policy since 2002

Submissions are organized by subject matter in the following order: transparency, non-discrimination, procedural fairness, hard core cartels, voluntary cooperation, capacity building, special and differential treatment, and more general remarks on competition and competition policy.

Submissions on transparency

Member	Proposals	Claims made in support of proposal	Evidence cited
Australia WT/WGTCP/W/211 24 September 2002	Transparency should include: • publication of relevant laws; • inquiry points for requests about laws; • notification to the WTO of changes to laws; • mechanisms for the review of competition decisions upon request; • mechanisms for advising complainants about the status of a matter; and • mechanisms for procedural transparency, to ensure that competition laws are administered in a reasonable, objective and impartial manner. • Public Information • Confidentiality • Exemptions are okay, so long as they are done in a transparent way	• By having these principles in place, they could provide additional support for a competition agency to do its job properly without being influenced by 'non-competition' arguments • this would provide a domestic consumer or business with easy access to legislative information and also provide avenues for making inquiries or complaints to a foreign regulator • provide useful and necessary information about how and where to lodge complaints, what processes etc	▪ OECD Joint Group on Trade and Competition's set of core principles include transparency, non-discrimination and procedural fairness. ▪ 1999 APEC Ministers endorsed the APEC Principles to Enhance Competition and Regulatory Reform
Canada WT/WGTCP/W/226 12 March 2003	• 'sufficiently' high standards of transparency should be adopted, standards which balance progressivity issues with the necessary technical assistance • Obligations should be on Member states rather than private parties	• Transparency crucial to application of exemptions	Evenett, Simon J. (2003). *A Study of Issues Relating to a Possible Multilateral Framework on Competition Policy*, commissioned by the secretariat of the World Trade Organization. 23 February, 2003

China WT/WGTCP/W/227 14 March 2003	• China supports the inclusion of transparency in a future multilateral framework • Developing countries should be given enough time to build up their transparency and procedural fairness mechanisms progressively	• Transparency is in line with China's draft Law on Legislation and the Draft Anti-Monopoly Law • The five areas of transparency outlined by the OECD will be too burdensome for governments of developing countries to adhere to	• OECD Secretariat, Core Principles in a Trade and Competition Context • Thai submission, WT/WGTCP/W/213
European Community WT/WGTCP/W/222 19 November 2002	• Part of a transparency obligation would be a notification requirement for WTO members to the Competition Policy Committee concerning their laws, regulations and guidelines of general application • Sectoral exclusions – the EC suggest that a flexible approach would be to focus - at this stage - on the essential question of transparency and its application to sectoral exclusions and exemptions, as well as their review over time		
Hong Kong, China WT/WGTCP/W/224 5 March 2003	• The scope of the transparency requirement must be identified. Two levels of transparency can be inferred from current WTO requirements: o Publication o Notification	• The scope of the transparency obligations has very different implications for Members.	OECD, COM/TD/DAFFE/CLP(2001)21, para.29
India WT/WGTCP/W/215 26 September 2002	• Developing countries cannot be expected to adhere to the same standards as more developed ones in terms of transparency and procedural fairness • Private firms must also be bound by transparency, e.g. they must surrender vital evidence regardless of whether or not it is confidential	• A system that has an inbuilt bias in favour of foreign suppliers cannot be said to be fair	

Korea WT/WGTCP/W/212 24 September 2002	• Desirable to define more clearly in a multilateral agreement the scope of the information subject to publication and notification obligations • Efficient technical assistance should be extended to developing members to ensure their compliance to this obligation		
Switzerland WT/WGTCP/W/214 24 September 2002	• Transparency is a Core Principle to be included in a Multilateral Competition Agreement • The Swiss define this to mean that domestic and foreign firms should have similar access to competition authorities	• This will ensure an effective competition policy	
Thailand WT/WGTCP/W/213 24 September 2002	• Laws and regulations, exemptions, guidelines and competition authorities' decisions or court deliberations should be disclosed • Each country should maintain the freedom to decide sectoral exemptions that are consistent with its own national industrial policy		
USA WT/WGTCP/W/218 6 November 2002	• none	• The US raises several questions in relation to the legality of transparency and non-discrimination in relation to existing GATT law	• background note by the WTO secretariat, June 1999 (WT/WGTCP/W/127) • background note by the WTO Secretariat, "Modalities of Voluntary Cooperation" August, 2002 (WT/WGTCP/W/204) • background note by the WTO Secretariat, "Modalities of Voluntary Cooperation" June, 2002 (WT/WGTCP/W/192) • USDOJ and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, April 1995 (www.usdoj.gov/atr/public/guidelines/internt.htm,) • General Agreement on tariffs and Trade, 1947 • Federal Trade Commission, Performance Report Fiscal Year 2000, (http://www.ftc.gov/opp/gpra/prfy2000.pdf)

Submissions on non-discrimination

Member	Proposals	Claims made in support of proposal	Evidence cited
Australia WT/WGTCP/W/211 24 September 2002	• Defines non-discrimination to be the application of competition principles in a manner that does not differentiate between or among economic entities on the basis of nationality. It relates to the behaviour and decisions made by the competition authority – i.e. that the competition law is applied in a non-discriminatory way • Australia maintains a non-discriminatory approach to the administration of its competition law. However, there are other government policies that co-exist which have allowed the Government to meet other priorities and goals eg. foreign ownership restrictions on Australian media. • As regards exemptions from Competition Law - Exemptions must be in the public interest - Subject to review • Non discrimination in terms of enforcement cooperation entails that - Cooperation between		

	Australia and any other nation must be extended on equal terms to any third nation - Exchange and handling of information should be done on a flexible and case-by-case basis		
Canada WT/WGTCP/W/226 12 March 2003	• Decisions of competition authorities or implementation of competition obligations should not be subject to scrutiny by dispute settlement panels • Non-discrimination provisions should not be extended to cover existing or future cooperation agreements to avoid implications of MFN • Obligations in a competition agreement should be on Member states, as opposed to private parties		Evenett, Simon J. (2003). *A Study of Issues Relating to a Possible Multilateral Framework on Competition Policy*, commissioned by the secretariat of the World Trade Organization. 23 February, 2003
China WT/WGTCP/W/227 14 March 2003	• The flexibility for developing members as provided in the existing WTO Agreements related to competition policy is inadequate	• There is a conflict between competition policy and our industrial and development policy objectives • Distinctions by developing countries in the treatment offered to domestic enterprises as compared to that of foreign enterprises will not be completely avoidable	OECD Secretariat, Core Principles in a Trade and Competition Context Thai submission, WT/WGTCP/W/213

European Community WT/WGTCP/W/222 19 November 2002	• Suggest a binding core principle that *de jure* discrimination be adopted in the domestic competition law framework • need for the inclusion of the non-discrimination principle in a WTO framework agreement on competition by way of a separate, specific provision, which would take into account the particularities of competition law and policy	• The main reason for limiting WTO provisions to *de jure* discrimination is that, when transposed to a competition context, the concept of *de facto* discrimination could raise complex questions about the enforcement policies, priorities and prosecutorial discretion of competition authorities, including how competition law is being applied to individual cases.	
Hong Kong, China WT/WGTCP/W/224 5 March 2003	• Certain areas of non-discrimination, if implemented, may cause problems for developing countries	• Horizontal and sectoral exemptions and exceptions from non-discrimination exist within developing countries and these may not be fully-consistent with non-discrimination	OECD, COM/TD/DAFFE/CLP(2001)21, para.29
India WT/WGTCP/W/216 26 September 2002	• Violations of national treatment principle in relation to competition laws are likely to be beneficial to the economic development of developing countries and competition within them	• Less strict application of competition laws in developing countries would prevent wastage and under-utilisation of scarce resources. Firms need to achieve a minimum threshold size to finance their research and development activities • Competition policy that ostensibly applies to all members equally is likely in practice to discriminate against firms in developing countries • Non-discrimination has not been uniformly applied in	

		GATS so no reason it should be uniformly applied under a competition agreement	
Japan WT/WGTCP/W/217 26 September 2002	• Bilateral agreements should be indicated as exceptions to non-discrimination	• This will avoid "misinterpretations"	
Korea WT/WGTCP/W/212 24 September 2002	• National treatment and MFN should be applied in a "straightforward" way to competition policy • Multilateral agreement should focus on de jure rather than de facto discrimination	• In terms of de facto versus de jure discrimination, discrimination may only be assessed with regard to what is written into law and based solely on nationality	
Switzerland WT/WGTCP/W/214 24 September 2002	• Non-discrimination is a core principle to be included in a Multilateral Competition Agreement • Some exemptions and exclusions should be possible especially in relation to industrial policy, if dealt with in a clear and transparent way ○ Principle of national treatment needs to be more restricted	• This will ensure an effective competition policy	
Thailand WT/WGTCP/W/213 Rev.1 26 September 2002	• Developing countries should be allowed to exempt national and international export cartels	• Combined strength required to counter the bargaining strength of larger buyers from developed countries	

USA WT/WGTCP/W/218 6 November 2002	• none	• questions legality of transparency and non-discrimination in relation to existing GATT law	• background note by the WTO secretariat, June 1999 (WT/WGTCP/W/127) • background note by the WTO Secretariat, "Modalities of Voluntary Cooperation" August, 2002 (WT/WGTCP/W/204) • background note by the WTO Secretariat, "Modalities of Voluntary Cooperation" June, 2002 (WT/WGTCP/W/192) • USDOJ and Federal Trade Commission, Antitrust Enforcement Guidelines for International Operations, April 1995 (www.usdoj.gov/atr/public/guidelines/internt.htm,) • General Agreement on tariffs and Trade, 1947 • Federal Trade Commission, Performance Report Fiscal Year 2000, (http://www.ftc.gov/opp/gpra/prfy2000.pdf)

Submissions on procedural fairness

Member	Proposals	Claims made in support of proposal	Evidence cited
Australia WT/WGTCP/W/211 24 September 2002	Characteristics of procedural fairness are as follows: • Due process - Rights of complainants to petition competition authorities to take action and to seek explanations for inaction on matters. - Rights of complainants to bring complaints before the competition authority. - Rights of private parties to directly access the judicial system to seek remedies for injury suffered by anticompetitive practices. - Due process for all parties in administrative or judicial procedures including protection of confidential information. - Where competition authorities make dispositive case decisions, publication/explanation of such decisions by the competition authorities should be required. - All parties should have appropriate access to avenues of appeal. • Accountability • Predictability • Independence		
Canada WT/WGTCP/W/226 12 March 2003	• Certain basic provisions for procedural fairness should be enumerated in a WTO agreement - Notice of charges, fair and equitable proceedings and an appeal process	• Adoption and adherence to these basic provisions will provide assurances to private parties that proper procedures are being followed	Evenett, Simon J. (2003). *A Study of Issues Relating to a Possible Multilateral Framework on Competition Policy*, commissioned by the secretariat of the World Trade Organization. 23 February, 2003

	could be sufficient • Obligations should be on Member states rather than private parties		
China WT/WGTCP/W/227 14 March 2003	• Each member is entitled to design, establish and maintain its own procedural system that is suitable to its specific national conditions and in accordance with its level of development	• Procedural fairness pertains to legal provisions, including many complicated operational and technical practices, which are not easily resolved by developing nations	OECD Secretariat, Core Principles in a Trade and Competition Context Thai submission, WT/WGTCP/W/213
European Community WT/WGTCP/W/222 19 November 2002	• effective and adequate domestic remedies, • Such "rights of defence" in favour of firms involved in administrative proceedings before a competition authority could include for instance: ○ the right for parties to proceedings under the domestic competition law to have access to the agency or court applying the law and to be informed of the objections of the authority to their conduct. ○ the right for such parties to express their views within a fair and equitable procedure in advance of an adverse decision addressed to them. ○ The right to be notified of a reasoned final decision detailing the grounds on which such a decision is based. ○ The right to appeal such administrative decisions by competition authorities and to have them reviewed by a		

	judicial body. • There need to be legal and practical limitations on what information can be exchanged to protect confidential information		
Hong Kong, China WT/WGTCP/W/224 5 March 2003	• The unique features of individual regimes should be taken into account when designing rules on procedural fairness	• Appeal and review proceedings involved in a due process can be very costly to developing members • Stringent obligations are likely to create costly or insurmountable compliance problems	• Korea submission, WT/WGTCP/W/212
Switzerland WT/WGTCP/W/214 24 September 2002	• Due Process is a core principle which needs to be included in a Multilateral Competition Agreement	• It will ensure an effective competition policy	
Korea WT/WGTCP/W/212 24 September 2002	• Competition laws should apply equally to foreign and domestic persons • All parties have the right of appeal • Domestic and foreign parties may appeal to and request remedy measures from competition authorities or courts against anti-competitive practices • Proceedings must go forward in a timely fashion and ensure prompt measure • Rules should define the disclosure responsibilities of private entities in a competition case	• Prompt judgments protect rights and prevent uncertainty or excess costs from delays accruing to applicants	• TRIPS agreement

Thailand WT/WGTCP/W/213 Rev.1 26 September 2002	• Each country should design its own appeal process and confidential information protection schemes • Developing countries be allowed to gradually introduce greater transparency		• Thai Trade Competition Act, 1999
USA WT/WGTCP/W/219 6 November 2002	• None	• Raises issues to be considered by the membership in deciding upon procedural fairness	

Submissions on hard core cartels

Member	Proposals	Claims made in support of proposal	Evidence cited
Australia WT/WGTCP/W/198 26 July 2002		• Hard-core cartels are the most insidious form of anti-competitive conduct and must be stopped	• OECD Council Recommendation on HCCs, 1998 • OECD, Nature and Impact of Hard-Core Cartels and Sanctions against Cartels under National Competition Laws
Canada WT/WGTCP/W/201 12 August 2002	• None (poses questions instead)		"Private International Cartels and Their Effect on Developing Countries" by Margaret Levenstein and Valerie Suslow OECD "New Initiatives, Old Problems" (23 March 2000)
Canada WT/WGTCP/W/226 12 March 2003	• Agreement should include a clear statement that hard core cartels are prohibited - Balance between cartels that are banned and those that are allowed as pro-competitive arrangements or partnerships • Should include domestic and international cartels • Means of cartel prosecution to be at the discretion of individual members • Obligations should be on Member states rather than private parties	• Domestic cartels are as damaging as international ones	Evenett, Simon J. (2003). *A Study of Issues Relating to a Possible Multilateral Framework on Competition Policy*, commissioned by the secretariat of the World Trade Organization. 23 February, 2003
European Community WT/WGTCP/W/193 1 July 2002	• The EC believes that a global competition concern such as the fight against pernicious hardcore cartels is best addressed by a firm response in the form of an international commitment to ban such practices • A multilateral ban on hardcore cartels would be implemented by means of corresponding domestic legislation and policies • A provision regarding hardcore cartels	• Such a ban should be included in a WTO competition agreement as nowhere else would it have the backing of a sufficient number of countries. Any alternative would run the risk of cartels seeking to shift the focus of their illegal behaviour to countries not	• OECD Hard Core Cartel Report (2000) • *"An inside look at a cartel at work: common characteristics of international cartels"*, by the US Department of Justice • *"Hard Core Cartels" (2000)*, Organisation for Economic Co-operation and Development • *"Private International Cartels and Their Effect on Developing Countries"* by Margaret Levenstein and Valerie Suslow • World Development Report 2001 background paper • WTO Symposium on 22 April 2002 by Simon J. Evenett • WTO Symposium on 22 April 2002 by Professor Frederic Jenny

	in a multilateral agreement should have the following: ○ A clear statement that hardcore cartels are prohibited ○ A definition of what types of anti-competitive practices could be qualified as "hard-core cartels ○ An accurate description of the limits of the concept of hardcore cartels, in order to be able to decide which practices should not be covered by the multilateral ban ○ An inclusion of suitably effective sanctions ○ Voluntary cooperation and exchange of information between jurisdictions ○ Be transparent	adhering to the ban, in an attempt to escape the jurisdiction of those countries that do prohibit cartels. The main consequence of this "forum shopping" would be greater damage to the countries not adhering to the ban	
Hong Kong, China WT/WGTCP/W/224 5 March 2003	• Further deliberations are required on whether a future multilateral competition framework should cover hard core cartels	• If the obligations are prescriptive, developing members will face severe compliance problems • The burden of adjustment will fall upon developing Members because the developed ones already have institutional capacity and basic legislation in place	
Japan WT/WGTCP/W/217 26 September 2002	• Hard core cartels should be globally banned	• The ban should be based on the universal recognition of the harmful effects of hard core cartels	

Korea
 	
WT/WGTCP/W/200
12 August 2002
	• Definition of hard core cartels should be clear and applicable
	• Require each member at minimum to prohibit hard core cartels and have procedures or provisions for sanctions and remedies
	  ○ Sanctions that ensure deterrence
	  ○ Enforcement procedures and institutions with the power to detect and remedy such cartels
	• Peer review mechanism should be implemented to improve regulations, learn from member experiences and contribute to a common understanding
	• Flexible approach warranted
		• Must provide practical guidance to regulations and obligations of Agreement
		• Flexible approach necessary for less experienced members, development objectives and differences in legal systems
			• United Nations' Set of Principles and Rules on Competition (Set)
			• OECD Council, 1998 Recommendation of the Council Concerning Effective Action Against Hard Core Cartels (C(98)35/FINAL)

Korea WT/WGTCP/W/225 5 March 2003	• There must be a clear statute against hardcore cartels • Must be an authoritative agency that can make independent judgments from the perspective of competition law • There should be procedural guarantees to ensure sufficient level of sanctions and remedies on hardcore cartels • It is not always essential to have a specialized competition law or a separate specialized agency to achieve this • A transitional period for developing countries could be provided for, but only on a temporary basis		
Mexico WT/WGTCP/W/196	• Mexico supports the prohibition of hard core cartels	• Hard core cartels have caused much damage (listed in document) to	• Reference to the pro-competition effect of Mexico's Federal Competition Commission (CFC) and Federal Law on Economic Competition (LFCE)

14 August 2002		Mexico's economy	
Switzerland WT/WGTCP/W/194 28 June 2002	• Supports the adoption of a minimum standard for fighting hard core cartels	• It will be difficult for a single competition authority in one nation to successfully prosecute an internationally operating cartel • Bilateral agreements demand time-consuming often-expensive negotiations and implementation measures. • Multilateral cartels may affect other or more countries than are covered by a bilateral agreement	• OECD Competition Committee, Working Party 3, survey of more than 100 cartel cases • Suslow, Levenstein, "Private International Cartels and Their Effect on Developing Countries", World Bank Development Report, 2001 • OECD, Annual Report on Switzerland 2001-2002 • Havana Charter • OECD Global Forum on Trade, June 2002
Thailand WT/WGTCP/W/213 24 September 2002	• Thailand believes that international cartels *do not* have a development justification and thus should not be included, and should be removed from, the list of sectoral anti-trust exemptions		• OECD, Competition Policy in Liner Shipping: Final Report, 2002
Thailand WT/WGTCP/W/213 Rev.1 26 September 2002	• Thailand believes that international cartels *rarely* have a development justification and should be removed from the list of sectoral anti-trust exemptions		• OECD, Competition Policy in Liner Shipping: Final Report, 2002

Thailand
 	
WT/WGTCP/W/205
15 August 2002
	• Cooperation to fight hard core cartels should include:
	  ○ Notification
	    ▪ Promptly alert concerned authorities in affected countries
	  ○ Mandatory consultation
	    ▪ Engage other governments who may be affected
		• Without positive comity agreements, developing countries are likely to continue to be victimized by collusive practices	World Bank, World Development Report 2001

	by a discovered cartel ○ Assistance ▪ Cooperation in information, experience and suggestions • Mutual legal assistance should be a medium term goal • Exchange of non-confidential information is recommended		
USA WT/WGTCP/W/203 15 August 2002	• Members may wish to consider: ○ Publicly condemning hard core cartels ○ Maintaining anti-cartel sanctions of deterrent value ○ Establish domestic enforcement procedures and institutions sufficient to permit investigation, adjudication and remedy of cartel activities		• Doha Ministerial Declaration, paragraph 25 • OECD cartel recommendation
OECD WT/WGTCP/W/207 15 August 2002	• Investigative tools should include ○ Leniency Programs ○ Sanctions ▪ the fines against those that are prosecuted should be at least two or three times the gain, • supports exclusions from the agreement of "agreements, concerted practices, or arrangements that ○ (i) are reasonably related to the lawful realisation of	• Cartels are not associated with any legitimate economic or social benefits that would justify the harm it causes • The harm from cartels falls on developed and developing countries alike ▪ The most successful approaches include those that have been based on the cartel members ' total turnover or gross revenues, or on the volume of commerce	• Levenstein, Margaret, Valerie Suslow (2001) Background Paper for the World Bank's World Development Report 2001 "Private International Cartels and Their Effect on Developing Countries." • OECD Competition Committee, Report On The Nature And Impact Of Hard Core Cartels And Sanctions Against Cartels Under National Competition Laws, available at http://www.oecd.org/pdf/M00028000/M00028445.pdf

	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." • Sanctions should reflect the fact that potential cartel participants will tend to discount the expected costs of penalties by some factor that represents their view on the likelihood of detection and punishment. •	affected by the cartel.	
UNCTAD WT/WGTCP/W/197 15 August 2002	• Hard core cartels should not be exempt from national laws ○ This prohibition does not exist with respect to price undertakings made by sovereign states (Sovereign Acts of State) with respect to a basic commodity such as oil, for example		• United Nations Set of Principle and Rules on Competition (Article 9, Section B)

Submissions on voluntary cooperation

Member	Proposals	Claims made in support of proposal	Evidence cited
Australia WT/WGTCP/W/199 26 July 2002	• Voluntary cooperation is both necessary and desirable - Informal networks between agencies should be used for the exchange of non-confidential (but not necessarily public) information - Formal antitrust treaties should be used for exchange of confidential information	• Actions against anti-competitive practices can be less rigorous than others in some countries, therefore formalized exchanges of confidential information are preferable. • Convergence of laws and procedures, as well as cooperation between agencies in this context, has the potential to simplify processes, reduce time delays and therefore lower the costs of compliance for the companies involved • Effective domestic enforcement of competition rules is based on having adequate and correct information to determine whether unlawful conduct has taken place; the same is true internationally • With increasing globalization, it is more possible than ever for anti-competitive conduct to transcend national boundaries and have an adverse effect on domestic markets	• As noted in paragraph 13 of the Secretariat paper (WT/WGTCP/W/191), "international cartels are unlikely to respect the neatly defined territories covered by existing bilateral agreements"
Canada WT/WGTCP/W/202 12 August 2002	• Canada takes the view that a WTO Competition Policy Committee should be established. It should - Provide a forum for exchange of information - Coordinate or monitor technical assistance - Examine the interaction between competition policy and international trade policy issues - Provide a forum for	• Cooperation is integral to a multilateral agreement on competition policy	

	non-binding peer review - Consider the long term vision of enhanced cooperation		
Canada WT/WGTCP/W/226 12 March 2003	• Cooperation should be voluntary • The framework for cooperation does *not* need to be flexible • Voluntary cooperation does not need to be limited to cartels • The international community could envisage a competition policy committee as a means of enhancing cooperation.	• Certain complementarities exist between different types of anticompetitive activities • A committee could provide a forum for information exchange, technical assistance coordination and monitoring, peer review, and providing a long term vision of cooperation • Peer review provides a non-adversarial forum to query and better understand other country policies and practices	Evenett, Simon J. (2003). *A Study of Issues Relating to a Possible Multilateral Framework on Competition Policy*, commissioned by the secretariat of the World Trade Organization. 23 February, 2003
European Community WT/WGTCP/W/222 19 November 2002	• Provisions on non-discrimination should not be extended to cover existing or future cooperation arrangements in the competition area, including bilateral cooperation agreements on competition. Nor should they be extended to cover consultation and cooperation provisions contained in bilateral or regional free trade agreements	• Were such a limitation not to be placed on the non-discrimination core principle, situations could occur whereby one or more WTO members not parties to a bilateral cooperation agreement would seek to avail themselves of the provisions of such an agreement by invoking MFN.[32]	See also WT/WGTCP/W/184
European Community WT/WGTCP/W/184 22 April 2002	• Two types of cooperation provisions are required for the proposed agreement - provisions to facilitate case-specific cooperation - provisions relating to general exchanges of information • cooperation should be undertaken in close	• The WTO can make an important contribution towards the development of a reinforced and better co-ordinated approach to technical assistance in the competition field	UNCTAD, TD/B/COM.2/CLP/21, para. 32

[32] By the proposed limitation of the non-discrimination principle the ensuing situation would in essence be that which would prevail under normal rules of public international law, cf. Article 34 of the Vienna Convention on the Law of Treaties according to which; "A treaty does not create either obligations or rights for a third State without its consent", and, Article 36 (1) according to which; "A right arises for a third State from a provision of a treaty if the parties to the treaty intended the provision to accord that right either to the third State, or to a group of States to which it belongs, or to all states, and the third State assents thereto. Its assent shall be presumed so long as the contrary is not indicated, unless the treaty otherwise provides."

	alliance with other relevant international organisations such as UNCTAD, the World Bank and bilateral donors and could only complement the primary role of the WTO, namely that of establishing binding rules and multilateral cooperation modalities		
Hong Kong, China WT/WGTCP/W/224 5 March 2003	• Members will need to make a realistic assessment of the breadth and depth of possible obligations under a future competition agreement	• Members need more information before deciding whether or not they are capable of taking on the obligations involved • Developing members are frequently targeted to provide cooperation assistance to developed members, creating tremendous burdens for the former.	

Japan
 	
WT/WGTCP/W/195
12 August 2002
	• Japans suggests three levels for cooperation at an international level
	  ○ Support for capacity building
	  ○ Information and experience exchange
	  ○ Cooperation on individual cases, involving
	    ▪ Notification
	    ▪ Enforcement cooperation through information exchange
	    ▪ Enforcement coordination
	    ▪ Positive comity
	    ▪ Comity
	• Japan is concerned that international cooperation should not take precedence over bilateral cooperation
		• A competition authority in a single country will experience difficulties addressing cross-border issues	• Japan-Singapore Economic Partnership

Korea WT/WGTCP/W/225 5 March 2003	• Cooperation should take the form of capacity building and technical assistance where the countries with more experience in competition law enforcement help	• There is a substantial gap between different levels of competition law enforcement and institutional development between Members	

	developing countries enhance the level of competition law enforcement • A requested country should respond to requests to cooperate. If its response is a refusal, then sufficient reasons should be provided for not cooperating • Cooperation can take the form of o Information and evidence exchange o Positive and Negative comity o Coordinated law enforcement • It would be desirable to set up a Competition Policy Committee to o Facilitate the exchange of information o Conduct 'peer' reviews o Evaluate technical assistance programs	• Korea believes that effective world-wide regulation of hardcore cartels will be possible when voluntary cooperation between the developed and developing worlds becomes more vigorous	
Thailand WT/WGTCP/W/205 15 August 2002	• Multilateral cooperation is the favourable alternative for developing economies • Cooperation to fight hard core cartels should include: o Notification ▪ Promptly alert concerned authorities in affected countries o Mandatory consultation ▪ Engage other governments who may be affected by an uncovered cartel o Assistance ▪ *Required* cooperation in information, experience and suggestions • Mutual legal assistance should be a	• Without positive comity agreements, developing countries are likely to continue to be victimized by collusive practices	World Bank, World Development Report 2001

	medium term goal • Exchange of non-confidential information is recommended		
USA WT/WGTCP/W/204 15 August, 2002	• None	• Antitrust cooperation can be very beneficial in minimizing conflict, enhancing enforcement effectiveness and promoting analytical convergence	• OECD, Revised Recommendation of the Council Concerning Co-Operation Between Member Countries on Anti-Competitive Practices Affecting International Trade, July 1995 (C(95)/Final) • OECD, Revised Recommendation of the Council Concerning hard Core cartels (C(98)35/Final)
OECD WT/WGTCP/W/208 17 September 2002	• There are three basic forms of voluntary co-operation ○ traditional comity ○ investigatory assistance ○ positive comity • Three general principles for voluntary cooperation are ○ notification ○ co-ordination ○ cooperation		• *Information Sharing in Cartel Cases – Suggested Issues for Discussion and Background Material*, CCNM/GFC/COMP(2002)2, 24 January 2002; available at: http://www.oecd.org/competition. • International Co-operation in Mergers: Summary of Responses to Questionnaire to Invitees and Suggested Issues for Discussion, CCNM/GFC/COMP(2002)6; available at: http://www.oecd.org/competition.
UNCTAD WT/WGTCP/W/197 15 August 2002	• Voluntary cooperation would consist of ○ Consultations ○ Peer reviews		

Submissions on capacity building

Member	Proposals	Claims made in support of proposal	Evidence cited
Australia WT/WGTCP/W/190 29 May 2002	• None	Australia recognises the importance of inter agency co-operation in regard to technical assistance and capacity building in the field of competition policy, particularly to the exchange of experience in developing countries, the best way of meeting those needs and identifying specific opportunities that maximize cooperation and coordination. This can be effected by • Participation in international fora • Participation in international organisations	WT/WGTCP/W/125 and WT/WGTCP/W/148
European Community WT/WGTCP/W/223 27 February 2003	• Detailed tabulation of all technical assistance projects currently funded by the European Community		
European Community WT/WGTCP/W/184 22 April 2002	• The EC has found that targeted and coordinated technical assistance for capacity-building purposes to boost and upgrade the human and institutional framework of developing country competition law implementation and enforcement is indispensable and could be reinforced by a WTO competition agreement.[33] • key principles for a reinforced approach to technical assistance include the following: - greater support to technical assistance in the competition field - an integrated approach to technical assistance	• Anti-competitive practices are rarely confined to merely one jurisdiction	

[33] This type of technical assistance should be seen as separate and distinct from that which will be provided for purposes of enabling developing countries to participate effectively in future WTO negotiations on competition.

	- convergence towards "best practices" - the development of a "model work programme" enforcement assistance for developing countries affected by cartels domestically and abroad	• An integrated approach will ensure continuous and coherent support for developing countries and transitional economies at different stages of the development of a domestic competition regime	
Egypt WT/WGTCP/W/187 29 May, 2002	Developed countries should assist in • developing locally appropriate competition legislation • funding the implementation of a competition law • encouraging a competition culture	• Different countries have different needs and capacity building should take place on a country-by-country basis	
Japan WT/WGTCP/W/217 26 September 2002	• Proper technical assistance and capacity building must be carried out	• This will ensure that each participating country has more than a "certain level" of the core principles	
Japan WT/WGTCP/W/186 19 June 2002	• Members should respect different approaches to competition policy from different members • Adequate technical assistance must be provided • Common principles must be agreed upon between donor and recipient	• Japan's experience assisting numerous developing nations has convinced it of the soundness of this approach	• APEC, 1996 "Working Group on Competition Policy and Deregulation" • APEC, 1999 Ministerial Meeting "APEC Principles to Enhance Competition and Regulatory Reform"

Romania
 	
WT/WGTCP/W/181
17 April 2002
	• Developing and least developed nations require enhanced support for technical assistance
	• Technical assistance takes place on two levels:
	  ○ Discussion of theory and models for competition law and policy
	  ○ Implementation of competition laws, conduct of investigations and market definition
		• To obtain the best results from a competition agreement, international organizations must better integrate the developing countries into the international economic system	Lester Thurow (Ed.), "Head to Head", Warner Books, 1993

Romania WT/WGTCP/W/181/Rev.1 22 April, 2002		• When countries with successful experiences in operating competition law join these efforts and share their experiences and know-how, the effort of developing nations is much easier	• OECD Competition Law and Policy Committee • OECD, Global Forum on Competition, October, 2001 • International Competition Network, October 2001 • WTO, Conclusions of the Ministerial Conference, Doha, 2001 • UNCTAD, Set of Principles and Rules for the Control of Restrictive Business Practices

Thailand
 	
WT/WGTCP/W/188
29 May 2002
	• Capacity building programs should include
	  ○ Long-term commitments of 2 – 5 years
	  ○ Local needs addressed in a local language
	  ○ Flexibility
	  ○ Building institutional knowledge by transferring know-how in training
	• Development of transparent and fair procedures in recipient countries
	• Sector specific bodies should be involved in the capacity building
	• Public awareness needs to be built
	• There should be a particular emphasis on provincial business and consumer communities
	• Civil organizations such as consumer organizations and the media should be targeted for education as well.
		• Short term programs ineffective
		• In terms of flexibility, locally initiated projects could help advocate competition
		• Institutional knowledge allows recipient countries to train the trainers and acquire practical know-how
		• Sector specific bodies ensure consistency across various sectors of the economy
		• Provincial business are more prone to anti-competitive abuses
		• Important to build a wide constituency of actors across society to ensure success of competition policy
			• World Bank provided drafting expertise for rules and regulations on abuse of dominance which were translated into Thai

USA
 	
WT/WGTCP/W/185
22 April 2002
	• Characteristics of an effective technical assistance program for antitrust enforcement should include the following:
	  ○ Focus on cartels
	  ○ Focus on market barriers rather than prices
	  ○ Focus on competition concerns only in assessing mergers and acquisitions, ignoring political and social concerns.
	• Effective antitrust laws should:
	  ○ Be effective remedies that act as deterrents
	  ○ Be well designed institutions resistant to failure
	  ○ Balance between the antitrust authorities and the judiciary
	  ○ Provide prosecutorial discretion
	  ○ Provide appropriate and realistic deadlines for official action
	  ○ Withstand institutional demands created by a legislative mandate
	• Supporting institutions are essential for effective antitrust enforcement
		• New antitrust agencies can benefit from the technical assistance provided by more experienced antitrust authorities	• William E. Kovacic, *Antitrust and Competition Policy in Transition Economies: A preliminary assessment* in Annual Proceedings of the Fordham Corporate Law Institute 537 (Hawk, ed., 2000 Ch. 23)

Submissions on special and differential treatment

Member	Proposals	Claims made in support of proposal	Evidence cited
China WT/WGTCP/W/227 14 March 2003	• Special and Differential Treatment should be accorded to developing countries in all respects including least developed countries		OECD Secretariat, Core Principles in a Trade and Competition Context Thai submission, WT/WGTCP/W/213
Hong Kong, China WT/WGTCP/W/224 5 March 2003	• Special and differential treatment should be a part of any multilateral framework on competition (implied)	• Developing countries face special challenges in establishing effective competition laws and policies attributable to problems developing a competition culture, weak enforcement capabilities, markets characterized by high concentration and historical state intervention	OECD, COM/TD/DAFFE/CLP(2001)21, para.29
India WT/WGTCP/W/215 26 September 2002	• Developing countries cannot be expected to adhere to the same standards as more developed ones in terms of transparency and procedural fairness • Private firms must also be bound by transparency, e.g. they must surrender vital evidence regardless of whether or not it is confidential	• A system that has an inbuilt bias in favour of foreign suppliers cannot be said to be fair	
Thailand WT/WGTCP/W/213 Rev.1 26 September 2002	• Special and differential treatment constitutes the fourth element of the core principles for competition policy • Priority of core principles be focused on tackling cross-border, rather than domestic, trade	• Will guarantee effective enforcement and fair treatment to all parties involved	

Submissions containing more general remarks on competition and competition policy-related matters

Member	Proposals	Claims made in support of proposal	Evidence cited
Argentina WT/WGTCP/W/206 27 August 2002	• Supports openly competitive markets • Supports the creation of a competition agency	• Argues that the risk of cartel arrangements is inversely proportional to the level of competition in a market.	• Commerce of Ancient Greece • German legislative reform to competition post-1947 ○ the *Bundeskartellamt* – an institution independent of political power that has significantly contributed to Germany's development and has gained unquestionable international repute
Canada WT/WGTCP/W/183 19 April 2002	Two principles should ideally underpin the early policy choices with regard to competition policy and its development • the concept of economic efficiency, and • the protection of competition and the competitive process, not competitors	• the primary objective of technical assistance is to encourage the elaboration and adoption of welfare-enhancing, economy-wide competition rules that will promote a solid basis for growth and development	Caves, Frankel and Jones in *World Trade and Payments*

European Community WT/WGTCP/W/222 19 November 2002	• A multilateral competition framework should ○ establish a solid basis for dealing with basic competition policy issues • a WTO competition agreement should *not* imply harmonisation of domestic competition laws and should be able to accommodate differences in national legal systems, as well as in institutional capacities		
Hong Kong, China WT/WGTCP/W/224 5 March 2003	• There is little if any systematic evidence that significant improvements in the performance of developing economies result from the adoption of a competition law • Sufficient flexibility has to be incorporated into any possible MFC to make it workable and acceptable to the wide membership		• IMF methodology
Japan WT/WGTCP/W/217 26 September 2002	• Certain flexibility must be allowed in the implementation of a competition agreement	• This is because of "divergencies" in each participating country	

Korea
 	
WT/WGTCP/W/189
21 June 2002
	• The minimum requirements for competition law should include
	  ○ prohibition of hard core cartels
	  ○ prohibition of vertical restraints
	  ○ restraints on abuse of dominant market position
	  ○ prohibition of mergers and acquisitions through the competition system
	  ○ competition advocacy system
	  ○ competition regulations and exemptions
	  ○ rules of process for enforcing competition law
		• The core policy of competition policy will be the introduction and enforcement of a competition law which strengthens competitiveness and increases consumer welfare	• Makes reference to Korea's competition commission KFTC

Korea
 	
WT/WGTCP/W/225
5 March 2003
	• Desirable to set up a Competition Policy Committee to
	  ○ Facilitate the exchange of information
	  ○ Conduct 'peer' reviews
	  ○ Evaluate technical assistance programs		

New Zealand WT/WGTCP/W/210 24 September 2002	• A multilateral agreement must preserve flexibility at the national level • Exemptions and exceptions should be allowed but implemented in a manner which minimizes economic distortions	• A flexible approach is necessary in recognition of the diversity of circumstances of WTO Member countries	• WTO Secretariat, 7th June 1999 "The Fundamental Principles of Competition Policy" WT/WGTCP/W/127 • "APEC Principles to Enhance Competition and Regulatory Reform"
South Africa WT/WGTCP/W/220 5 November 2002	• None	• Principles of transparency, non-discrimination and procedural fairness are reflected in all administrative practice, including competition policy, which has enhanced the credibility of the South African competition authorities and helped promote a competition culture • There is room for positive discrimination in South African law without countenancing discrimination against any class of business or person	• Chaskalson et al (eds), *Constitutional Law of South Africa*, 1999

UNCTAD
 	
WT/WGTCP/W/197
15 August 2002
	• The core principles of competition law should be:
	  ○ a prohibition of cartels;
	  ○ case-by-case control (based on rule of reason) of vertical restraints, especially by dominant firms;
	  ○ control of concentrations through mergers and acquisitions or other forms of concentrations such as joint ventures, whenever such
			• UNCTAD Model Law, www.unctad.org/competition

	concentrations may lead to the creation of a dominant firm and ultimately a monopoly
	• A comprehensive multilateral competition framework would ideally contain
	  ○ (i) The core trade principles,
	  ○ (ii) The main competition principles,
	  ○ (iii) Voluntary cooperation rules
	• Special and differential treatment should include:
	  ○ Technical cooperation
	  ○ Exceptions and exemptions
	  ○ Specific undertakings for developed countries		