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**Working Group on the Interaction  
between Trade and Competition Policy**

**PROVISIONS ON HARDCORE CARTELS**

Background Note by the Secretariat

*This document has been prepared under the Secretariat's own responsibility and without prejudice to the positions of Members and to their rights and obligations under the WTO*

**I. INTRODUCTION**

1. This note has been prepared in response to the request by the Working Group during the informal meeting that was held on 26 February 2002 that the Secretariat prepare a set of background papers based on the discussions held and materials considered in the previous work of the Group. The papers were to deal, respectively, with each of the four substantive elements that are contained in paragraph 25 of the Doha Ministerial Declaration, namely: (i) core principles, including transparency, non-discrimination and procedural fairness; (ii) provisions on hardcore cartels; (iii) modalities for voluntary cooperation; and (iv) support for progressive reinforcement of competition institutions in developing countries through capacity building. The first in this series of notes, dealing with the subject of support for progressive reinforcement of competition institutions in developing countries through capacity building, was issued as document WT/WGTCP/W/182, dated 17 April 2002.

2. The present note deals with the second subject mentioned above, namely provisions on hardcore cartels, which is to be the subject of focused attention at the Working Group's meeting to be held on 1-2 July 2002. The aim of the note is to provide a synthesis of the issues raised and points made by Members on the topic. It has been prepared on the basis of the Working Group's annual reports, which in turn rely upon the minutes of the Group's meetings and on written submissions by Members to the Group. In addition, where appropriate, reference is made of other documentation that has been discussed in the Working Group, particularly: (i) a background paper on cartels that was prepared for the World Bank's 2001 World Development Report (henceforth "World Bank background paper on international cartels")<sup>1</sup> and which was brought to the attention of the Working Group at its meeting on 5-6 July 2001;<sup>2</sup> (ii) the 1998 OECD Recommendation on Effective Action Concerning Hardcore Cartels, which has been referred to in various meetings of the Working Group in 1998, 1999 and 2000;<sup>3</sup> and (iii) a report by the OECD entitled Hardcore Cartels: Meeting of the OECD Council at Ministerial Level,<sup>4</sup> copies of which were made available by the representative of

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<sup>1</sup> Margaret Levenstein and Valerie Suslow, Private International Cartels and Their Effect on Developing Countries (Background Paper for the World Bank's World Development Report 2001, 9 January 2001) (available on the Internet at <http://www-unix.oit.umass.edu/~maggiel/WDR2001.pdf>).

<sup>2</sup> See Report of the Working Group on the Interaction between Trade and Competition Policy (2001), WT/WGTCP/5, paragraphs 35 and 98. (Henceforth in this Note, documents issued in the series WT/WGTCP/1-5 are referred as "Report (1997—2001)", as appropriate. Documents issued in the series WT/WGTCP/W/\_\_\_ are referred to as W/\_\_\_).

<sup>3</sup> See Report (1998), paragraph 71; Report (1999), paragraph 61; and Report (2000), paragraph 41.

<sup>4</sup> OECD, Hardcore Cartels: Meeting of the OECD Council at Ministerial Level (Paris 2000).

the OECD at the Working Group's meeting of 22-23 March 2001.<sup>5</sup> Annex I contains a list of contributions to the Working Group relevant to the topic of Provisions on Hardcore Cartels. The 1998 OECD Recommendation on Effective Action Concerning Hardcore Cartels is reproduced in Annex II.

3. The term "cartel" refers to agreements between firms that would otherwise be in competition with each other (i.e., "horizontal agreements") that aim to fix prices, reduce output or allocate markets or that involve the submission of collusive tenders.<sup>6</sup> The term "hardcore" underscores the harm caused by such arrangements and distinguishes them from joint ventures or other inter-firm arrangements that involve active collaboration among firms and potentially enhance social welfare.<sup>7</sup> In this regard, the OECD Recommendation Concerning Effective Action on Hardcore Cartels provides that the term "hardcore cartels" does not include "agreements, concerted practices, or arrangements that: (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws."<sup>8</sup>

4. Hardcore cartels can be domestic or international in scope. The discussion in the Working Group has focused principally though not exclusively on issues concerning international hardcore cartels.<sup>9</sup> The same approach is taken in this paper – i.e., the discussion is focused principally on issues concerning international cartels although reference is also made to domestic cartels and the effects that these can have on trade and development.

5. The concept of an international hardcore cartel should also be distinguished from that of export and import cartels. Export cartels fix prices or outputs in the participating firms' export markets but not in their home markets. Import cartels aim to regulate the price or other terms of goods or services that are imported into the participating firms' home markets. In contrast, international cartels generally fix prices, outputs or other dimensions of competition across a number of national markets, often including but not limited to the home countries of the participating firms. Another distinguishing feature is that export cartels are exempted from the national competition laws of many countries, in some cases on a condition of public registration, whereas international cartels often are illegal and typically are carried on in secret unless and until they are investigated and disclosed. The discussion in this paper is chiefly concerned with international cartels as such, although reference is also made to export cartels.

6. The remainder of this note is divided into three sections that deal, respectively, with:

- The need for measures to address hardcore cartels. The focus here is on points made by Members concerning the harm caused by international and other hardcore cartels, their implications for the multilateral trading system and the costs they impose on poor countries as well as on the conditions that give rise to cartels and the other points;
- Points made by Members concerning the measures that are needed to address cartels at the national level;
- Points made regarding the role of international cooperation in addressing international hardcore cartels, including at the bilateral level, and the potential

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<sup>5</sup> See Report (2001), paragraph 52.

<sup>6</sup> See Contribution of the United States (WT/WGTCP/W/62), Contribution by the European Community and its Member States (WT/WGTCP/W/140) and OECD, *Hardcore Cartels: Meeting of the OECD Council at Ministerial Level*, op cit.

<sup>7</sup> OECD, *Hardcore Cartels: Meeting of the OECD Council at Ministerial Level*, op cit.

<sup>8</sup> OECD Recommendation on Effective Action Concerning Hardcore Cartels, op cit., also referenced in Contribution by Japan (WT/WGTCP/W/176), paragraph 10.

<sup>9</sup> Contribution by the European Community and its Member States (WT/WGTCP/W/140).

contribution of provisions on hardcore cartels which could be embodied in a multilateral framework on competition policy.

## II. THE NEED FOR MEASURES TO ADDRESS HARDCORE CARTELS

7. The points have been made in the Working Group that hardcore cartels are the most pernicious type of anti-competitive practice from the point of view of trade and development as well as of competition law enforcement; that they can have the effect of undermining the benefits that should flow from international trade liberalization, and hence are an important concern for the multilateral trading system; that they impose heavy costs on consumers and user industries, and thereby also on the development prospects of poor countries; that the magnitude of harm caused particularly by international cartels has recently been shown to be greater than was previously known; and that cartels proliferate wherever countries lack legislative and other tools to deal with them. These points are elaborated below, with appropriate references.

8. The view has been expressed in the Working Group that cartels are the most pernicious type of anti-competitive practice from the point of view of trade and development as well as of competition law enforcement<sup>10</sup> and impose heavy costs on consumers and the economies of Members, including both developed and developing countries.<sup>11</sup> The point has been made that international cartels can have clear effects on market access, where they allocate national markets among the participating firms.<sup>12</sup> Furthermore, even where they do not affect market access *per se*, international cartels distort the efficient functioning of international markets and thereby undermine realization of the benefits that should flow from trade liberalization.<sup>13</sup> A particular source of distortion is that they artificially raise the costs of countries' imports. For these reasons, cartels are an important and legitimate concern for the multilateral trading system.<sup>14</sup> The point has also been made that cartels operating in certain service sectors such as international maritime shipping or financial services can be particularly harmful to trade, since they not only restrain trade within the relevant service but also raised the price of that service to exporters, introducing another level of distortion.<sup>15</sup> Moreover, cartels are highly unlikely to have valid efficiency-related justifications.<sup>16</sup>

9. The point has also been made in the Working Group that the magnitude of the harm caused by international hardcore cartels, particularly to developing countries, has recently been shown to be higher than was previously known.<sup>17</sup> In this regard, the above-noted World Bank background paper on international cartels which was brought to the attention of the Working Group at its meeting on 5-6 July 2001 refers to examples of international cartels that affected the supply of 16 products in the 1990s. The total value of developing countries' imports of these products in 1997 was US \$81.1 billion. Available information suggests that the price impact of cartels supplying these products was in the range of 20-40 percent, on average – implying a possible cost impact in the range of US \$16-32 billion for these products alone.<sup>18</sup>

10. Reference has been made in the Working Group to a number of examples of international cartels considered to have affected trade and development. In particular, reference has been made to the example of the International Heavy Electrical Equipment Cartel, which fixed prices at higher than

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<sup>10</sup> Report (2000), paragraph 29.

<sup>11</sup> Report (2000), paragraph 39.

<sup>12</sup> Report (1998), paragraph 84.

<sup>13</sup> Report (1998), paragraphs 71 and 85.

<sup>14</sup> Report (1999), paragraph 71; Contributions by Japan (WT/WGTCP/W/135), page 2 and (WT/WGTCP/W/168), paragraphs 1-2.

<sup>15</sup> Report (1998), paragraph 87.

<sup>16</sup> Report (1998), paragraph 86.

<sup>17</sup> Report (2000), paragraph 39; Report (2001), paragraphs 35 and 98.

<sup>18</sup> See Hardcore Cartels and Developing Economies (Presentation by Dr. Simon Evenett to the Symposium on Trade and Competition Policy: Looking Ahead After Doha, held at the WTO, 22 April 2002).

competitive levels in many countries' national markets over a period of several decades. The suggestion was made that this case illustrated the impact that cartel arrangements could have not only on international trade but also on economic development, in that heavy electrical equipment is an important input to energy production and the cartel raised significantly the cost of such equipment to developing countries.<sup>19</sup> Reference has also been made to the Citric Acid Conspiracy, an international price-fixing arrangement prosecuted by the United States antitrust authorities that involved actions by firms from various countries during the first half of the 1990s and to the Fax Paper case, a cartel that affected the price of thermal fax paper in Canadian and United States markets and involved firms headquartered in various countries.<sup>20</sup> Other examples of cartels believed to have had effects on international trade and/or development and that have been referred to in the Working Group include cartels in the markets for synthetic fibers, photographic equipment (that is, prisms, lenses and lightening equipment), television equipment, chemical textile products, micro-crystalline cellulose, and food preservatives.<sup>21</sup>

11. The view has been expressed that, in many cases, the harm caused to developing countries by international cartels has not been adequately addressed. For example, reference has been made in the Working Group to a major international cartel alleged to have operated from 1990 to 1995 in the market for stainless steel tubes used in the exploration and transportation of oil and gas, products which are important for many developing countries. The suggestion has been made that this is an example of the kind of case in which enhanced possibilities for cooperation with respect to hardcore cartels could be of particular benefit to developing countries in addressing the harmful impact of cartels on them. Moreover, the suggestion has been made in the Working Group that this is far from being an isolated example. Often, in decisions condemning international cartels in both the European Community and the United States, mention has been made that the cartel has operated elsewhere.<sup>22</sup> In fact, hardcore cartels tend to operate wherever countries lack legislative and other tools to deal with them.<sup>23</sup> Accordingly, the argument has been made that developing countries affected by cartels can only mount an appropriate response if they have strong competition laws and adequate enforcement.<sup>24</sup>

12. The importance of action to suppress domestic cartels has also been noted by Members in the Working Group.<sup>25</sup> Such cartels aggravate poverty by raising the prices of goods and services that are important for consumers and for development-related purposes. Beyond this, where they are successful in raising prices, domestic cartels may need to be accompanied by government measures excluding foreign companies from the domestic market, such as tariffs and non-tariff barriers. Alternatively, members of a domestic cartel may engage in joint exclusionary conduct to prevent the entry of foreign firms, for example by controlling the distribution of imported goods.<sup>26</sup>

13. The following factors have been mentioned in the Working Group as contributing to the harmful effects associated with hardcore cartels as referred to above: (i) the non-existence of a well-constituted competition law and policy; (ii) statutory exemptions or protective regulatory regimes covering the conduct in question; (iii) a failure to adequately enforce existing laws and policies relating to anti-competitive practices; (iv) the existence of other government policies that implicitly or explicitly sanction or encourage anti-competitive conduct; and (v) the lack of effective rules governing access to essential facilities, in the context of deregulation.<sup>27</sup> The point has also been made

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<sup>19</sup> Report (1998), footnote 143.

<sup>20</sup> Report (1998), footnote 143.

<sup>21</sup> See Contribution of Japan (W/168).

<sup>22</sup> Report (2000), paragraph 54.

<sup>23</sup> Report (1998), paragraph 90; Report (2001), paragraph 35; Contribution by Japan (WT/WGTCP/W/168), paragraph 3.

<sup>24</sup> Contribution by Japan (WT/WGTCP/W/168), paragraph 3.

<sup>25</sup> Report (1998), paragraph 51; see also Contribution of UNCTAD (W/17); Contribution of Korea (W/133) and Contribution of Japan (W/134).

<sup>26</sup> Report (1999), paragraph 71.

<sup>27</sup> Report (1998), paragraph 90.

that international cartels are unlikely to respect the neatly defined territories covered by existing bilateral agreements. Rather, they tend naturally to act strategically and to seek out the cracks that exist between relevant regional and bilateral agreements. Only by having a network that covers all potential areas of cartel activity can Members prevent such behaviour.<sup>28</sup>

14. With regard to the subject of export cartels, the suggestion has been made that these are a clear example of an anti-competitive practice potentially distorting the terms of trade.<sup>29</sup> Furthermore, the suggestion has been made that the victims of export cartels often include developing countries that import goods such as machinery or consumer products.<sup>30</sup> The point has also been made that the extent of such cartels and their deleterious effects on trade and development may be greater than is widely known, since some countries do not insist on registration of such cartels; they simply turn a blind eye to them.<sup>31</sup> On the other hand, the view has been expressed that the extent of harm caused by export cartels is less than is sometimes thought, in that not all export-related consortia or similar arrangements fix prices or exercise market power. In any case, these are likely to be of less concern than situations where both export and domestic markets are subject to cartelization. Even in the absence of relevant exemptions, cartels relating purely to export markets might well be outside the jurisdiction of "home countries" to the extent that their effects are felt abroad rather than in the home country market.<sup>32</sup>

15. Notwithstanding the apparent general condemnation of hardcore cartels, the argument has also been made that a degree of flexibility may be warranted in regard to the application of competition law in relation to certain types of inter-firm conduct.<sup>33</sup> In this regard, reference has been made to cases in national systems in which exemptions or exceptions exist or have existed in relation to cartels, for example depression or structural adjustment cartels, rationalization cartels, cartels involving small and medium-size enterprises (SMEs) and SME cooperatives, and export and import cartels.<sup>34</sup> Nonetheless, the point has also been made that such exemptions should be kept to a minimum and, ideally, phased out over time.<sup>35</sup>

### **III. DISCUSSION OF THE MEASURES NEEDED TO ADDRESS HARDCORE CARTELS AT THE NATIONAL LEVEL**

16. The view has been expressed in the Working Group that adopting and vigorously enforcing national competition laws can help countries to protect themselves against hardcore cartels and other market abuses by giving them the tools to investigate and prosecute anti-competitive conduct affecting their national interests, whether acting alone or in cooperation with other countries.<sup>36</sup> Important elements of an effective national competition law include a clear prohibition of cartel activity, backed up by substantial penalties including fines and/or imprisonment, and relevant investigatory powers. Furthermore, the suggestion has been made that particular attention should be devoted by relevant enforcement authorities to the investigation and prosecution of domestic and international cartels,

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<sup>28</sup> Report (2000), paragraph 58.

<sup>29</sup> See, generally, Report (1998), paragraph 89; Report (1999), paragraph 26; and Report (2000), paragraph 25.

<sup>30</sup> Comments by the observer from UNCTAD, summarized in M/4, paragraph 30.

<sup>31</sup> Report (1998), paragraph 89.

<sup>32</sup> Report (2000), paragraph 25.

<sup>33</sup> Report (1998), paragraph 88.

<sup>34</sup> Contribution by Japan (WT/WGTCP/W/177), page 2.

<sup>35</sup> Report (2001), paragraph 77; see also Contribution of Japan (WT/WGTCP/W/177).

<sup>36</sup> Contribution by Canada (WT/WGTCP/W/70), page 2; Contribution of the United States (WT/WGTCP/W/62); Contribution by the European Community and its member States (WT/WGTCP/W/62), pages 4-5; Contribution by Trinidad and Tobago (WT/WGTCP/W/179).

given the clear anti-competitive effects of these practices and their harmful impact on the development prospects of poor countries.<sup>37</sup>

17. As an example of the effective enforcement of national competition law in relation to hardcore cartels, reference has been made in the Working Group to criminal prosecutions undertaken by the United States Department of Justice in relation to international cartels involving a range of products and services. Under relevant U.S. laws, criminal penalties including prison sentences as well as heavy fines may be imposed in such cases.<sup>38</sup> Heavy fines may also be imposed in such cases in the European Community and certain other jurisdictions, some of which also provide for the possibility of jail sentences for individual perpetrators of cartels.<sup>39</sup>

18. The point has been made in the Working Group that developing countries affected by international cartels cannot rely exclusively on the assistance of developed countries to address the harm caused to them by cartels. Competition law enforcement in developed countries is primarily focused on addressing the harmful effects of anti-competitive effects in their individual home markets, though it may also have beneficial spillovers for other countries. If countries lack adequate competition laws or the laws are not backed by adequate enforcement, they will be victimised and will be unable to mount an effective response.<sup>40</sup>

19. Notwithstanding the foregoing points, at a more general level, a number of questions have been raised in the Working Group regarding the need for countries to adopt national competition laws. The argument has been made that a country can have an effective competition policy without necessarily adopting a comprehensive competition law.<sup>41</sup> It has been suggested that this can be achieved through an open trade and investment regime and a general absence of government intervention coupled with sectoral and other measures to deal with particular problems where required.<sup>42</sup> However, scepticism has been expressed by some Members as to whether such an approach is sufficient to guard against the harm caused by international anti-competitive practices such as cartels that cut across national markets.<sup>43</sup> Furthermore, the view has been expressed that having a national competition law may have certain other advantages such as ensuring greater consistency in enforcement approaches across industries; giving the policy statutory character, enforceability and stability; enhanced ease of adaptation of new analytical techniques applicable across sectors; and a reduced danger of institutional "capture" of a comprehensive competition authority as compared to the situation of regulators that focus on particular economic sectors.<sup>44</sup>

#### **IV. DISCUSSION OF EXISTING AND POSSIBLE FUTURE MEASURES TO ADDRESS HARDCORE CARTELS AT THE INTERNATIONAL LEVEL**

20. Two principal kinds of measures have been discussed in the Working Group to address, at the international level, the harm caused by international cartels. The first involves proposals for expanded cooperation among national competition authorities in the investigation and prosecution of cartel cases as well as in other types of anti-competitive practices. Since these proposals will be the subject of a separate note by the Secretariat, only some particular aspects relating to cartels are discussed in this paper, in Part IV(A). More general aspects of cooperation will be considered in the separate note on this subject (to be issued). The second kind of measure that has been proposed involves "provisions on hardcore cartels", which are discussed below in Part IV(B).

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<sup>37</sup> Report (1998), paragraph 51; Report (2000), paragraph 29 and Report (2001), paragraph 33.

<sup>38</sup> Contribution by the United States (WT/WGTCP/W/66), pages 5-6.

<sup>39</sup> See Contribution by the European Community and its member States (WT/WGTCP/W/62), pages 4-5 and Contribution by Canada (WT/WGTCP/W/70), page 2.

<sup>40</sup> Contribution by Japan (WT/WGTCP/W/168), paragraph 3.

<sup>41</sup> Report (1998), paragraph 37; Report (2001), paragraph 80.

<sup>42</sup> Report (1998), paragraph 37; Report (2000), paragraph 19; and Report (2001), paragraph 80.

<sup>43</sup> Report (1998), paragraph 38.

<sup>44</sup> Report (1998), paragraph 38.

A. THE ROLE OF GENERAL COOPERATION MECHANISMS IN RELATION TO THE SUBJECT OF  
HARDCORE CARTELS

21. The view has been expressed in the Working Group that the need for cooperation among the competition authorities of WTO Members is particularly clear in the case of international cartels, which impose heavy costs on economic and consumer welfare and often originate outside the markets of the affected countries. It is difficult for any one country to effectively regulate such behaviour by itself.<sup>45</sup> The required cooperation may be as simple as the exchange and dissemination of basic information such as legislation and enforcement guidelines or may extend to the exchange of information related more specifically to particular cases (discussions in the Working Group have focused principally on the benefits that might be achieved through more widespread exchange of non-confidential information regarding relevant firms and cases as opposed to confidential information)<sup>46</sup>. The suggestion has been made that, even at this basic level, cooperation facilitates the development of useful channels of communication between national competition authorities and can engender a dynamic of common interest. Cooperation of this kind may be particularly valuable in the investigation of hardcore cartels.<sup>47</sup> However, even at this basic level, to be of genuine value, cooperation has to develop over time, and to be founded on a mutuality of interest, trust and commonality of purpose.<sup>48</sup>

22. As an illustration of the role that cooperation can play in cases involving hardcore cartels, reference has been made to the *Thermal Fax Paper* case, which involved an international conspiracy to raise the price of thermal fax paper in North America. The conspiracy involved participants based in Japan, Canada and the United States. The conspiracy was uncovered by the Canadian Competition Bureau; however, much of the evidence was located in the United States. Cooperation between the enforcement authorities of the two countries resulted in guilty pleas, fines and prohibition orders against the various participants.<sup>49</sup>

23. Cooperation mechanisms of the type used in the *Thermal Fax Paper* and other cases already exist in a number of agreements at the bilateral level.<sup>50</sup> Some Members have proposed the adoption of similar mechanisms at the multilateral level, as part of a WTO agreement on competition policy.<sup>51</sup> The view has been expressed that mechanisms of this nature could be of particular assistance to developing countries in addressing the harm caused to them by international cartels,<sup>52</sup> although their scope and application would not be limited to cartels. A number of more general points have been made regarding the proposed cooperation modalities, including with respect to their pros and cons (see the separate note to be provided on this subject).

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<sup>45</sup> Contribution by Japan (WT/WGTCP/W/168), paragraph 2.

<sup>46</sup> Report (2000), paragraph 41; Report (2001), paragraph 65.

<sup>47</sup> Report (2000), paragraph 41.

<sup>48</sup> Report (1998), paragraph 92

<sup>49</sup> Contribution of Canada (WT/WGTCP/W/70), pages 2-3.

<sup>50</sup> Contribution of the United States (WT/WGTCP/W/148).

<sup>51</sup> See, e.g., Contribution of the Czech Republic (WT/WGTCP/W/165); Contribution of Japan (WT/WGTCP/W/167); and Contribution of the European Community and its member States (WT/WGTCP/W/173).

<sup>52</sup> Contribution by the European Community and its member States (WT/WGTCP/W/140), page 6 and Annex.

B. VIEWS EXPRESSED IN THE WORKING GROUP REGARDING THE POTENTIAL CONTRIBUTION OF PROVISIONS ON HARDCORE CARTELS IN A MULTILATERAL FRAMEWORK ON COMPETITION POLICY IN THE WTO

**1. Nature of the proposal**

24. A key element of current proposals by some Members for the development of a multilateral framework on competition policy is a commitment to the prohibition of hardcore cartels.<sup>53</sup> In this regard, the view has been expressed that there exists a strong international consensus that hardcore cartels should be prohibited on the ground that they have serious, and unambiguously harmful effects on consumers, on the economies of Members, including both developed and developing countries, and on international trade.<sup>54</sup> The point has also been made that the majority of existing competition laws contain some kind of ban against hardcore cartels. However, many Members, particularly developing countries, lack such provisions.<sup>55</sup> Concern about the impact of cartels and the need for strengthened action against them at the national and international levels is already embodied in an OECD Recommendation on the subject as well as in relevant provisions of the United Nations Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (see especially Parts D(3) and (4) and text on the need for international cooperation).<sup>56</sup> However, the precise nature of the provisions that are proposed to be adopted in the framework of the WTO remains to be elaborated.

25. As a source of insight into the nature and scope of possible provisions on hardcore cartels in the framework of the WTO, reference has been made in the Working Group by a number of members to the above-noted OECD Recommendation Concerning Effective Action Against Hardcore Cartels (attached as Annex I).<sup>57</sup> Essentially, the Recommendation provides that OECD member countries should ensure that their competition laws effectively halt and deter hardcore cartels, in particular by providing for (i) effective sanctions, of a kind and level adequate to deter firms and individuals from engaging in cartel practices; and (ii) adequate enforcement powers and institutions including powers to obtain documents and information. The Recommendation also commits members to cooperate with each other in enforcing their laws against cartels and sets out a number of principles to govern such cooperation. The OECD Competition Committee is charged, among other tasks, with reviewing Members' experience in implementing the Recommendation. Non-OECD member countries are invited to associate themselves with the Recommendation. The point has been made in the Working Group that the kind of cooperation sought to be engendered by this Recommendation has the advantage of promoting the adoption of "best practices" which, in turn, increases the possibilities for convergence in approaches, or "soft harmonization", in the long-run.<sup>58</sup> The point has also been made that the commitment to take action against hardcore cartels which has been called for by some WTO Members would provide the basis for a common language and for cooperation among different competition policy regimes but would in no way constitute a harmonization of competition law.<sup>59</sup>

**2. Potential benefits of provisions on hardcore cartels in a WTO framework**

26. A number of potential benefits have been referred to by the proponents of a WTO agreement on competition policy regarding the inclusion of a prohibition on hardcore cartels in such a framework. In essence, it has been argued that such a prohibition is important to assist developing and other countries to deal effectively with international cartels, and thereby to alleviate the above-described

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<sup>53</sup> Paragraph 34, Report 2001; Report (2000), paragraph 34.

<sup>54</sup> Report (2001), paragraph 73; Report (2000), paragraph 39; Report (1998), paragraph 93. See also Contribution by the United States (WT/WGTCP/W/185), page 3.

<sup>55</sup> Report (2001), paragraph 100.

<sup>56</sup> Report (2000), paragraph 39.

<sup>57</sup> See Report (1998), paragraph 71; Report (1999), paragraph 61; and Report (2000), paragraph 41.

<sup>58</sup> Report (2000), paragraph 41.

<sup>59</sup> Report (2001), paragraphs 72 and 73.

adverse effects of cartels on their consumers, growth and development prospects. For example, coupled with related commitments on cooperation and on support for progressive reinforcement of competition institutions in developing countries, it would provide the means for developing countries to intervene effectively in cases in which, currently, they are often powerless to act.<sup>60</sup> The view has also been expressed that a multilateral framework might be of assistance in dealing with the impact of export cartels<sup>61</sup> which, as mentioned above, may not be subject to the application of national competition law for various reasons.<sup>62</sup>

### **3. Concerns/reservations expressed regarding possible provisions on hardcore cartels/related aspects of a WTO framework**

27. Relatively little has been said in the Working Group by way of concerns or reservations specifically in relation to possible provisions on hardcore cartels in a WTO agreement on competition policy. However, a range of related but more general concerns have been expressed regarding the proposals for a possible multilateral framework. For example, concerns have been expressed that: (i) the proponents' interest in a multilateral framework is motivated principally by market access concerns;<sup>63</sup> (ii) the adoption of a multilateral framework would entail an undesirable degree of harmonization in the field of national competition laws and policies;<sup>64</sup> (iii) developing countries lack the requisite institutional infrastructure and human resources;<sup>65</sup> and (iv) the proposed framework might entail undesirable costs in terms of limiting countries' options in the area of industrial policy.<sup>66</sup> A number of counter-arguments and points have been made in response to each of these concerns. For example, the points have been made that the content of the current proposals does not reflect any undue emphasis on market access;<sup>67</sup> that harmonization of national laws would not be required since the proposed framework would be based on principles rather than detailed requirements or model legislation;<sup>68</sup> that assistance would be provided for developing countries to develop any necessary institutions over time and appropriate transition periods provided;<sup>69</sup> and that the principles to be embodied in the proposed framework would apply to national competition law/policy as such and not to wider aspects of industrial policy.<sup>70</sup> In any case, how far these general concerns and reservations would apply in the specific context of possible provisions on hardcore cartels is an issue that the Working Group may wish to clarify.

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<sup>60</sup> Report (2002), paragraphs 39 and 54.

<sup>61</sup> Report (2000), paragraph 25; Report (1999), paragraph 26.

<sup>62</sup> Report (2000), paragraph 25.

<sup>63</sup> Report (2001), paragraph 58.

<sup>64</sup> Report (2001), paragraph 17.

<sup>65</sup> Report (2001), paragraph 28.

<sup>66</sup> Report (2001), paragraph 51; M/17, to be issued.

<sup>67</sup> Report (2001), paragraph 58.

<sup>68</sup> Report (2001), paragraph 73.

<sup>69</sup> Report (2001), paragraph 55.

<sup>70</sup> Report (2001), paragraph 20.

**ANNEX I**

Working Group on the Interaction between Trade and Competition Policy

**CONTRIBUTIONS RELEVANT TO THE  
TREATMENT OF HARDCORE CARTELS**

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/17	UNCTAD	para. 12 (c)	techniques of cartel control
W/21	OECD	<i>passim</i>	OECD experiences with cartels
W/23	Poland	page 1	national institutions lacking means to deal with international cartels
W/28	Singapore	para. 11, 15 (b)	implications of exemptions for import and export cartels
W/42	Canada	page 3	implications of exemptions for export cartels
W/43	Turkey	pages 3, 4, 6	necessity of suppression of cartels
W/45	European Community	page 5	analysis of horizontal restraints
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W/48	United States	page 4	mentioning the OECD Recommendation on Cartels
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W/56	Korea	page 2	implications of exemptions for export cartels
W/61	European Community	page 3	role of competition authorities in preventing cartels
W/62	European Community	pages 4 <i>et seq.</i>	analysis of cartel cases in European law
		pages 13 <i>et seq.</i>	proposals for WTO discussions on cartel issues
W/66	United States	<i>passim</i>	experiences with international cartels
W/70	Canada	pages 2-3	examples of enforcement action against cartels
W/71	Czech Republic	page 3	export cartels
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W/78	European Community	page 14	benefits of a WTO commitment on hardcore cartels
W/95	Kenya	para. 9 (e)	significance of cartels in the informal sector
W/100	Brazil	page 1	impact of cartels
		page 2	cooperation to prevent cartels
W/104	Hong Kong, China	para. 13	exemption of export cartels from competition law in some countries

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/108	Japan	page 2	competition policy as a tool for addressing hardcore cartels
		page 3	cooperation between national competition authorities
W/115	European Community	page 5 <i>et seq.</i>	implications of exemption of export cartels from national competition laws
W/116	United States	page 5	cooperation agreements and control of cartels
		page 7	reference to OECD Recommendation on Hardcore Cartels
W/117	Switzerland	para. 8 (and 16)	desirability of prohibition of hardcore cartels
		para. 12	publication of anti-cartel laws
W/118	Hong Kong, China	para. 9	implications of exemption of export cartels from national competition laws
W/119	Japan	pages 2, 4	importance of suppressing hardcore cartels
		page 4	exemption of export cartels
W/124	Korea	page 3	OECD Recommendation on Hardcore Cartels
W/126	Zimbabwe on behalf of the African Group	page 2	cartels as priority for developing countries in their approach to competition policy
W/130	European Community	page 4	need for provisions on hardcore cartels
W/133	Korea	para. 12	feasibility of common understanding on prohibition of hardcore cartels
W/134	Japan	page 1-2	cartels and development (including in domestic markets)
		pages 2-3	formerly authorized cartels in Japan
W/135	Japan	<i>passim</i>	impact of cartels on international trade
W/140	European Community	page 3	impact of international cartels on developing countries
		pages 6, 8-9	cooperation in cartel cases
		page 8	need for agreement of WTO Members on hardcore cartels
		pages 13 <i>et seq.</i>	cartel cases: examples
W/141	Hong Kong, China	para. 10 (a)	relevance of differing approaches to export and import cartels among WTO Members
W/143	Trinidad and Tobago	page 3	impact of international cartels on small open economies

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/145	Japan	page 4	anti-cartel legislation as priority for competition law enforcement
W/149	India	page 2	potential advantages of cartels as reflected in some countries' industrial policies
W/151	Switzerland	pages 2, 4	anti-cartel provisions necessary on a multilateral level
W/152	European Community	page 2	importance of anti-cartel law enforcement
		pages 5, 7, 8	feasibility of a multilateral framework to address anti-competitive practices
		pages 11-12	cooperation and assistance in regard to cartels
W/154	Korea	pages 2-3	cartels as problem for the international trading system
W/155	Canada	page 2	importance of national rules and international cooperation
		page 4	OECD Recommendation on Hardcore Cartels
		page 6	common enforcement action as first step of cooperation
W/156	Japan	para. 3 (b)	unique added value of multilateral agreement in area of export cartels
W/160	European Community	pages 4-5	examples of EC cartel cases as argument for international cooperation
		page 7	cartel legislation as priority for developing countries and for a multilateral agreement
W/161	Romania	pages 1-2	cartels as major topic for multilateral agreement
W/164	United States	page 2	anti-cartel law enforcement as priority of antitrust agencies
W/165	Czech Republic	pages 1, 4	anti-cartel legislation as a priority for a multilateral agreement
W/168	Japan	para. 2, 5 <i>et seq.</i>	cartels as a problem for trade and development; examples
W/173	Canada and Costa Rica	page 1	provisions addressing cartels/other matters in a bilateral free trade agreement
W/175	European Community	<i>passim</i>	effects of cartels, development dimension
W/176	Japan	para. 8 <i>et seq.</i>	adverse effects of cartels on development
W/177	Japan	<i>passim</i>	status of cartel exemptions in Japan

SYMBOL: (WT/WGTCP/-)	MEMBER/ OTHER SOURCE	PARAGRAPH/ PAGE REFERENCE	MATTERS DISCUSSED
W/179	Trinidad and Tobago	page 2	enforcing anti-cartel legislation as a priority for small developing economies in area of competition policy
W/184	European Community	page 3	importance of universal ban on hardcore cartels
		page 5	exchange of information in cartel cases
		page 8	impact of cartels on developing countries
W/185	United States	<i>passim</i>	importance of anti-cartel provisions as component of national competition policy

## ANNEX II

### OECD COUNCIL RECOMMENDATION CONCERNING EFFECTIVE ACTION AGAINST HARDCORE CARTELS<sup>71</sup>

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

THE COUNCIL,

Having regard to Article 5 b) of the Convention on the Organisation for Economic Cooperation and Development of 14th December 1960;

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

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

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

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

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

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

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<sup>71</sup> Brought to the attention of the WTO Working Group on the Interaction between Trade and Competition Policy at various meetings in 1998, 1999 and 2000 (see Report (1998), paragraph 71; Report (1999), paragraph 61; and Report (2000), paragraph 41).

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

I. RECOMMENDS as follows to Governments of Member countries:

A. CONVERGENCE AND EFFECTIVENESS OF LAWS PROHIBITING HARDCORE CARTELS

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

- (a) effective sanctions, of a kind and at a level adequate to deter firms and individuals from participating in such cartels; and
- (b) enforcement procedures and institutions with powers adequate to detect and remedy hardcore cartels, including powers to obtain documents and information and to impose penalties for non-compliance.

2. For purposes of this Recommendation:

- (a) a "hardcore cartel" is an anticompetitive agreement, anticompetitive concerted practice, or anticompetitive arrangement by competitors to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers, territories, or lines of commerce;
- (b) the hardcore cartel category does not include agreements, concerted practices, or arrangements that (i) are reasonably related to the lawful realization of cost-reducing or output-enhancing efficiencies, (ii) are excluded directly or indirectly from the coverage of a Member country's own laws, or (iii) are authorized in accordance with those laws. However, all exclusions and authorizations of what would otherwise be hardcore cartels should be transparent and should be reviewed periodically to assess whether they are both necessary and no broader than necessary to achieve their overriding policy objectives. After the issuance of this Recommendation, Members should provide the Organisation annual notice of any new or extended exclusion or category of authorization.

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

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

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

- (a) the common interest in preventing hardcore cartels generally warrants cooperation to the extent that such cooperation would be consistent with a requested country's laws, regulations, and important interests;
- (b) to the extent consistent with their own laws, regulations, and important interests, and subject to effective safeguards to protect commercially sensitive and other confidential information, Member countries' mutual interest in preventing hardcore cartels warrants cooperation that might include sharing documents and information in their possession with foreign competition authorities and gathering documents and information on behalf of foreign competition authorities on a voluntary basis and when necessary through use of compulsory process;
- (c) a Member country may decline to comply with a request for assistance, or limit or condition its cooperation on the ground that it considers compliance with the request to be not in accordance with its laws or regulations or to be inconsistent with its important interests or on any other grounds, including its competition authority's resource constraints or the absence of a mutual interest in the investigation or proceeding in question;
- (d) Member countries should agree to engage in consultations over issues relating to cooperation.

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

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

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

## II. INSTRUCTS the Competition Law and Policy Committee:

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

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

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

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

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