

COMMUNICATION FROM THAILAND

The following is the final text of a paper received from the Permanent Mission of Thailand which was circulated as an advance copy for the Working Group's meeting of 1-2 July 2002.

INTERNATIONAL COOPERATION IN COMPETITION POLICY

I. RECOGNITION OF THE NEED FOR MUTUAL ASSISTANCE

1. 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 the multilateral efforts in providing mutual assistance in fighting these cartels.
2. We are concerned of the fact that closer cooperation in the enforcement of competition law among more advanced economies may divert cartels' activities to economies with weak competition law enforcement. According to a background paper for the World Bank's *World Development Report 2001*, cartel-affected imports contribute to approximately 6.7% of all imports by developing countries. These estimates are based only on known cartels as revealed by competition authorities in the United States and Europe. The actual figures could be much higher.
3. Thailand believes that multilateral cooperation **must guarantee** developing countries better protection against international cartels. In the past, only cartels affecting developed economies, in particularly the United States and the European Union, have been exposed and subsequently, prosecuted. While the breaking up of such cartels may help impair their operations in developing economies, other cartels that operate exclusively in developing countries may never be discovered or prosecuted. The steel cartel is an example of a cartel that is known to be in existence for over a decade but has never been prosecuted.

II. PROPOSITION ON THE MODE OF COOPERATION

4. 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. Thus, a *multilateral cooperation* would be a favourable alternative for developing economies.
5. We believe 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 the 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.

6. Due to the overwhelming discrepancy in financial and technical resources between competition authorities in developed countries and those in their developing country counterparts, *special and differential treatment* for developing members would be necessary in the case of mandatory enforcement assistance. We propose that competition authorities in developing countries be financially compensated for delivering requested services and be allowed to cooperate to the extent possible subject to technical and financial constraints.

7. We also propose that the medium term goal in cooperation should be focused on establishing mutual legal assistance¹. A plurilateral legal assistance treaty against cartels² would help eliminate the dual criminality requirement. We believe that companies as legal entities can be criminals and that companies act through people. It is thus necessary to bring to trial those responsible for corporate crime - just as any other crime - and to prosecute if found guilty. While we recognize that the current legal environment in some Member countries does not provide for extraterritorial jurisdiction based on the "effects doctrine", it may be worthwhile exploring the possibility of a positive comity agreement initially among Member countries where such an arrangement would be legally feasible.

8. We recognize that the *exchange of confidential information* will be most useful in assisting law enforcement. Thailand has passed an administrative law with respect to the classification and the handling of confidential information in 2001. Our Public Information Act 1997 also guarantees public access to government documents. A committee has been established to consider requests for disclosure of public documents. Its decision is binding on all government entities. While there are no explicit prohibitions with regard to the exchange of confidential information in our law, the idea of sharing confidential information on a multilateral basis at this point is hardly feasible considering the legal and institutional constraints. The exchange of non-confidential information would be more practical and appropriate. However, the exchange of confidential information would be required in the case of a positive comity requests, which we see as an essential element of an effective cooperation that should be worked out in the medium term. This issue will be addressed in more details below.

9. We understand that differential sanctions and substantive procedural rules as well as leakage of confidential information are major causes of concern. Nevertheless, we believe that these elements can be worked out if national industrial and trade policies do not get in the way. Indeed, countries that are eligible to participate would have to meet the minimum requirements in terms of the quality

¹ Thailand has established several bilateral treaties on mutual assistance in the enforcement of criminal offence. It should also be noted that violations of the competition law constitute a criminal act in Thailand.

² Indeed, the definition of cartels and the elements that would constitute a violation would have to be agreed upon.

of the procedures and the handling of confidential information. We would like to emphasize that without a positive comity agreement, developing countries would likely continue to be victimized by international cartels' detrimental collusive practices.

10. Finally, we believe that the proposed cooperation modality is practical, feasible and can be effective in fighting cartels in both developed and developing Member countries. More importantly, such cooperation, which entails exchange of information, coordination, consultation and assistance, would lay the ground for closer cooperation in the future.
