

UNITED NATIONS CONFERENCE ON TRADE AND DEVELOPMENT

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



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Prepared at the request of UNCTAD by Simon J. Evenett, World Trade Institute, Bern, Switzerland; E-mail: [simon.evenett@wti.org](mailto:simon.evenett@wti.org). Any errors are the responsibility of the author. The views expressed in this paper are those of the author and not of UNCTAD, its officials or its members.

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## Executive summary

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

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

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

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

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

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

Please send any comments, inquiries and suggestions to:

Dr. Simon J. Evenett  
Director, Economic Research  
World Trade Institute  
Hallerstrasse 6  
3012 Bern  
Switzerland  
Tel,: +41 31 631 3861  
Fax: +41 31 631 3630  
E-mail: [simon.evenett@wti.org](mailto:simon.evenett@wti.org)

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

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

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

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

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

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

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

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

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

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

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

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

The goal of this paper is to assess whether developing economies can benefit from negotiations that might lead both to binding provisions on national cartel enforcement and to measures that encourage voluntary cooperation on cartel enforcement matters between official agencies. After this introduction, the first order of business is to define what a private international cartel is and to relate it to the commonly used term “hard core cartel.” In the third section of this paper, the enforcement record against private international cartels in the 1990s is reviewed and evidence presented on the prevalence of, and estimated damage done by, private international cartels. The fourth section discusses a number of ways in which States effectively encourage their firms’ attempts to cartelize markets abroad. Drawing on this evidence

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