

COMMUNICATION FROM THE UNITED STATES

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

PROVISIONS ON HARD CORE CARTELS

The Doha Ministerial Declaration created a specific work program for the Working Group on the Interaction Between Trade and Competition Policy during the period until the Fifth Session. In particular, the Working Group will devote itself to clarifying core principles, provisions on hard core cartels, modalities for voluntary cooperation, and support for progressive reinforcement in developing countries through capacity building¹. In this submission, the United States identifies issues that are likely to arise while considering a multilateral framework that would include provisions on hard core cartels. The United States does not offer solutions to many of the issues it raises herein, but instead hopes that its submission will encourage a productive exchange of views among the Members and assist the Working Group in its efforts to begin clarifying hard core cartel issues, consistent with the mandate of the Doha Ministerial.

I. BACKGROUND

1. The United States' position on the importance of an effective anti-cartel enforcement program has long been clear. Detection and prosecution of hard core cartels has always been, and remains, a primary antitrust law enforcement priority. There is broad consensus that hard core cartels - whether in the form of price fixing, output restrictions, bid rigging, or market division - are the most egregious of violations of antitrust law. They raise prices and restrict supply, enriching producers at consumers' expense and acting as a drag on the entire economy. As commerce has become more global, so too have cartels. That is why the United States has been one of the leaders both in prosecuting international cartels and in encouraging other countries to do likewise. Since 1996, the US Justice Department has prosecuted more than 50 companies for participating in international cartels affecting more than \$10 billion in US commerce. The Justice Department has obtained fines of more than \$1.9 billion, and at least 20 senior executives have been sentenced to jail time. These cartels cost U.S. businesses and consumers hundreds of millions of dollars annually, in some cases artificially inflating prices by as much as 100%. They undoubtedly cost businesses and consumers in the rest of the world, in both developing and developed countries, as much or more.

2. Although we are encouraged by our success in prosecuting these cartels, we recognize that cartels continue to be a way of life in many parts of the world, impeding economic performance,

¹ Doha Ministerial Declaration, Paragraph 25.

promoting inequality and impoverishing consumers. We realize that effective cartel enforcement requires other countries to have appropriate anti-cartel laws and to enforce those laws against both local and international cartels. That is one reason why we worked to secure approval in 1998 of the OECD Recommendation Concerning Effective Action Against Hard-Core Cartels ("OECD Cartel Recommendation"). The OECD Cartel Recommendation encourages each member country to ensure that its competition laws effectively halt and deter hard core cartels and to cooperate in investigating and prosecuting those cartels. Since the Recommendation was adopted, many OECD member countries have strengthened their laws in this area. Worldwide, more than 90 countries now have antitrust laws, and almost all of these laws have anti-cartel provisions.

3. Despite the non-binding nature of the Recommendation, and even though virtually all OECD members had laws in place prohibiting cartels before entering negotiations, it still took a significant amount of time to negotiate and finalize the OECD Cartel Recommendation. The following discussion highlights many of the issues we can expect to face in addressing hard core cartels in the WTO context, drawing largely upon our experience in the OECD.

II. TERMS OF AN AGREEMENT/SCOPE OF COVERAGE ISSUES

A. DEFINITION OF HARD CORE CARTEL

4. As an obvious starting point for any agreement, the WTO Members would need to reach some consensus on a definition of hard core cartels. Is the term limited to price-fixing, bid-rigging and market-allocation arrangements? How should joint ventures and joint marketing arrangements be treated? Should the term be limited to horizontal arrangements? Although less plausible, would vertical pricing arrangements, such as resale price maintenance, be covered by a WTO agreement?

5. All of these issues were raised during the negotiations in the OECD. Ultimately, after extensive negotiation, the OECD Cartel Recommendation defined a hard core cartel as: "an anti-competitive agreement, anti-competitive practice or anti-competitive 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."² WTO Members might conclude that the definition adopted by the OECD is the proper one, depending on the nature of any commitments to be undertaken and their enforcement mechanism.

6. Another major issue we can expect to arise relates to the treatment of horizontal agreements in which any potential harm may be counterbalanced by other considerations, notably pro-competitive efficiencies. The legality of this category of agreements is determined by a case-by-case examination in some jurisdictions. For example, although cartels are treated as *per se* unlawful in the United States, other horizontal agreements that are not *per se* offences are analyzed under a rule of reason standard, which balances the pro-competitive effects of the arrangement against any anti-competitive effects³. In other jurisdictions, guidelines, regulations or block exemptions provide guidance on the legality of some of these agreements. The OECD Cartel Recommendation excludes agreements that "are reasonably related to the lawful realisation of cost-reducing or output-enhancing efficiencies", but consensus on this point was not reached easily and certainly would require more discussion in the WTO.

² OECD Cartel Recommendation, Section I. A. (a).

³ For instance, price-fixing and bid-rigging agreements among horizontal competitors are accorded *per se* treatment in the United States, but legitimate joint ventures that hold the promise of increasing efficiency and enhancing competition are scrutinized under a rule of reason standard.

B. EXEMPTIONS

7. There are other, more complex issues that would need to be considered in connection with a possible WTO agreement that included provisions on hard core cartels. One is the question of exemptions from cartel laws, either in connection with regulation of an industry or simply because a choice has been made not to apply antitrust laws to certain conduct or sectors. Virtually every country has exemptions of this sort. A second set of issues involves cartels that are not formally exempt but that are either not covered by a country's cartel law or are informally but deliberately sanctioned by a government. A third issue concerns the question of "export cartels". The competition laws of most countries do not reach outbound joint export activities that do not have anti-competitive spillover effects in their home markets - i.e., the kind of effects at which antitrust laws are aimed.

8. The OECD Cartel Recommendation permits members to exclude certain industries or activities such as export cartels from cartel enforcement, but such exclusions must be transparent and "no broader than necessary to achieve their overriding policy objectives". WTO provisions relating to exemptions may need to be spelled out in more detail. This subject area will require further and more focused discussion among WTO Members.

III. COMMITMENTS

9. Another key area requiring clarification involves the commitments that WTO Members would have with respect to hard core cartels. Would a WTO multilateral framework require Members to do more than simply have laws in place banning hard core cartels? What if a Member has a hard core cartel law but does not establish adequate penalties for violators? What penalties would be adequate? What commitments would be required of the scores of WTO Members that currently do not have a national antitrust authority or appropriate enforcement procedures and mechanisms in place? What if a Member enacts a hard core cartel law but never enforces it? How would a WTO agreement be drafted so that it does not restrict an antitrust agency's discretion to not take enforcement action where, for example, the evidence was not sufficiently strong or provable or where prosecution was not otherwise in the interests of justice?

10. Obviously, anti-cartel laws are not effective if they do not carry sanctions of a sufficient magnitude to deter and punish offenders. Legislation that bans hard core cartels is an important component of any effective anti-cartel program, but legislation alone will not deter cartels. An antitrust agency must also make combating hard core cartels an enforcement priority and devote sufficient resources to effectively investigating and prosecuting cartels.

11. Therefore, it might, for example, make sense to set forth minimum provisions to be adopted by the Members in their own enforcement regimes. They might include provisions to:

- publicly condemn hard core cartels and state an intention to investigate and prosecute this conduct;
- adopt and maintain an anti-cartel law with sanctions of at least equal deterrent and punitive effect as those imposed for other economic crimes such as corruption, fraud and embezzlement;
- establish domestic enforcement procedures and institutions that are sufficient to permit effective investigation, adjudication and remedy of cartel activities.

12. Again, possible commitments of WTO Members is a subject that will require further and more focused discussion.

III. CONCLUSION

13. The United States believes the OECD experience has provided useful lessons in negotiating a multilateral framework on cartels. Given the nature of WTO agreements, reaching a consensus might be considerably more challenging. The United States hopes that this paper's brief presentation of some of the issues WTO Members can expect to face while considering an agreement including cartels will assist the Working Group in its clarification efforts, consistent with the mandate of the Doha Ministerial.
