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FIGHTING HARD CORE CARTELS IN LATIN AMERICA AND THE CARIBBEAN

1. "Prosecuting hard core cartels" was one of the topics of the most recent in a series of OECD seminars for Latin American and Caribbean competition officials. The seminar was held in October 2004 in Santiago, Chile, and was co-hosted by Chile's competition enforcement authority. As usual, officials from non member countries presented actual cases, and those presentations provided the context for the discussion of key legal and economic principles. These case-based discussions were supplemented by reports on recent events in those countries without competition laws.[1]

2. The cases and discussions showed that since 2000, when a previous OECD seminar in Latin America had focused on anti-cartel enforcement, countries in the region have developed increased awareness of the importance of prosecuting cartels and, in some cases, increased tools for doing so. There were, of course, differences among the countries on the level of public awareness, the strength (and even the existence) of competition laws, and the extent, sophistication, and success of anti-cartel activity. Some countries had serious, important investigations underway, but others did not. The imposition of significant fines has been rare, and some cases have been under review by the courts for years. Despite positive developments, it was clear that those who advocate and/or engage in anti-cartel enforcement in this region continue to face significant difficulties.

3. These difficulties are to some extent the result of the region's history, which in general has seen considerable state intervention in economic matters and in some cases has included government approval and even sponsorship of cartels. (This note uses the terms "hard core cartel" and "cartel" interchangeably.) At the same time, the difficulties are not unique. Recent advances in anti-cartel enforcement in OECD countries has required a great deal of work to increase public and governmental awareness of the harm caused by cartels (and other anticompetitive practices), as well as to develop the necessary legal tools and skills.

4. This Forum's discussion of anti-cartel enforcement will be organised so as to build on both the common aspects of Latin American and Caribbean enforcement and the relevant experiences of OECD members. This note does not discuss any of the case studies submitted to OECD training seminars, in part because the OECD treats submissions to such seminars as non-public in order to encourage candour. In addition, this Forum is not a training seminar, but rather a policy discussion in which high levels officials from the region can discuss with each other and with officials and experts of OECD countries the ways in which they have overcome past obstacles, the challenges they currently face, the ways in which they can assist each other, and the ways in which the international community can assist them.

5. As background for that discussion, this note describes the 1998 OECD Council Recommendation concerning Effective Action against Hard Core Cartels[2] and some of the

principal findings of more recent OECD and other work in this field. In light of what is at least an historical tendency for the public and governments in this region to adopt a tolerant if not supportive view of cartels, the note goes into some detail in discussing cartels' harm and the kinds of activities that can increase awareness of their harm. It also addresses substantive legal standards, the treatment of government-sponsored cartels, sanctions, investigation tools, and international co-operation, but those sections are less detailed. Although the note raises many questions, it is not a questionnaire but rather a "menu" of topics and issues that participants may choose to address in their written submissions and at the Forum meeting itself.

I. AWARENESS OF CARTELS' HARM – A PREREQUISITE FOR PROGRESS AND A CONTINUING CAMPAIGN

6. As noted above, many countries in Latin America and the Caribbean have histories of government-sponsored cartels, and this history undoubtedly contributes to a widespread lack of awareness of how harmful cartels are.[3] Based on experiences in the region and elsewhere, it is clear that this lack of awareness is directly or indirectly responsible for many of the difficulties faced by competition advocates and officials.

7. Most obviously, perhaps, a lack of public awareness of cartels' harm makes it more difficult to persuade legislatures to enact competition laws and to provide the investigation methods and sanctions necessary to fight effectively against cartels. Even in countries with adequate competition laws, however, a failure of the public and government departments and officials to understand cartels' harmfulness can create or contribute to a host of problems. The problems are greatest in developing countries that lack a "competition culture," but they exist even in OECD countries. Even in OECD countries where a competition culture is best established, the competition authorities face a never-ending challenge to educate the public and other parts of government of the benefits of their anti-cartel (and other) law enforcement.

8. In countries whose anti-cartel laws provide adequate investigative tools and sanctions, a lack of awareness of cartels' harm can contribute to some or all of the following problems.

- The competition authority may be inadequately funded or may be subject to undue influence. This is very common problem in developing countries.
- Other parts of government may compel price fixing in order to make markets more "orderly," or may enact standards and rules that facilitate price fixing or other anticompetitive conduct. In some developing countries, including Peru, this tendency has led to the adoption of competition laws that can terminate even government imposed price fixing.
- Other parts of the government may not cooperate in investigations of private anticompetitive conduct. For example, the police force may be unwilling to assist in "dawn raids." And where judicial approval of such raids is necessary, judges may be reluctant to provide it.
- Individuals and businesses that are aware of cartel activity may be reluctant or unwilling to alert the competition authority or to cooperate in investigations. In varying degrees, this is a problem throughout the world. Some time ago, one OECD competition authority noted that its attempt to encourage people to complain about cartels had not been successful, apparently because cartels were not seen as a serious enough offence for people to overcome their reluctance to offend their fellow citizens by becoming "informants."

- In countries where independent competition authorities must rely on public prosecutors to bring criminal cases, the view that cartels are not sufficiently reprehensible to warrant criminal action undercuts the competition agency's authority and its effectiveness. The Mexican competition authority, for one, has had difficulty in persuading prosecutors to prosecute cartels criminally.
- A failure to appreciate the harm of cartels also makes it more difficult for competition authorities to impose strict sanctions, persuade courts to do so, or obtain convictions from juries. In some form, this problem exists everywhere. For example, even though New Zealand has a very competition-oriented culture, judges there regularly refused to impose large fines for cartel activity until a government report seeking legislative changes emphasised the amount of harm cartels cause and the reasons for strict sanctions.

A. The OECD Anti-cartel Recommendation as "Competition Advocacy" on the Harm Caused by Cartels

9. The 1998 Recommendation served as a catalyst for reform in part by identifying specific requirements for effective action. Thus, the body of the Recommendation focused on three topics: (1) ensuring that sanctions are adequate to halt and deter cartels, (2) providing competition authorities with adequate, compulsory investigation tools, and (3) seeking to improve international co-operation in anti-cartel enforcement by, among other things, using legislative and other means to remove unwarranted legal obstacles to the sharing of confidential information among competition authorities.

10. These substantive topics will be discussed in subsequent sections of this note, but it is important to call attention to the several ways in which the Recommendation has been a vehicle for "competition advocacy" to increase awareness of cartels' harm. In the first place, the process of considering and adopting the Recommendation permitted competition advocacy within OECD members' governments, as competition officials explained the policy basis for the Recommendation and sought their governments' approval. Moreover, the issuance of the Recommendation attracted public and governmental attention, particularly in countries that had not traditionally been strongly opposed to cartels.

11. Second, the Recommendation's preamble lays the predicate for its substantive recommendations by describing in a conclusory but quite specific way the harm that cartels cause to consumers and to the world trading system. The penultimate clause refers to cartels as "the most egregious violations of competition law," and explains that they "injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchases and unnecessarily expensive to others." The final clause adopts a global perspective, explaining that cartels' "distortion of world trade creates market power, waste, and inefficiency in countries whose markets would otherwise be competitive." The "most egregious" label has become part of the standard description of cartels.

12. Third, the Recommendation invited non member countries to associate with the cartel. The association process is relatively simple and is described on the OECD website. An association request must be made by a country's government, not merely by its competition authority, which may pose an obstacle for interested non member competition authorities but also provides them an opportunity for intra-governmental competition advocacy. In October 1998, a group of Western hemisphere competition officials issued a communiqué affirming the importance of anti-cartel activities, but Brazil is the only non member country to have associated itself with the Recommendation.[4]

13. Fourth, the Recommendation called upon the OECD Competition Committee to review members' experience in implementing the Recommendation and to report in two years on any necessary further action. As discussed below, this and subsequent Committee reports have continued to provide information about cartels' harm and explore the most effective ways of fighting them.

14. In its 2000 report on implementation of the Recommendation ("the First Report"),[5] the Competition Committee noted the lack of data on cartels' harm, observed that improved public knowledge would bolster support for effective anti-cartel action, and announced its intention to pursue this issue (among others) in its further work. To provide policymakers and the public some sense of the magnitude of cartels' harm, the First Report applied formulas from the United States sentencing guidelines to available data concerning international cartels recently prosecuted by the United States. These formulas, which had also been used in the United Kingdom to make public estimates of cartels' harm as a means of educating the public, presume that cartels produce overcharges amounting to 10 percent of the affected commerce and cause overall harm amounting to 20 percent of affected commerce. Applying the 10 percent formula, the report estimated that the recently detected cartels had overcharged United States consumers by USD one billion, and overcharged other consumers by an unknown but much larger amount.

B. Follow-up Analyses of Cartels' Harm

15. Follow-up Committee work on cartels' harm was described in a 2002 "Harm and Sanctions Report"[6] and a second "implementation" report ("the Second Report")[7] that was issued in 2003. The analysis in these reports was based primarily on survey data from OECD countries, though non members were invited to make relevant contributions to the October 2001 meeting of the OECD Global Forum on Competition (GFC). In addition, a draft of the Harm and Sanctions Report was discussed with non members at this meeting.

16. OECD countries' survey responses reported on 145 cartel cases (less than half of those they prosecuted during the relevant period). It was possible to estimate the amount of affected commerce in only 16 of these cases, but their total exceeded USD 55 billion, which under the above noted formula implies overcharges of USD 5.5 billion (and total harm of USD 11 billion). In 14 of the cases, it was possible to make actual estimates of overcharges, expressed as percentages of affected commerce. The estimates ranged from a low of 3 percent to a high of 65 percent, with the median in the 15-20 percent range. Since the total amount of cartels' harm to consumers exceeds amount of the overcharges, it was clear that the total harm is substantial indeed. Like the First Report, these reports noted that cartels may be particularly harmful to developing countries, but the survey data did not provide a means for examining this issue.

17. There have been other important analyses of cartels' harm, including their harm to developing countries. For example, a study presented to the second GFC meeting indicated that developing countries imported an estimated USD 81.1 billion of products affected by 16 cartels.[8] (These are not exactly the same cartels as those in the OECD study, though there is overlap.) These imports were estimated to represent 6.7 percent of their imports and 1.2 percent of their GDP. This volume of commerce implies overcharges of USD 8.1 billion using the formula in the sentencing guidelines or USD 12-16.2 billion using the median found in the OECD reports. Those numbers probably overstate the overcharges from those 16 cartels, but probably understate the overcharges to developing countries of all cartels.

18. Other studies have also made findings on cartels' harm. One study used estimates from more than 500 cartel episodes to conclude that the average overcharge is in the range of 20-30 percent, with higher overcharges for international cartels.[9] Another study, funded by the Inter-American Development Bank and focusing on the desirability of including competition law provisions in the proposed Free Trade Area of the Americas, found that in Latin America and elsewhere, the monetary amount of imported vitamins grew faster in countries without anti-cartel laws.[10] This finding supports the often expressed view that cartels target countries without such laws (and perhaps those with weak enforcement records).

19. Most of the foregoing studies relate to the harm caused by international cartels, but domestic cartels may well cause even more total harm, particularly in developing countries with no competition laws or without aggressive anti-cartel programmes. Most of the cases reported by OECD countries involved domestic cartels, some of which lasted for decades, involved many participants, and affected billions of the national currency.

C. Anecdotal, "Popular" Evidence of Cartels' Harm

20. The OECD's reports on hard core cartels have all included some "popular" evidence of cartels' harm, because such evidence, though anecdotal and sometimes indirect, can be useful in gaining the attention of laymen and in showing that cartel members know that their conduct is both harmful and illegal. Such evidence is often subject to various forms of confidentiality protections, however.

21. The decision of some individuals in the global lysine conspiracy to contest the allegations against them provided powerful evidence of the true nature of cartels. Public record evidence in that case, including videotapes, has been seen around the world. The Committee's First Report quoted the now-famous statement that "Our competitors are our friends. Our customers are the enemy." The 2002 and 2003 reports contained some similar, if less spectacular, evidence. A representative of a driving school noted that competing on price would "give away" money to customers, and that "would be a stupid thing to do." Officials from a large corporation piled evidence of a cartel into cars, drove to the country, and destroyed the evidence in four bonfires that lasted all day.

22. The Committee's Third Report is still under preparation, but relevant information from some recent cases is public. During a meeting of participants in the copper plumbing tubes cartel sanctioned by the European Commission in 2004, one individual stated: "The objective is to keep the prices in the high price countries high – if possible to increase [them] even more." The Commission's 2003 peroxide case was remarkable in both its duration (30 years) and the sophisticated way in which the cartel's operations were concealed.

23. Cartels that have a direct or obvious impact on consumers can be particularly useful as vehicles for raising awareness of cartels' harm. In the United Kingdom, a case against sellers of replica "England" and "Manchester United" football shirts and other such merchandise attracted great public attention even though it involved a relatively small amount of commerce. Ownership of houses or apartments is an important goal for Koreans, and cases against two construction cartels were extremely popular and highly publicized because of the cartels' indirect but clear increase in the price of apartments.

24. Various Latin American competition authorities have brought anti-cartel cases in recent years, but it is unclear whether or to what extent there is evidence in such cases that has been or could be used to illustrate the nature and harm of cartels.

D. **Communication by Competition Authorities**

25. It is important for competition authorities to maintain proactive communications policies in order to educate the public and other government institutions about the benefits of all their activities, including anti-cartel enforcement. The need for and range of such policies was addressed in a Competition Committee roundtable discussion in October 2002.[11] In some OECD countries, these policies have been important in overcoming a traditionally suspicious attitude towards competition and a tolerance of cartels. In all OECD countries, they serve general educational purposes and are important in promoting the detection and deterrence of cartels.[12] Brazil was among the countries that reported a substantial increase in its communication efforts.

26. Communication policies can be implemented in many ways, depending on variables such as resource levels, target audience, and national culture. The Korea Fair Trade Commission uses a cartoon character on its website, but this approach was not considered appropriate for Germany.

27. A roundtable discussion in October 2004 dealt specifically with raising awareness of cartels' harm, and considered both general education programmes aimed at different groups (the business community, lawmakers, the general public) and specific programmes for procurement authorities. This roundtable has not been published but will be discussed in the Competition Committee's third "cartel report."

28. In general, these two roundtables reflect an ongoing need for competition authorities to have active programmes to communicate clearly and consistently about anti-cartel and other work. Representatives of various authorities noted that the public, lawmakers, and even the business community often lack a good understanding of the premises or benefits of competition law enforcement, even actions against most cartels. There is greater public understanding of the harm of bid rigging (collusive tenders) and the reasons for prosecuting it, but there is a continuous need to educate procurement officials to be alert for such activity. In addition to showing that cartels are harmful, publication of information about cartel cases is important to showing that competition authorities are capable of detecting and prosecuting cartels, and that successful prosecution leads to substantial penalties.

Raising General Awareness of Cartels' Harm

29. In raising general awareness of cartels' harm, quantitative estimates of the harm caused by cartels can be very useful, even if the underlying data and methods require that the estimates be qualified substantially. Monetary amounts are useful both in attracting attention and conveying the fact of harm, even if the amount is uncertain. Even anecdotal evidence of falling post-cartel prices is perhaps the most persuasive form of evidence, but the lysine case shows that when evidence from the parties can be released, statements about expected higher prices and/or profits or reflecting "guilty knowledge" are also useful. Although any competition authority would prefer to use evidence of harm from its own cases, evidence from other sources is necessary when competition advocates are seeking a country's first competition law and may also be necessary in many other situations. In addressing business groups, it is useful to stress that enterprises are often harmed by cartels.

30. When factual evidence is not available, competition authorities may often be able to educate the public and lawmakers by focusing on the practical way in which challenged or even hypothetical conduct affects consumers. Simple examples may be particularly useful in countries (or sectors of the economy) in which competition enforcement is (or would be) new and its implications are not widely understood. In such situations, it may not be necessary to quantify harm but merely to explain how harm may come about using terms and examples to which the audience can relate. For example, in dealing with those whose initial reaction is that cartels help local firms remain in business, one can at least begin by seeking to refocus the discussion on consumer prices. Or, to use an actual example involving what might be seen as a "soft core cartel," if lawmakers in an Anglophone country question the value of a case challenging a professional organisation's ban on advertising, one can communicate more clearly by alleging the "suppression of truthful information" – such as "Se Habla Español."[13]

31. Seminars, conferences, and other public events can provide useful forums for increasing public awareness – particularly in the host country. The United Nations Conference on Trade and Development addresses anti-cartel enforcement in meetings and conferences.[14] The WTO Working Group on Trade and Competition has also prepared materials and organised discussions of anti-cartel enforcement.[15] In 2004, the International Competition Network created a Cartel Working Group, which prepared materials that were discussed at its June 2005 conference in Bonn, Germany.[16] In Latin America, a number of countries have hosted meetings of the Iberoamerican Competition Forum, and Chile – and perhaps other countries in the region – holds an annual "National Competition Day."

32. Public events and non-public intra-governmental discussions need not relate specifically to cartels or even to competition law in order to provide useful forums for anti-cartel advocacy. Discussions of public procurement provide an obvious opportunity, but events or meetings on other topics – such as corporate governance, corruption, or consumer protection – can also be useful vehicles for raising awareness of the importance of effective action against cartels. Developing countries have a particular interest in foreign and domestic investment, and their policymakers often regard competition law enforcement as harmful to investment. Therefore, competition officials can use public and intra-governmental meetings on investment to promote competition law enforcement as a benefit to the investment climate.[17]

Raising the Awareness of Procurement Officials

33. Bid rigging (collusive tendering) is a great concern to developed and developing countries throughout the world. Procurement officials are typically in the best position to detect signs of unlawful bidding arrangements, and they can to some extent influence how bidding procedures are organized to make the formation of cartels more difficult. Few countries have programmes to systematically educate procurement officials about bid rigging, however. Some have recently begun developing limited programmes, but in many OECD countries, procurement authorities and officials are not yet sufficiently aware of the danger of cartels and of the important role they can play in preventing and detecting them.

34. The most comprehensive programmes for procurement officials are found in the United States and Canada. The competition authorities in both countries organize seminars, speeches, and other educational programmes to reach out to the procurement community. The United States has published brochures on the danger of cartels and a checklist of suspicious behaviour and statements.[18] Canada's multimedia presentation on detecting and deterring bid rigging is available on CD ROM and on the Competition Bureau's website.[19]

35. Although other countries' efforts to involve procurement authorities in discovering and preventing cartels are more recent, some have already shown positive results. In Sweden, for example, increased interest in bid rigging was triggered by a case against a cartel among asphalt producers that had targeted national and local road building projects. Media reports highlighted the losses for taxpayers caused by the cartel, as well as the fact that prices soon dropped by [20] percent. Sweden's checklist for detecting bid rigging closely follows that of the United States, emphasising that competition authorities can benefit from the experiences and established programmes of others in order to more effectively reach out to public procurement officials.

36. The role of procurement officials in fighting bid rigging should not be limited to the detection of cartels once they have occurred. Competition authorities can advise procurement authorities on measures to make bid rigging less likely by making the formation of cartels more difficult and/or more costly.[20] For example, since a small number of similar competitors increases the likelihood of collusion, procurement authorities should seek a larger number and a better mix of competitors. The frequency of interaction among participants in procurement procedures increases the potential for collusion, and varying the scope of tenders can help reduce the extent to which the same parties participate in the same tenders. Moreover, procurement authorities can minimise the extent to which contracts of a similar size come up for bids at regular intervals.

37. Competition officials can also urge other steps to deter bid rigging. For example, the United States sometimes "debars" companies convicted of bid rigging from bidding on future government contracts. While this remedy must be applied cautiously to avoid reducing competition for the duration of the debarment, its availability and selective use is seen as a substantial deterrent. In some countries, every participant in a procurement procedure is required to sign a written statement of compliance or a statement of independent bid determination. Such statements can deter bid rigging by requiring firms to disclose the material facts about any communications and arrangements with competitors regarding the tender call, or by requiring bidders to certify that there were no consultations, communications, or agreements with competitors relating to pricing or intent to submit an offer.

E. Potential Issues for Discussion in Written Submissions and at the Forum

38. The foregoing discussion raises many issues that participants may want to address, and many different kinds of information could be relevant to those issues. For example:

1. To what extent, and in what ways, does lack of awareness of cartels' harm obstruct your efforts to obtain the powers needed to fight cartels or to use your existing powers effectively?
    - Have you encountered the difficulties described in this note? Have you encountered other difficulties? Have there been instances in which specific legislative or enforcement initiatives have been frustrated by legislators, prosecutors, judges, or others on the ground that cartels are beneficial or not particularly harmful?

2. To what extent, and in what ways, do you promote awareness of cartels' harm?
    - Do you have easily understandable, publicly available brochures or other documents focusing on the harm caused by cartels? Are such documents available on your website?
    - To what extent do you have proactive programmes to distribute information on cartels' harm to the general public, lawmakers, government regulators,

and business interests? What kinds of activities do you use – *e.g.,* speeches, newspaper articles or advertising, other media shows or advertising?

- At what point does your competition authority make public the allegations against enterprises? Are the decisions finding competition law violations made public? Is there an attempt to write such official documents in a manner that can increase public awareness of cartels' harm – for example, by including colourful details in allegations, or by discussing cartels' harm in general as background in decisions relating to cartels?
- To what extent do you have a programme to educate procurement officials on the means by which they can detect and deter bid rigging? Do you have written materials on this topic? Do you have meetings with or training programmes for procurement officials?

3. What kinds of evidence have you used to explain cartels' harm?
   - Have you used the information on cartels' harm from OECD Competition Committee reports? Information from other international organizations or other countries? What kinds of information – quantitative estimates, colourful anecdotes, large fines, etc. – have you found most useful? How could information on cartels' harm be made more helpful?
   - To what extent have you sought to gather and distribute information about the harm cartels have caused in your country? Based on your experience, do you have particular suggestions on gathering and/or presenting relevant evidence or arguments?

4. Assuming that your country has an anti-cartel law, would it assist your anti-cartel advocacy and enforcement activities for your country to associate itself with the 1998 OECD Recommendation? If you proposed such association to your government, would discussing the proposal provide a useful opportunity for competition advocacy within your government?

II. STANDARDS FOR PROVING THE EXISTENCE AND LEGALITY OF CARTELS

39. The OECD Recommendation defines "hard core cartel" as an anticompetitive agreement, concerted practice, or arrangement by competitors to fix prices, restrict output, rig bids (collusive tenders), or divide markets. It did not, however, seek either to define these terms or to state what legal standards a country should apply in assessing whether conduct or other evidence is sufficient to show (a) the existence of an agreement, concerted practice, or arrangement by competitors or (b) that the agreement is anticompetitive and illegal. Clearly, however, these are important issues.

A. Proving the Existence of an Agreement

40. The statutory and case law of OECD and other countries uses differing terminology, but by definition all horizontal restraint cases, including those constituting cartels, require proof of some kind of "agreement" – some kind of "meeting of the minds." Proof of an agreement is difficult in many horizontal restraint cases, because the agreement is seldom written down and the parties often claim to have acted unilaterally. Direct evidence is difficult to find, but circumstantial evidence of agreement – that is, evidence of facts and circumstances supporting an inference of agreement – is admissible and can be very convincing.

41. Consciously parallel conduct by the alleged parties to the agreement is circumstantial evidence, but it is generally insufficient to support a finding of agreement unless "plus factors" – additional circumstantial evidence – are also shown. Sometimes, the improbability of parallel conduct absent agreement can itself be a plus factor (e.g., identical list prices and discounts for differentiated products over many years, with simultaneous price increases even when costs are declining). Evidence from telephone logs, email, other correspondence showing frequent contact can also be a plus factor (though evidence of a secret meeting is more persuasive), especially when the communication is closely followed by simultaneous, identical actions. Similarity in the language of documents from different firms, pretextual explanations for price increases, and evidence that allegedly unilateral conduct would be contrary to the parties' self interest absent an agreement are other kinds of circumstantial evidence. None of this evidence can be looked at in a vacuum, taken together, all of the evidence must make concerted action more probable than unilateral action.

42. In civil or administrative cases, where the applicable standard of proof requires something along the lines of showing that it is "more likely than not" that there was an agreement, circumstantial evidence is often dispositive.[21] Circumstantial evidence can also be important in criminal cases, but in such cases the higher standard of proof (e.g., "beyond a reasonable doubt"), the need to make an additional showing of "intent" or "guilty knowledge," and the possible need to persuade jurors who may have difficulty drawing inferences means that some direct evidence is much more important as a practical matter. (This is one reason for questioning whether criminalisation of cartels would be beneficial in some countries.)

43. If agreements are inferred when the conduct shown does not make it more likely than not that there was some meeting of the minds, anti-cartel enforcement would tend to deter legitimate conduct. On the other hand, insistence on direct testimonial or physical evidence of the agreement, especially in civil or administrative cases, would appear to be an unwarranted barrier to effective enforcement. The peer review report on competition law and policy in Chile noted that although some cartel agreements had been inferred from circumstantial evidence, it had been suggested that the commissions that then decided cases had a tendency to reject even persuasive circumstantial evidence and to insist on "concrete" evidence that company representatives had actually reached an agreement.[22]

B. Proving that an Agreement is Illegal

44. Several countries treat cartel and some other agreements differently from other types of anticompetitive agreements, sometimes by making certain agreements automatically or "per se" illegal even in the absence of evidence that the parties had market power or more direct evidence of effects. (In Columbia, Costa Rica, Mexico, and Panama, these agreements are described as being "absolutely prohibited.") Stated differently, this approach says: "Since the parties to this agreement presumably believed that it would have some effect, and since we know cartel agreements are always or nearly always anticompetitive, we will conclusively presume that this agreement had anticompetitive effects." Although many countries require some sort of evidence of anticompetitive effects, the study of cartels over the last five years has increased interest in specifying a lesser standard of proof in cartel cases.

45. Another evidentiary issue in cartel and other cases is whether and how the parties may defend on the ground that the agreement was "justified." It is often said that no justifications may be offered in cartel or other "per se" cases, but the process by which an agreement is characterised as "price fixing," for example, often take into account possible efficiency justifications.

46. Issues relating to whether a competition authority must show market power and whether and what efficiency or other justifications may be offered are illustrated by a cartel case described in last year's peer review report on competition law and policy in Peru.[23] Peru's law presumes that cartel agreements "harm the general economic welfare," and for years Peru treated this presumption as conclusive and applied a "per se" approach. In 2003, however, the Competition Tribunal held that accused members of a cartel must be given an opportunity to show that their agreement did not cause such harm.

47. This case was described by the competition authority as applying a "rule-of-reason" approach, and it caused considerable controversy in Lima, but the peer review report suggested that the decision was unlikely to have any substantial impact unless it portends some future change. In the first place, the Tribunal did not remand the case for further findings, but rather found the conduct illegal after rejecting proffered justifications but without any examination of market power or other evidence relating to anticompetitive effects. If this was the rule of reason, it was at most what is sometimes referred to as a "quick look" or "truncated" rule of reason, under which some agreements among competitors may be condemned without a "full-blown" analysis of market power and effects if they lack efficiency justifications or there is anecdotal evidence of effect.[24] In the second place, the change was described as moving from a United States to a European model, but the European Commission has for some time considered hard core cartels to be essentially "per se unexemptable."

48. It is sometimes suggested that developing countries – or those developing countries that are just beginning competition law enforcement – should make greater used of absolute prohibitions because they do not have the data, the expertise, or the resources to do a full-blown rule-of-reason analysis. However, these suggestions seldom provide a means of identifying what additional agreements might fall into an expanded "per se" category. One clear candidate would be agreements among competitors to refuse to buy or sell to enterprises that deal with the competitors' existing or potential competitors. In a number of countries, such agreements are considered a subcategory of horizontal "boycotts" that are subject to the per se rule or are condemned as hard core cartels.[25]

C. Potential Issues for Discussion in Written Submissions and at the Forum

1. How may the existence of a cartel agreement be proved in your country? What kinds of circumstantial evidence have been used?

2. How does your country distinguish between hard core cartels and legitimate, procompetitive joint ventures that may have some provisions which restrict price or other competition in ways that might be characterised as price fixing or other cartel agreements if they occurred outside the joint venture context?

3. What must be proven in order to declare an alleged cartel agreement to be illegal? If anticompetitive effects must be proven, is it necessary to define product and geographic markets and demonstrate that the cartel has market power? What other methods of showing effects are used? To what extent and how may cartel members seek to justify their conduct?

III. GOVERNMENT-SPONSORED CARTELS

49. Although the economic policies of Latin American governments have become more market oriented in recent years, the history of interventionism and its persistence in some situations calls for a separate, though brief, consideration of cartels that are mandated or encouraged by national or local governments.

A. Applicability of Competition Law

50. In general, the competition laws of OECD countries do not apply either to government entities that adopt regulations mandating price fixing or other cartel activity, or to the enterprises that adhere to those regulations. When government entities encourage cartel activity, their activity is not likely to be covered, and the liability of cartel members is likely to depend on whether the "encouragement" included approval and oversight or merely informal suggestions.

51. The Treaty of Rome, however, does subject Member States to some competition law and related requirements, however, and in developing and transition countries it is quite common to find provisions that apply to government entities – even ministries – not only when they engage in proprietary (commercial) activity, but also when they engage in regulatory activity that is unauthorised and anticompetitive. These provisions often apply also to unauthorised anticompetitive conduct by government officials.

52. The competition laws of both the countries that have been peer reviewed in previous meetings of this Forum apply in some situations to government entities acting in their regulatory capacity. The scope of this coverage is more limited in Chile, where the law applies to discriminatory action that creates an uneven playing field, but does not apply to rules that are not discriminatory but may have anticompetitive effects.

53. In Peru, while the Free Competition Law does not apply to governments acting in a regulatory capacity, the "Market Access" law permits the competition authority to issue reports finding that regional or municipal ordinances, and some ministerial orders, are unjustified barriers to competition. If the responsible government council does not respond, the restriction is automatically invalidated. If it responds by claiming that the restriction is justified, the competition authority may bring a legal action seeking to require its elimination. The scope of the law is very broad, in that it (a) permits anticompetitive rules to be condemned automatically if they are "illegal" (extending beyond the area in which the government entity is authorised to regulate), and (b) permits "legal" rules to be condemned if they are "irrational" in the sense that they are more restrictive than necessary to achieve their legitimate regulatory purpose. In one case, the Competition Tribunal found Ministry of Transport rules that in essence fixed prices for road freight transport to be both illegal and irrational.

B. Potential Issues for Discussion in Written Submissions and at the Forum

1. To what extent do government entities in your country sponsor, support, or facilitate cartels, either officially or unofficially?

2. Does your current or proposed competition law apply to anticompetitive rules and activities by government entities when the rules and activities reflect government action in its regulatory capacity? Under what circumstances? How does the law distinguish between (a) regulations that include some anticompetitive provisions as part of a legitimate regulatory scheme, and (b) anticompetitive regulations whose claimed legitimacy is a disguise?

IV. SANCTIONS IN CARTEL CASES

54. There is increasing consensus that strong sanctions against hard core cartels are necessary to deter future cartel activity. The most commonly used sanctions are civil or administrative corporate fines, but since those fines are seldom large enough to deter cartels, there is increasing interest in criminal, civil, and/or administrative sanctions on responsible individuals.

A. Available Sanctions

55. Fining Enterprises. OECD studies suggest that whether fines are criminal, civil, or administrative, they should exceed the amount of the unlawful gain that the cartel members realised from their conspiracy, to take into account the fact that 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. Since only one in two or three cartels, or even one in six, are prosecuted and punished, it is often suggested that the fines against those that are prosecuted should be at least two or three times the gain.

56. Despite recent large increases in the size of fines, few have reached the level of two or three times the unlawful gain. In some situations, maximum penalties have been too low, a problem that the United States recently addressed by increasing maximum corporate fines from USD 10 million to USD 100 million. In other situations, courts have been reluctant to impose fines at or near the maximum levels permitted under domestic laws. As indicated above, competition authorities have sought to address this problem by increasing judges' awareness of cartels' nature, the harm they cause, and the need for deterrence.

57. In addition, theoretically sound measures of penalties, such as the amount of the actual overcharge, are difficult to prove and may, especially if a multiplier is applied, result in fines so large that they would bankrupt even very large enterprises.[26] Other measures, such as a percentage of profits, are problematic because of the ease with which cartel members can manipulate their profits. 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 affected by the cartel.

58. Latin America has seen relatively few large fines. Last year's peer review report on Peru noted that the Competition Tribunal tends to reduce the fines of the Competition Commission, and that some attribute to the Tribunal's disapproval of the Commission's deterrence-based approach. There does not appear to be much information available about how Latin American competition institutions and/or courts assess what constitutes an appropriate fine.

59. Fines as Individual Sanctions. In light of the extreme difficulty of fining enterprises enough to deter cartel activity, increasing attention is being paid to fining natural persons for their participation in a cartel. The utility of such sanctions is clear. Such sanctions not only provide additional deterrence, they create an incentive for culpable individuals to defect from the cartel and to co-operate with the investigation.

60. The effectiveness of fines against individuals is undercut if and when enterprises are willing and able to assure individuals that they will reimburse them for the fines they pay. Reimbursement for fines is illegal in some countries, and it would appear to be possible to monitor against many forms of reimbursement, but it would be difficult to prevent

reimbursement through pay increases stretched over a considerable period. Nevertheless, individual fines can clearly be useful, because enterprises will not necessarily guarantee reimbursement for fines, and when one does so, the individual cannot be sure that the enterprise will follow through on its promise. The deterrence value of individual fines would presumably be reduced if enterprises paid premiums in advance to compensate for the risk, but such payments (a) may be unlikely, and (b) would not prevent individual fines from being a powerful incentive for an individual to seek leniency and co-operate with an investigation. Fines against individuals can be an especially useful tool where imprisonment is not an option, but it is noteworthy that in the United States, where imprisonment is most common, the maximum individual fine was recently increased from USD 350,000 to USD 1 million.

61. Criminalisation and Imprisonment. Although corporate cartel participants can be fined through civil and administrative procedures, the bad publicity, stigma, and possible other consequences that may accompany a criminal fine can be an additional deterrent. If criminal sanctions are also available for the responsible individuals, criminalisation can increase deterrence even more and provide significantly greater incentives for leniency applications and co-operation.[27] Moreover, criminalising cartel activity may bring with it stronger investigative powers, including expert surveillance and search techniques.

62. For these reasons, there is increasing interest in some countries in making cartels criminal violations. On the other hand, the higher standards of proof and greater rights of the accused would to some extent make prosecution more difficult, and for this reason proponents of criminalisation generally propose it as a supplement, rather than a substitute, for the existing civil or administrative system. Two-track systems can also present some difficulties, and New Zealand has resisted criminalisation based in part on a study concluding that in its system, criminalisation would lead to fewer prosecutions and fewer successful cases.[28]

63. In addition, criminalisation could be problematic in countries where cartels are not viewed as sufficiently serious violations for the criminal justice system – the prosecutors, judges, and juries – to bring good cases and to convict cartel members. Notably, Chile's recent amendments to its competition law decriminalised the law but substantially increased the maximum fines – a trade that was considered beneficial since the public has not accepted the view that cartels are a serious crime. In the end, the costs and benefits of criminalisation will vary from country to country depending on its legal and cultural traditions and other factors.

64. Other Individual Sanctions. Individual sanctions can include penalties other than (or as well as) fines or imprisonment. Possible sanctions include temporary or permanent bans on serving as an officer or director of an enterprise (or an employee of the government), orders to engage in community service (perhaps assisting the competition authority in its communication programmes), and travel restrictions.

65. Private Actions for Damages. Private actions for damages by cartels' victims are common in a few OECD countries and are authorised by the laws of some additional countries. Even when damages are purely compensatory, they can add to the deterrence provided by competition authorities' cases, and several OECD countries are seeking to make it easier for victims to bring private damage actions. Compensatory damages are not "sanctions" in the sense of being a penalty, but the availability of treble damages in the United States is a sanction in this sense (and also provides a significantly greater incentive for victims to bring damage cases).

B. Potential Issues for Discussion in Written Submissions and at the Forum

1. What sanctions are available under your current or proposed law? What has been your competition authority's experience in applying those sanctions?

2. Of the sanctions listed above that you currently do not have, which do you think would be most useful in your country? Which ones appear unobtainable or unworkable in your country, and why?

V. TOOLS FOR INVESTIGATING CARTELS

66. The 1998 Recommendation called for ensuring that competition authorities' investigation powers are compulsory and adequate. Given cartels' obvious illegality and the elaborate mechanisms that are sometimes used to maintain their secrecy, it is clear why the ability to use compulsory process is necessary, and most competition authorities have this ability. However, given this obvious illegality and the potential imposition of severe sanctions, it is also clear that this power is not sufficient as a means to investigate cartels.

A. Investigative Tools

67. Dawn Raids. Destruction of documents demanded by a competition authority is generally punishable as a criminal or a serious civil law violation, but it has become evident that competition authorities need the ability to act with the element of surprise to acquire documentary and electronic evidence (computer files) that may contain evidence of an unlawful cartel agreement. Competition authorities with the necessary authority have found the "dawn raid," whereby investigators conduct a surprise visit to the offices of suspected cartel members, to be an effective tool. Mexico's Federal Competition Commission lacks (but is seeking) the necessary authority; Brazil apparently has and uses the authority; it appears that other non-OECD countries in the region generally lack this authority.

68. Because of dawn raids' intrusive nature and its costs to the investigated entity, the laws of some countries require that formal approval be obtained from an independent magistrate or judge, satisfying some standard for reasonable probability that a violation has been committed or that relevant evidence exists on the premises. Whether or not competition authorities need to obtain such approval beforehand, they sometimes need assistance from the police. The need to obtain co-operation from judges and police can cause difficulties for competition authorities in developing countries. In addition, such authorities may have difficulty mustering the substantial resources needed for dawn raids.[29]

69. Sealing Business Premises and Inspecting Personal Residences. Although the European Commission has long had the power to conduct dawn raids, it only recently received the ability to seal business premises and to inspect personal residences.

70. Oral Testimony. The competition authorities in many countries lack the ability to compel oral testimony or statements from individuals. This tool becomes more important as cartel operators become more sophisticated, and eliminate "paper trails" of their agreement.

71. Leniency Programmes. Leniency programmes are a relatively new and dramatically successful investigative tool, providing a means to both detect cartels and acquire evidence with which to prosecute them. Such programmes promise amnesty from punishment to the first cartel participant (and only the first) that comes forward to offer co-operation with the competition

agency. The programmes may also offer leniency short of full amnesty to other cartel participants who subsequently approach the enforcement authority to offer their co-operation. Leniency is usually sought by corporate cartel participants, but can apply to individuals in those countries whose competition laws expose responsible individuals to sanctions.

72. As discussed in Competition Committee reports,[30] leniency programmes create uncertainty within cartels by providing a powerful incentive for members to "defect." Jurisdictions that have adopted the most refined leniency programmes have experienced a substantial increase in the number of cartels uncovered, the number of successful prosecutions, and the level of average fines.[31] Brazil has a programme, which will be discussed during the peer review at the Forum meeting.

73. Leniency programmes do not work, however, unless there is: (a) a high degree of certainty regarding the nature of the leniency that will be granted, and (b) a credible threat of strong sanctions for those who do not co-operate. At present, the latter requirement may limit the potential benefits of leniency programmes in much of Latin America. Thus, the Mexican authority is seeking both the ability to offer leniency and the power to impose substantially higher maximum fines. Without a tradition of strong sanctions, competition authorities in the region may also wish to consider other mechanisms to provide incentives for individuals to defect from cartels. Korea, for example, recently introduced a monetary reward system for individuals who inform the KFTC about a cartel, thus creating incentives that do not rely on the threat of sanctions.[32]

74. Improved International Co-operation. As is discussed in the next section, international co-operation is still limited by national laws that impose unnecessarily broad bans on the sharing of confidential information with foreign competition authorities, but some improvements in international co-operation have made it a more valuable investigative tool.

75. Specialised Cartel Units and Expertise. Although there is no single "correct" way to organise a competition authority, more authorities have created specialised cartel units to ensure that investigators have the specialised skills needed for anti-cartel work. Other authorities regard industry expertise as more important, at least in some fields, and are organised more on the basis of industries. No matter how a competition authority is organised, it is vital in dawn raids and important in other situations that some investigators have excellent skills in information technology.

76. *Criminal Investigation Tools*. The criminalisation of cartel conduct typically provides additional surveillance and other investigative tools.

B. Strategies to Compensate for Deficient Investigation Tools

77. When countries lack the sanctions and other powers needed for leniency programmes and/or the power to conduct dawn raids, one approach some OECD countries have used is to focus on visible conduct that may facilitate or manifest cartels rather than to devote substantial resources to trying to uncover and prosecute secret, truly hard core cartels. For example, an authority can monitor trade associations' information exchange programs to see whether they are anticompetitive in and of themselves or even a means of preventing cartel members from cheating on the cartel.

78. In addition, a competition authority without powerful anti-cartel investigation tools can focus on agreements among competitors to observe uniform hours of business, refrain from

advertising, or otherwise eliminate a potentially significant form of competition. Such agreements are easier often to detect than agreements that fit more neatly into one of the four categories of agreement that are mentioned in the 1998 Recommendation, and they can be very harmful to competition either as partial restrictions on output or by raising entry barriers.

79. Finally, one can be on the alert for "exclusionary boycotts" – horizontal agreements not to deal with customers or suppliers unless they agree that they will not compete with the parties to the agreement or do business with the parties' competitors or potential competitors. As noted above such agreements are in fact considered cartels and/or condemned as per se illegal in some OECD countries. Since their principal impact stems not (directly) from restraining competition among the parties, but from the resulting exclusion of third parties, such agreements may be easier to detect than those referred to in the Recommendation because they are more likely to produce victims that know or strongly suspect that they have been harmed by illegal conduct.

C. Potential Issues for Discussion in Written Submissions and at the Forum

1. What investigative tools does your authority use in cartel cases, and what problems does it face?
   - If your authority has the ability to use dawn raids, have its investigations been harmed by a lack of co-operation by judges or police?

2. What additional investigative tools would you most like your competition authority to have?
   - Do you regard the current or likely fines and other sanctions in your country as large enough to provide an incentive for cartel members to seek leniency?
   - Have you considered cash rewards or other incentives for co-operation?

3. To what extent does your authority focus on agreements among competitors of the sort described in the preceding section – agreements that may be (a) more easily detectable and "provable" than the kinds of agreement listed in the 1998 Recommendation, but may be (b) anticompetitive in and of themselves or as a means of facilitating one of those four kinds of agreement?

VI. International Co-operation, Including Sharing Information in Cartel Investigations

80. International co-operation in discovering, investigating, and prosecuting international cartels has reached unprecedented levels, but continues to be limited by national laws that place undue restrictions on sharing confidential information with foreign competition authorities.

A. Informal Co-operation

81. The term "informal co-operation" has come to refer to all co-operation among competition authorities that does not include sharing "confidential information" (for the most part, information gathered by use of compulsory process).

82. Despite its limitations, informal co-operation can contribute to more effective enforcement. Conferences, bilateral meetings, and other exchanges of know-how spread both expertise and mutual understanding. Bilateral co-operation agreements facilitate case-specific co-operation by

further clarifying the parties' understanding of each others' systems and expectations. Case-specific informal co-operation can include discussion of investigation strategies, market information, and witness evaluations. A recently developed form of successful informal co-operation is the coordination of surprise inspections in several jurisdictions, enabling the participating authorities to maintain the surprise element of their investigations and to avoid the possible destruction of evidence.

B. Formal Co-operation

83. Except pursuant to specific laws and treaties or after receiving confidentiality waivers from enterprises being investigated, competition authorities are banned from sharing confidential information with their foreign counterparts. In terms of actual formal co-operation, the most important recent development is that whereas confidentiality waivers were unheard of prior to the development of leniency programmes, such waivers have been included in leniency applications and have provided an opportunity for greater co-operation.

84. These bans on information sharing by competition authorities are broader than those applicable to some other areas of law and broader than necessary to protect confidential information. Because cartels are secret and increasingly have some international aspect, the bans are particularly harmful to anti-cartel enforcement. Truly effective action against cartels will require additional countries to adopt laws that permit competition authorities to share confidential information in appropriate cases and subject to adequate protections. Except with respect to formal co-operation among the European Union's Member States, there has been little recent progress in this area, but the Competition Committee is continuing its efforts to promote the enactment of laws and procedures that permit enforcement co-operation while protecting confidential information from improper disclosure or use.

85. Currently, the Committee is working to develop "recommended practices" that identify safeguards that countries should consider applying when they consider legal reform in this area. During this process, the Committee is holding extensive discussions with representatives of the business and legal communities. It is hoped that by issuing recommended safeguards, the Committee can assist countries that want their laws to permit the information sharing that is and protecting information that is shared.

C. Potential Issues for Discussion in Written Submissions and at the Forum

1. To what extent has your competition authority engaged in informal case-specific co-operation? With whom, and with what success?

2. To what extent did informal co-operation call your attention to alleged cartel activity of which your authority had not been aware? What kind of information was contained in those communications?

3. Have their been instances in which your competition authority's inability to receive confidential information from a foreign authority has prevented or hindered its ability to obtain the evidence necessary to prosecute a cartel operating in you country?

VII. OTHER POTENTIAL TOPICS AND ISSUES

86. Another problem that many competition authorities in the region seem to face is a court system that is often slow, sometimes hostile or resistant to competition law enforcement, and sometimes corrupt. Participants are invited to address these and any other topics in their written submissions and at the Forum meeting.

[1] Of the participating non-OECD countries, Argentina, Brazil, Chile, Columbia, and Peru have competition laws and enforcement programmes. In Jamaica, a court has held that the combination of investigative and decision making powers in the Fair Trading Commission is unconstitutional; the FTC is doing only competition advocacy at present. Ecuador, Guatemala, and Nicaragua have no competition law. The Andean Community reported on the ongoing efforts there to adopt a new Community competition law.

[2] OECD, Recommendation of the Council Concerning Effective Action against Hard Core Cartels, 25 March 1998 [C(98)35/FINAL]. Both the Recommendation and the OECD Competition Committee reports and roundtable discussions cited in this note are all available at http://oecd.org/competition.

[3] *See, e.g.,* Submission of Brazil to the 4th Meeting of the OECD Global Forum on Competition, *Challenges/Obstacles Faced by the Brazilian Competition Defense System for the Attainment Of Greater Economic Development Through Competition*. (February 2004)(noting a national tradition of tolerating cartels and discussing the importance of educating the media and the public to generate support for competition law enforcement, and promoting academic study of competition policy); Ignacio De León, *Institutional Analysis of Competition Policy in Transition and Developing Countries: The Lessons fro Latin America*, Washington University Global Studies Law Review, Vol. 3, 405 (2004)(as late as the 1980's, cartels were not only tolerated, but openly promoted by the state); Claudio Monteiro Considera and Paulo Corrêa, *The Recent Brazilian Economic Development: From Price Control to Regulatory Rules and Competition Policy*, Submission to the 2nd Meeting of the OECD Global Forum on Competition (February 2002); Roberto Augusto Castellanos Pfeiffer, *Trade Associations and Cartel Leadership: The Brazilian Competition Defense System Experience*, IV International Cartel Workshop, Rio de Janeiro (September 2002)(emphasising the continuation of cartels after the end of price controls and the importance of sanctions as a means of educating trade association members and others); Ignacio De León, *The Role of Competition Policy in the Promotion of Competitiveness and Development in Latin America*, World Competition 23(4):115-136 (2000)(stressing that Latin American "development " policies once regarded competition with disdain and contempt, and the importance of competition advocacy in this context).

[4] *See* John W. Clark, Consultant, OECD Competition Division, *Competition Policy and Regulatory Reform in Brazil: A Progress Report*, OECD Journal of Competition Law and Policy, Vol 2, No. 3, at 181 (2000). Among other things, this report recommended that Brazil focus more attention on hard core cartels.

[5] OECD, Report by the Competition Committee on Effective Action against Hard Core Cartels (2000).

[6] OECD, Report by the Competition Committee on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws (2002).

[7] OECD, Second Report by the Competition Committee on Effective Action against Hard Core Cartels (2003).

[8] OECD, Secretariat Report on the OECD Global Forum on Competition: Preventing Market Abuses and Promoting Economic Efficiency, Growth and Opportunity (2004). The presentation was made by Simon J. Evenett, currently a professor at the University of St Gallen, Switzerland, and the study, *International Cartel Enforcement:: Lessons from the 1990's,* was prepared by him together with Margaret C. Levenstein and Valerie Y. Suslow. The study is available at *http://oecd.org/competition/GlobalForum*.

[9] *See, e.g.,* John M. Connor, Price Fixing Overcharges: Legal and Economic Evidence (2005), on file with OECD. *See also* Gregory J. Werden, *The Effect of Antitrust Policy on Consumer Welfare: What Crandall and Winston Overlook*, Economic Analysis Group Discussion Paper 30 (2003) (estimating average price increase of more than 20 percent).

[10] Julian L. Clarke and Simon J. Evenett, *Tackling International Ant-Competitive Practices in the Americas: Implications for the Free Trade Area of the Americas*, (April 2003). The same authors had

reached similar conclusions in *The Deterrent Effects of Anti-Cartel Laws: Evidence from the Vitamins Cartel*, September 2002. This and other work by Professor Evenett is available at http://evenett.com.

[11] OECD, Communication by Competition Authorities (2003).

[12] The website of the United States Department of Justice contains a range of materials, including *Price Fixing, Bid Rigging, and Market Allocation Schemes: What They Are and What to Look For; Antitrust and the Consumer,* http://www.usdoj.gov/atr/contact/newcase.htm.

[13] The author of this note was head of the Health Care Division of the US Federal Trade Commission's Bureau of Competition when professional associations launched a campaign to persuade the US Congress to exempt them from the FTC Act. Competition law enforcement against professional groups had only recently begun. Many people were uncertain about what such enforcement implied, and this uncertainty was exploited by those seeking the exemption. The resulting legislative battle, in which the exemption was eventually (but barely) defeated, demonstrated the importance of explaining the benefits of competition enforcement in simple, "non-competition" terms. These explanations can be included in all sorts of speeches, brochures, and documents – even, to some extent, in formal legal documents. For example, whereas the formal complaint in a then-ongoing case against the American Medical Association referred generally to the use of ethical rules to restrict certain advertising, the next such case challenged the "suppression of truthful information" and included specific examples of the suppression of obviously useful information. One of the examples was the ability to speak Spanish.

[14] UNCTAD's website is http://www.unctad.org.

[15] *See, e.g.,* WTO, Provisions on Hard Core Cartels, WT/WGTCP/W/191 (June 2002). The WTO's website is http://www.wto.org.

[16] Information about the ICN's various activities relating to anti-cartel enforcement is available at http://www.internationalcompetitionnetwork.org/cartels.html, and the website for the Bonn conference is http://www.icn-bonn.org/.

[17] *See, e.g.,* Simon J. Evenett, *Links between Development and Competition Law in Developing Countries,* September 2003. This study, funded by the United Kingdom's Department for International Development as a case study for the World Development Report 2005: Investment Climate, Growth and Poverty, is noteworthy in part because of its partial reliance on anti-cartel (and other) cases reported to the OECD Global Forum on Competition, including cases from Brazil and Mexico.

[18] Available at http://www.usdoj.gov/atr.

[19] *See* http://competition.ic.gc.ca/epic/internet/incb-bc.nsf/en/ct02296e.html.

[20] WTO requirements on national procurement laws may limit the extent to which such laws can be adjusted to make the formation of cartels more difficult. However, even within the framework set forth by these rules, some adjustments can be made to reduce the likelihood of cartels.

[21] *See, e.g.,* Richard Whish, Competition Law, Fourth Ed. (2001), at 83 (describing the European Commission's *Dyestuffs* case as having found a price fixing agreement on the basis of "various pieces of evidence, including the similarity of the rate and timing of price increases and of instructions sent out by parent companies to their subsidiaries and the fact that there had been informal contact between the firms concerned."

[22] OECD/IADB, Competition Law and Policy in Chile: A Peer Review (2004).

[23] OECD/IADB, Competition Law and Policy in Peru: A Peer Review (2004).

[24] *See generally* Timothy J. Muris, *California Dental Association v. Federal Trade Commission: The Revenge of Footnote 17,* 8 Sup. Ct. Econ. Rev. 265 (2000); Timothy J. Muris, *GTE Sylvania and the Empirical Foundations of Antitrust,* 68 Antitrust L.J. 899 (2001).

[25] More generally, the truncated rule of reason discussed in the articles cited in the previous footnote could perhaps be used, but identifying the "inherently suspect" conduct that may be condemned under that approach can itself be a complex process.

[26] Most countries take account of an enterprise's ability to pay in calculating the fine to be imposed.

[27] That the threat of criminal sanctions weighs much heavier than financial sanctions is further evidenced by the experience of the United States where individuals repeatedly offered to pay high financial fines if they could avoid jail time, but nobody has ever offered to go to jail in order to avoid paying a fine.

[28] Review of the Trade Practices Act 1974, Chapter 10, Penalties and other remedies, at 150-63 (2003).

[29] Conducting a dawn raid requires careful planning and execution. Enforcement officials must make meticulous preparations in advance, such as obtaining information about the target firm's organisational structure and its business locations and preparing a detailed scenario for the search. If more than one location is to be searched it is usually necessary to arrive at these locations simultaneously and to co-ordinate the activities at each of them through a central command. Documents or materials that are carried away must be carefully preserved and catalogued.

[30] OECD, Report by the Competition Committee on Leniency Programmes to Fight Hard Core Cartels (2002); also published in OECD, *Fighting Hard-Core Cartels – Harm, Effective Sanctions and Leniency Programmes* (2002).

[31] Recent developments relating to leniency programmes include new systems for receiving oral requests, improved international co-operation (discussed in the next section of this note), and, in the United States, the adoption of a law limiting a corporate amnesty applicant's private damages exposure to the damages actually inflicted by the applicant's conduct, provided the applicant cooperates with private plaintiffs in their damage actions against remaining cartel members.

[32] Several commentators have suggested that a reward scheme could be an effective tool to uncover cartels and could also make the formation of cartels more costly and therefore less likely. *See* Cécile Aubert, Patrick Rey, & William E. Kovacic, *The Impact of Leniency and Whistleblowing Programs on Cartels* (2004).