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**CARTELIZATION IN GLOBAL COMMODITY MARKETS,
GOVERNANCE CHALLENGES AND WAY FORWARD**

-- CUTS ¹--

1. Introduction

1. Developing countries are rapidly increasing their share of manufactured trade. Their shares have been rising not just in labour-intensive products, but also in capital- and skill-intensive ones. However, manufactured exports remain highly concentrated with a few of these countries; most developing countries still depend on primary products for their export earnings. In some cases, commodities account for over 60 per cent of their merchandise exports. Yet, the share of developing countries in the world export of primary products remains smaller than that of the developed countries (Table 1).

Table 1: Exports of primary products by region, 2009

Region	Share in regional exports (%)		Share in world exports (%)	
	Agricultural products	Mineral and fuel	Agricultural products	Mineral and fuel
North America	11.2	13.6	15.33	9.61
Latin America	30.5	38.2	11.95	9.27
EU	10.5	9.6	45.19	29.45
CIS	8.7	62.9	3.35	9.42
Africa	10.2	64.0	3.34	8.30
Middle East	2.6	68.0	1.55	14.2
Asia	6.3	10.8	19.29	17.8
World	9.6	18.6	100.0	100.0

Source: WTO (2010)

2. This could primarily be attributed to restrictions on the trade of commodities in the form of licensing, quotas, export restrictions², tariffs, packaging regulations and other non tariff barriers by

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² Export restrictions may be imposed on raw materials for a number of reasons, including for security, revenue and conservation purposes. Export restrictions in the form of export duties are permissible under Article XI: 1 of the WTO Agreement as well as enjoy some exemptions under Article XX of the Agreement. Despite the domestic welfare objectives, export restrictions on raw materials such as food, metals, minerals etc. have been seen to be responsible for the increasing commodity prices in the international markets and a major contributory factor for price volatility in the primary commodities market. For example, export restrictions on grains were one of the key drivers of the food crisis and price spikes during the 2007 – 2011 period.

developed countries (Jain et al. 2010). In part, this could also be due to anti-competitive practices of international and domestic export cartels. Since the mid 1990s there has been a resurgence of interest in economic and legal studies of cartels, in particular international cartels. It is found that the export cartels have had a large impact on the international trade of developing countries, on developing country consumers and producers (Levenstein et al, 2003). This paper examines the role of export cartels in exclusionary practices and obstructing the free play of market forces in the export of primary products, and documents the existing regulatory framework for cartels. It finds that the existing national policy institutions are limited in their ability to address or prevent this kind of harm to their economies. We discuss policy options that could ameliorate this situation, governance challenges and the way forward. There is plenty of scholastic debate on the welfare enhancing and reducing/ monopoly promoting impacts of export cartels. Many countries have also had differing positions on the subject. But due to the lack of incentives for exporting countries to curb the ills of export cartels, little has been done on this matter. As a result, the issue of export cartels rarely comes up in international initiatives on enforcement actions against cartels.

2. Export cartels in primary products: A brief analysis

3. Cartels are arrangements between private enterprises and sometimes between governments to control the production and sale of homogeneous products in an oligopolistic setting largely. There are basically two types of cartels: domestic and international cartels.

4. **An international cartel** consists of a group of producers of a certain commodity located in various countries, who agree to restrict competition among themselves in matters of markets, price, terms of sale etc. Connors and Helmers (2006) define an international cartel as “a conspiracy in restraint of trade that has or is alleged to have one or more corporate or individual participants with headquarters, residency, or nationality outside the jurisdiction of the investigating antitrust authority”. **Domestic cartels** on the other hand are agreements among competing firms in a particular sector in the same country.

5. We focus on international export cartels which are further classified into three types (OECD, 2011). Type 1 cartels are “hard core” cartels which are made up of private producers from at least two countries who cooperate to fix prices, make rigged bids (collusive tenders), establish output restrictions or quotas, or share or divide markets by allocating customers, suppliers or territories. Type 2 are private export cartels where independent, non-state-related producers from one country take steps to fix prices or engage in market allocation in export markets, but not in their domestic market. Type 3 are state-run, export cartels.

6. There is considerable literature on the industrial patterns, formation, duration and effects of cartels (Dick, 1996; Audretsch 1989. Folster and Pelzman 1997, Gallo et al., 2000; Connors, 2002; Levenstein and Suslow 2006). In the absence of appropriate data, however most studies focus on selected cartels. In a recent study, Connors and Helmers (2006) have developed a dataset that provides detailed information on the *members, markets, monetary sanctions, and other* economic dimensions of all modern international cartels discovered by antitrust authorities through 1990 to 2005. There are a total of 283 private international cartels in the sample. Of this, eight (3 percent) operate in the primary sector affecting 2.3 percent of sales in the sector. The leading cartelised industries are in manufacturing (79 percent of sales) followed by services. Apparently, the least important are primary products. However, these figures need to be used with caution for several reasons. First, these figures pertain to private cartels that have been discovered. It is a well known fact that cartels are of clandestine nature. The majority of private cartels never come to light. The figures presented are therefore an underestimate. Second, inter-government cartels which may play an important role in the primary sector (as discussed later) are excluded from the purview of these figures. Third, the number of cartels in this sector does not reflect their impact on trade, domestic producers and consumers. Finally, historical evidence suggests that there are sporadic cartel episodes in the primary sector. They are disrupted and then are re-formed several times

within a very short span of years, Tea cartel for instance appeared and disrupted seven times over a time of 50 years between 1925 and 1978. In what follows, we examine theoretical propositions and empirical studies to analyse whether cartels can succeed in the primary sector.

3. Can cartels succeed in the primary sector?

3.1 *Industry characteristics*

7. The likelihood that an industry chooses to establish a cartel depends on the industry structure and characteristics that determine the expected profits associated with colluding, benefits of cheating, and the extent of repeated interaction. One of the biggest challenges cartels face is the possibility of entry. If the barriers to entry/exit are low, the market would attract more, newer players and render the collusive behaviour among a few players as unprofitable. Theoretically therefore firms are more likely to collude in concentrated and industries with high entry barrier (Zimmerman and Connors 2005). Viewed from this perspective, producers in primary products should have no incentives to collude. The primary sector is characterised by product homogeneity, a pre-condition for the absence of imperfect competition. Furthermore, production techniques are more or less standardised and entry barriers are believed to be low. Does that rule out cartel formation and success? Two things need to be observed here. One, the relationship between concentration and cartel formation is not unambiguously positive. While most contemporary international cartels are in concentrated industries, cartel formation in un-concentrated industries is not infrequent. In unconcentrated industries, trade associations, large multinationals or even national governments play a key role in organising and implementing the agreement. Historically, the number of participants has been rather high in primary product cartels. Levenstein and Suslow (2006) show that in the Coal cartel, the number of participants varied between 70 and 100 while in tea it was 349 across three countries. In this scenario, the participation of governments, trade associations and large multinationals remains key to cartel formation in these sectors. Two, the primary sector is characterised by natural entry barriers. These barriers arise from the natural limitations of primary products and their uneven geographical distribution. While they are found in abundance in few places, in many they are scarce. This attracts rent-seeking behaviour among a few who control the majority share of supply to collude to set higher prices to exploit the global dependence and heavy demands. In addition, primary product markets involve several associated costs such as costs of extraction and transportation. These act as entry barriers for players as many may lack the resource capacity to undertake such activities and bear the heavy financial costs. Finally, locating a supply is not enough, it takes long to develop it into a tangible, usable asset. The cost of extraction of these naturally found commodities may be technologically complex, expensive and therefore challenging. These factors are entry deterrent and can create an incentive to form cartels.

8. Many argue that the cartels in the primary sector are short-lived with a few exceptions. Empirical findings also show that primary sector industries are associated with significantly shorter cartel duration (Zimmerman and Connor 2005; Suslow 2001; Marquiesz 1992). Nonetheless, there are exceptions. In the sample of cartels used by Levenstein et al (2006), one can observe up to hundred years' duration of cartels as in diamonds; 20 years in coal and 10 years in sugar. Further, there have been repeated efforts by primary producers to collude. Alexendar (1964) argues that in many industries, cartel formation in initial phases is marred by bargaining issues. Over time firms learn to cooperate and manage to sustain long lived cartels. This was the case with the copper, sugar, and potash cartels in the primary sector. Evidence suggests that in the case of copper cartel each period of cartelisation was longer than the previous period (Levenstein et al. 2006).

3.2 *Product characteristics*

9. Theoretically one would expect collusion to be more prevalent in industries with relatively inelastic demand (Pindyck, 1979). Primary products are largely essential in nature lacking in many substitutes. As a result, the demand for such products is less responsive to changes in price and offers little incentive for cartel members to cheat. This is an important feature determining the success of a cartel. Taking the example of success of OPEC oil cartel, it has been argued that the success of cartelisation depends on the inelasticity of demand and supply of the products. In contrast, a relatively high elasticity of copper was instrumental in the failure of copper cartel to raise prices. The copper cartel constituted in 1967 known as Council for Copper Exporting Countries (CIPEC) dissolved in 1988 after being unable to raise high prices as intended. Scholars have argued that this was because they were unable to restrict the output due to the relatively higher elasticity of demand of the product. Thus cartel formation is likely to succeed in the products where demand is price inelastic.

3.3 *Business shocks*

10. Business shocks play a critical role in cartel stability. Industries that are stable are characterised by cartels of longer durations (Levenstein et al. 2006). Viewed from this perspective, one can argue that the primary sector is less likely to have cartels. This sector is characterised by volatile business shocks. Many countries globally have suffered the escalating highs and depressing lows of commodity prices, a phenomenon popularly understood as commodity crisis. This would ensure that cartels are short lived. One cannot however rule out the possibility of their re-emergence. Further, as discussed above, firms develop organisational capabilities over time to survive these fluctuations to increase the duration of their collusive activity.

3.4 *Large customers*

11. Stigler (1964) hypothesised that the presence of large customers increases the incentive to cheat and defect and contribute to the cartel instability. Large buyers can use their bargaining power to lower input prices and encourage defection and cheating. This hypothesis suggests that cartels in primary products may not be sustainable because commodity markets are largely seen to have a structure resembling a monopsony/oligopsony that mainly means a handful or a single buyer intermediary leading to market concentration. Large buyer power in agricultural markets is one such example. Agricultural sector in developing countries is marked by excessive buyer power in the intermediary chain between primary producers and end consumers that consists of traders, processors, transporters and retailers. These large buyers can undermine cartel stability. There are however instances that large customers benefit from the existence of a cartel if they perceive preferential pricing relative to their small competitors and can contribute to the stability of the cartel.

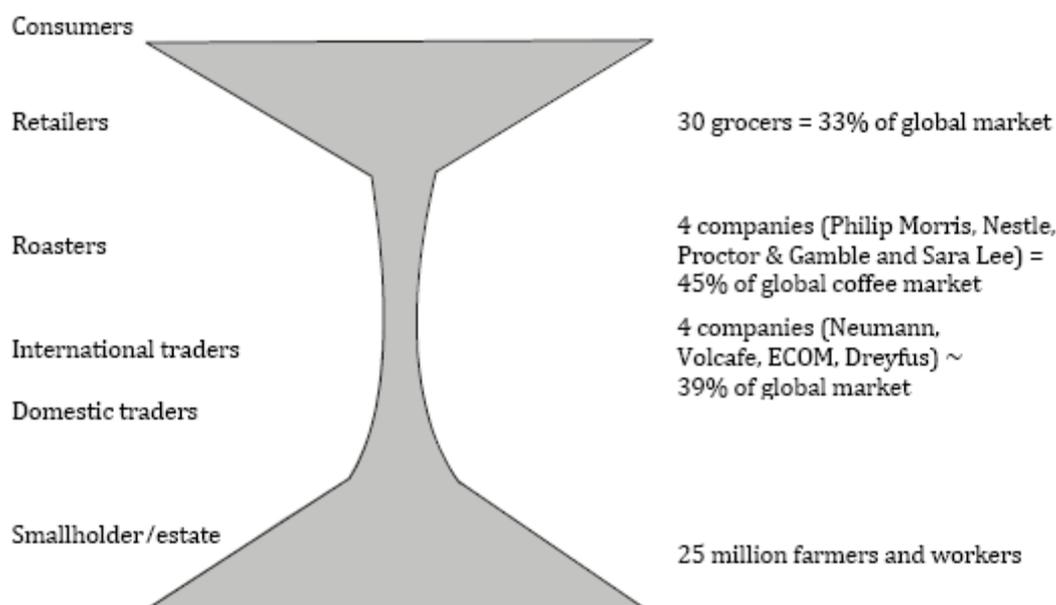
12. The upshot is that to the extent that natural resources are geographically concentrated in a handful of countries or one country and demand for these products is price inelastic, the potential profits from collusion can create powerful incentives to collude. Restricting the volume of exports by way of a cartel would raise commodity prices. However, a large number of participants, possibility of entry, large buyers, bargaining issues and demand shocks may affect the stability of a cartel. These factors do not however undermine firms, trade associations or national governments to collude. If conspiring firms believe that they would be able to raise prices significantly even for a short duration before it is undercut by the entry of a new market player into the relevant market or before the conspirators get tempted to cheat, collusion might be regarded as more profitable than competition. A concern that world commodities will be dominated by cartelisation has gained significant ground ever since the success of Organisation of the Petroleum Exporting Countries (OPEC) in quadrupling the oil prices and International Bauxite Association (IBA) in tripling that of bauxite (OTA Report, 1990).

4. Cartelisation of downstream industries and the primary sector

13. There has been global concern regarding the concentration of economic power by industries along value chains which has been seen to affect the profitability and livelihoods of small primary producers. For example, four multinationals (Kraft, Procter & Gamble, Sara Lee, and Nestlé) dominate the processed coffee market. In the early 1990s the earnings of coffee exporting countries were around US\$10-12 billion out of the retail sale of around US\$3 billion, i.e., less than 30 per cent of the retail sales were appropriated by the coffee-producing countries; the rest had been captured by coffee-processing countries. It was seen that later in 2000s when the retail sales increased, the earnings of the producing countries fell down even further. In fact, in 2002, retail sales exceeded US\$70 billion, but the earnings of the coffee-producing countries increased to only US\$5.5 billion. This means their share in total earnings fell to a mere eight percent (Action Aid International Report, 2005).

14. The main reason for this divergence is that coffee distribution is a roaster driven chain and four big roasting companies control 45 percent of the global market. The situation is illustrated in the following diagramme.

Figure 1: The global coffee bottleneck



Source: Mehta and Nanda, CUTS³

15. This huge gap between the producer surplus and what the customers pay is due to market structure dysfunctions in the vertical chain of agricultural commodity products. This chain is regulated and governed by the private sector and is characterised by long-term vertical coordination between producers, supplier-integrators, processors and retailers. Anticompetitive practices such as abuse of dominance of a few large firms among these intermediary both upstream and downstream of the sector cause market distortions and act as blockades in transferring the benefits of competitive market efficiency.

³ [http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf/\\$FILE/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf](http://www.ifc.org/ifcext/fias.nsf/AttachmentsByTitle/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf/$FILE/Conferences_CompetitionPolicy_Nitya+Nanda+2.prn.pdf)

16. A World Bank report estimated that divergence between producer and consumer prices may have cost commodity-exporting countries more than \$100 billion a year, and suggests that imperfect competition at the intermediary level—the international trading companies—is a key factor. (Morriset, 1997). Secondly, the resulting buyer chains have barriers to entry, including ‘voluntary’ standards, codes and benchmarks, which can profoundly affect farmers’ access to (and entry into) markets. In the 1990s, trade liberalisation in Brazil paved the way for many prominent global dairy products firms such as Parmalat, Royal Numico, and Nestlé who started imposing new private standards in quality and safety for local milk producers, their transport and monitoring activities etc. (Goldmark et al 2005). As a result thousands of smaller dairy farms were excluded and were forced to enter informal markets in some isolated regions. Finally, the retail-driven agribusiness revolution that is seen in the form of supermarket dominance in agri-food might be seen as promoting market efficiency and frees up wealth to spend on non-food items. However scholars have argued that supermarkets have been growing towards a concentrated structure with more power and leverage with the retail ends of the supply chain that are closer to the consumers and are better able to manage the supply chain, leaving the primary producers out of these multi layered transactions for the most part. Ultimately, the gains of trade liberalisation in these sectors tend to disproportionately go to intermediaries and processors engaging in cartelisation and other anticompetitive practices along the value chain.

5. Economic Consequences of Export Cartels

17. Economic analysis of export cartels began from the 1990s. Since then there has been a great amount of debate on the impact of export cartels. The main question being: are export cartels welfare enhancing or reducing. Empirical research is not unambiguous and can be classified into two categories. While one set of studies find cartels welfare reducing, another set of studies come to the conclusion that they may enhance economic welfare. Based fundamentally on the neoclassical view the former observe that cartels fix prices, reduce production and worsen allocative efficiency. Export cartels can also influence domestic production and pricing if the export quantity influences utilisation of capacity especially if members of the export cartel have a substantial share of the domestic production, as their export decisions will spill over and influence domestic suppliers and prices. Operating such cartels in the home country can also create a potential situation of “conscious parallelism” when sensitive price information is shared to set prices for foreign markets. Another domestic effect is the exclusion of competition between export traders. The European Union stated in 2000 that export cartels “had a clear distortionary effect on international trade as well as a harmful impact on development”. In less developed countries where the domestic industries are not very competitive, export cartels are especially more successful as they are able to gain greater market power in these foreign markets. The entrance of a foreign cartel into the importing country whether there is no domestic production or there is an existing domestic oligopoly, would have welfare reducing effects if the foreign cartel restricts its sales in the importing country (Bhattacharjea, 2004; Levenstein and Suslow 2006). Additionally, such cartels hurt world trade among partners. A good example is the case of the infamous fertiliser cartel which has been examined by CUTS (Mehta and Nayak, 2011). Canpotex is an exporter of potash and phosphate, and an offshore company for three North American firms: Agrium, Mosaic and Potash Corp of Saskatchewan. Canpotex coordinates with Belarusian Potash Co in the world market of potash formed by member companies: Belaruskali and Uralkali. Canpotex is an export cartel because Saskatchewan’s three major potash producers use it to set prices for foreign potash buyers and to control supply. Canpotex has an explicit exemption pursuant to section 45(5) of the Competition Act (1985) of Canada. It further coordinates with Belarusian Potash Co and PhosChem, a U.S. based export cartel to together control about 70 percent of the world trade in two key fertilisers: potash and phosphate. Due to their agricultural production needs and reliance on fertiliser imports, countries such as India, China, Brazil and Australia have to buy from these transnational companies despite the high international prices set by them. Since potash and phosphate are essential fertilisers for agricultural production, most countries such as India, Brazil, China and others that are import reliant on potash have no option but to pay the high monopoly rents of the supplier cartel. Mehta and Nayak (2011)

argue that the huge fertiliser subsidy bills do not translate into a proportionately high volume of fertiliser use in India. During 2002-07, 88 percent of the reported increase in subsidies was due to the sharp rise in international fertiliser prices while only 12 percent was a result of enhanced consumption of fertilisers. A study by noted economist Frederic Jenny highlighted the overcharge paid by India due to anti-competitive practices in the global potash market. Under a competitive scenario, the price of potash would decline from \$574 per tonne in 2011 to \$217 by 2015, and subsequently increase to \$488 by 2020. However, in the continuing presence of fertiliser cartels, the price of potash would steadily increase from \$574 per tonne in 2011 to \$734 in 2020. Given this, it is far from surprising that when the high tax revenues made by Canpotex were threatened by a takeover bid of Potash Corp. by BHP, the Canadian government blocked such a takeover under the Investment Canada Act claiming that the takeover did not provide ‘net benefit’ to Canada. No specific reasons were deliberated upon. Another example of export cartel exemption which has caused huge costs for developing countries is the case of maritime transport. (Fink, Mattoo and Neagu, 2001) concluded in a study that a breakup of price-fixing arrangements among private carriers could reduce transport prices by 20 percent on U.S. routes and a fall in the import bill of developing countries by \$2.3 billion. Becker (2007) highlights that “export cartel exemptions lead into a downwards spiral of anticompetitive measures and counter-measures taken by governments and market participants”

18. Advocates of cartels on the other hand argue that cartels stabilise process at profitable levels in industries characterised by high fixed costs; and the possibility of cut-throat competition and volatile business shocks (Scherer, 1980). One of the early studies addressing this question was Dick (1990). His study revealed that of the sixteen commodities under study, foreign consumers benefited from six and were adversely affected in three. Hence, raising doubts about the blanket criticism on the negative impact of export cartels. His findings have been endorsed by many. Observations of an American attorney, John Magnus have also reflected on some of the benefits of export cartels such as cost sharing and economies of scale leading to market growth and lower costs for consumers globally (Magnus, 2005). This experience has been shared by Finnish industries in national export cartels for wood pulp and paper. Scholars have argued in this case that such export cartels were needed for the growth of Finnish industries that were too small to compete independently with large foreign rivals. Through such arrangements, it was seen that the industries shared risks, organised shipping, collected information about trading conditions, economic and political developments as well as new technological advances for their members, and reaped many such benefits that helped them grow and prosper (Jensen-Eriksen, 2010). Benefits of export cartels have been recognised by many developing and least developed countries as well. Some countries such as India, Thailand and China argued before the “Working Group on Interaction Between Trade and Competition Policy” at the WTO that export cartels consisting of small companies should be exempted from new government restrictions as they lack the capacity to compete independently with foreign competitors at an equal footing and hence need this exemption to overcome barriers to market entry and survival. Furthermore, for most LDCs, primary commodities form the majority of the export earnings compared to industrialised nations. Therefore, in these countries, export commodity cartels may have significant implications for GDP growth. In order to assess the impact of an export cartel on an importing country, Bhattacharjea (2004) advocates ‘a rule of reason case by case analysis’ taking into account some core factors. These are: market structure, demand elasticity of the product, degree of import penetration, prevailing tariff levels in the importing country, and whether the cartel is a new entrant.

19. Apparently, there is need for more careful studies with explicit counterfactual analysis. This in turn requires improvement in data quality and the sharing of information between competition authorities across different countries.

6. Treatment of Cartels in National Competition Policy and Need for International Rules against Export Cartels

20. While empirical research on the effects of export cartels remains inconclusive no country has a strong incentive to ban export cartels unilaterally provided they do not adversely affect competition in domestic economies, either explicitly or implicitly. Implicit exclusions are as good as an explicit one as far as action by the home authorities is concerned. Studies have shown that fifteen countries maintain these exemptions. It may well be inferred from this treatment of export cartels under a competition regime that the same activity would be illegal if it were pursued domestically but since the exported quantities affect foreign markets and generate revenue in the process, they are exempt from the competition regime of the country (Sokol, 2008). Or in other words, while monopoly rents accrue to the home country, the consumer loss due to high prices is mostly felt in the foreign (importing) countries leaving little incentive for exporting countries to regulate such activity.

21. The approach of governments to collusive cartels for production and exportation in resource rich countries is paramount to note here. In some cases, governments of resource-rich countries are closely involved in collusive export arrangements while in others they may simply allow collusive practices among exporters as long as they do not affect domestic markets. In 1918, the United States Congress passed the Webb-Pomerene Act (WPA) with the mandate of helping domestic firms in facing competition from foreign international cartels. The Act exempted the export activity of associations for trade in goods. In 1982, the Export Trading Companies Act was additionally passed to include export of services. While the rationale for orchestrating such exemptions for export associations were well founded, an OECD study carried out in 1994 revealed that 87 of 97 of these export cartels acted as hard-core cartels i.e. either through price-fixation, co-ordinated bids or allocation of customers. Yet the United States continues to grant explicit exemption to export cartels to this day since they do not harm the domestic market. Another country that follows explicit exemptions to export cartels is Australia. On the other hand, EU grants implicit exemption to export cartels as the provisions under EU competition law (Articles 101 and 102, formerly 81 and 82) regulate activities that 'distort competition within the common market' only.

22. The rationale adopted by the Webb Pomerene is often duplicated by many national export cartels. The rationale for permitting export cartels is that it may facilitate cooperative penetration of foreign markets, transfer income from foreign consumers to domestic producers and result in a favourable balance of trade. Critics however argue that the export cartel exemptions represent nothing but a beggar thy neighbour policy where the home country where the cartel originates gains while the foreign country loses. Studies have revealed lack of evidence indicating that export cartels were necessary as an instrument of countervailing power against cartels of foreign competitors or foreign buyers. Besides, many export cartels such as the Canadian potash cartel, Canpotex, have been seen to comprise of large companies to enter markets where there is no domestic production of potash hence hardly any domestic competition (Waldie, 2010). Another reason why governments exempt export cartels lies in strategic trade theory (Sokol, 2008). Export cartels have the effect of restricting the volume of exports and raising the export price which ultimately helps in shifting rents from foreign firms to domestic ones and improving their terms of trade. Scholars have also argued that the continuation of exemptions granted to export cartels despite their welfare reducing impacts can also be partly explained through the public choice theory (Sokol, 2008), that is to say, that the people that are affected by such cartels are foreign consumers and do not have the same lobbying power as the firms participating in the export cartels to influence political decision making in their favour.

23. A few researchers who applied the prisoner's dilemma theory to the export cartels issue highlight the need for international cooperation in formal enforcement actions against cartels. Sweeney (2007) for instance argues that the incentives to discipline export cartels present a prisoner's dilemma in the sense that a country currently prohibiting export cartels can always make itself better off by allowing them and a

country that currently permits export cartels can make itself worse off by prohibiting them. He concludes that “in the absence of an agreement, the world’s trading nations are in equilibrium when they permit export cartels. Durand, Galarza, and Mehta (2004) endorse his findings. They examined the welfare effects of banning or allowing export cartels.

24. Their study revealed that when a country chooses to allow export cartels while the other country still bans this practice, the welfare level it reaches is higher than when it also chooses to ban them. The authors conclude the study holding that if countries could co-ordinate their antitrust policy to prosecute export cartels they would all reach a higher welfare level”.

25. Clearly, while the potential loss to total welfare and consumer welfare caused by hard-core cartels has been globally recognised, the global fight against the gravest antitrust infringement excludes from its ambit similar impacts that may arise from the operation of exempt cartels such as those formed to control exports. This issue has been discussed at length in the forthcoming sections. It discusses the governance challenges posed by export cartels in primary products that may be especially damaging due to the nature of these commodities leaving importing countries with little options to combat extra-territorially against the ills of such exempt cartels.

7. International Commodity Agreements and Cartels

26. Export cartels in particular in the primary sector have been exempted from control in some countries due to the volatile nature of commodity prices and dependence of many countries on commodity exports for their export earnings and GDP growth. In the past, many countries entered into international commodity agreements (ICA), a form of public international cartel between governments to manage the price of a commodity through interventions. Prior to 1945, these agreements were entered into by major economic powers to provide them with increased revenue and to promote their national industries; the colonies which produced these commodities were not the chief beneficiaries of these agreements (Chimni 1987).

27. The commodity issues were reviewed at the Havana Conference in 1947. A special treatment was given to such cartels under the draft Havana Charter treaty enacted in 1948 which exempted them from its main anti-cartel thrust such agreements to set and stabilise the prices of primary commodities. Chapter VI of the Final Act, devoted to inter-government commodity agreements, specified the objectives of ICAs and defined the circumstances in which they could be entered into. Its content was heavily influenced by the perception of the US which viewed an ICA as a necessary evil (Chimni 1987). The manner in which these agreements worked was essentially that if demand and supply pressures caused a commodity's price to move outside a range pre-determined by free market forces, an elected or appointed manager would enter the market to buy or sell the commodity to bring the price back into range. The manager would correct the upward and downward price movements by operating a buffer stock. While the Havana Charter was never brought into force, the principles of ICAs were adopted.

28. The 1970s saw a brief period of ‘commodity power’ (1973–79), which put control of supply in the hands of developing country exporters and which culminated into the adoption of IPC by UNCTAD. The very first session of the UNCTAD adopted a number of resolutions to address the problems of developing countries in primary commodities’ trade. The most significant resolution was “ ICAs and Removal of Obstacles and Expansion of Trade” which laid down the guidelines for the negotiations on future ICAs. It was envisaged that ICAs would have within themselves mechanisms for regulation of production, supply and demand and prices at the world commodity markets. Collective action was taken first for phosphates and then, in 1973–74, for crude petroleum (Page and Hewitt, 2001). Similar agreements were formulated for agricultural products such as coffee, rubber, wheat, tea etc. Unfortunately, most such agreements were dissolved due to their failure to achieve the mandated objective of commodity

price stabilisation. Historically, only three ICAs (on coffee, on cocoa, and on natural rubber) were reasonably successful over limited periods of time (UNCTAD website). In October 1999, the International Agreement on Natural Rubber - at that time the last remaining ICA with a price-regulating mechanism - terminated its activities. At present, all ICAs (on cocoa, coffee, cotton, grains, olive oil and table olives, sugar and tropical timber) are administrative in nature, serving as fora for producer-consumer cooperation and consultations, market transparency, development projects and sources of statistics. They are not attempting to regulate markets by supply or price management mechanisms.

29. Views on ICAs are fragmented. While some see ICAs as successful tools in stabilising prices of commodities in the world market, many have argued these as a doomed policy tool. There were criticisms about market intervention through export quotas and a buffer stock which many argued had mainly managed to keep prices high instead of stabilising them. Besides this, the agreement ran into severe implementation challenges as reaching decisions on export quotas and buffer stocks collectively was difficult given the varying vested interests. Furthermore, scholars have argued that such an agreement that fixed the maximum and minimum prices of part of the total volume of a commodity was likely to give rise to more violent price fluctuations than would otherwise occur as their sharp rise and fall had the potential to lead to a longer term instability of world commodity markets. For example, the OPEC cartel raised oil prices massively in 1973-74 which contributed materially to the world-wide recessions of 1975 and the early 1980s (LeClair, 2000).

30. The most profound criticism of ICAs is that while these were brought in to stabilise the commodity prices on the world market, the buffer stocks and other such arrangements for price stabilisation effectively became vehicles for cartelisation and monopoly price maintenance (Pindyck, 1979). Empirical studies have revealed the dangerous extent of changes in market structures brought about by such agreement. An empirical study conducted after the dissolution of the coffee cartel revealed that of the 75 percent drop in the price between 1988 and 2001 since the breakdown of the international commodity agreement (ICA) for coffee in 1989, the breakdown of the ICA explains 49 percent points and only the remaining is attributable to weather and other shocks as well as entrance of a new market player (Igami, 2010). This shows that economically significant market power was maintained by the agreement and the fluctuation leading to the commodity crisis was attributable to the changes introduced in the market structure of coffee beans as a result of the presence and later disappearance of the coffee cartel. A contradictory opinion was voiced by Oxfam which viewed the International Coffee Agreement as a 'golden era of good and stable prices.'

31. The era of international cartels for commodity export continues. In 2008, Thailand attempted to create a rice cartel with four other Southeast Asian countries: Vietnam, Burma, Laos and Cambodia. The purpose of the cartel was to control products and set prices modelling the OPEC cartel. This arose from Thailand's concern of its distorted terms of trade resulting from operation of oil cartels such as OPEC that exported oil at such high prices as well as the export restrictions on rice by India and Vietnam which had led to tripling of the prices of rice in less than four months. The proposal was met with great opposition from the rest of the world that apprehended the formation of an oligopoly and hurt consumers globally by charging high prices for an essential commodity like rice. Eventually it was dropped due to such overwhelming global response concerning the negative impact of such a cartel at a time of global food insecurity.

32. In addition to the long standing practice of exemption of export cartels for the practices that may be severely punishable if directed to the domestic economy, export cartels also interestingly find no remedy under the multilateral trading agreement which is quite stringent on other forms of export restrictions.

8. Trade - Competition interface and export cartels

33. The importance of the interface between trade and competition has been growing in times of enhanced international market integration where competition is international and one of its major aims is to make markets internationally contestable. Both trade and competition policies aim at facilitating economic growth. Despite this commonality, there are instances of conflict in their respective applications. This is so because while trade policies focus on achieving efficient allocation of resources between countries, competition policies are directed towards achieving these ends within countries. Due to these differences, trade measures such as voluntary export restraints, quantitative restrictions and antidumping are used extensively to ensure fair trade while export cartels flourish unnoticed and continue to distort competition in international trade.

34. To explain the interface discussed above, let us first look at some examples of trade policy induced cartelization. Generally speaking, monopolies and cartels operating freely within the domestic market engage in price discrimination or what is termed as dumping that involves selling output at prices lower in export markets than in the home market (Scherer, 1996). Dumping occurs when firms sell products abroad at below costs or significantly below prices in the home market. In order to seek remedy for the injury suffered by the domestic industries of the importing country, duties are imposed on exports and also by way of negotiations such as voluntary restraint agreements and other means of regulating exports as per which exporting countries decide to raise the prices of exports and/or restrict output which invariably takes the form of an exempt export cartel (Scherer, 1996, Immenga 1995). Similarly, trade policy tools such as export controls and measures to regulate exports introduce a strong discretionary element in the trading system through quota allocation arrangements which often encourages the formation of powerful de facto export cartels (Piermartini, 2004). At other times, export taxes that lead to higher commodity prices give a legitimate justification for governments to get into such arrangements with an objective to “exchange information and prevent apprehended price wars”.⁴

35. It is important to note here that export cartels are also a form of export restriction in trade much like taxes, bans, quotas, restricting licencing etc. which are imposed under the trade policy of both developing and developed countries to meet certain objectives both economic (to raise revenue) and non-economic (environmental, political, social etc.) The most frequently employed export restrictions are those on agricultural products and raw materials. These have received great scrutiny over the years. While there may be important national security or other policy reasons for using export controls, in general, the consensus in the economic literature is that export controls distort market prices⁵. In addition, they impose net-welfare losses to a domestic economy that uses them. Consequently, many recent trade agreement negotiations have been used as platforms to strengthen the WTO disciplines on export restrictions. However, little is done to address the same rent seeking behaviour of export cartels under WTO rules.

36. Cartels also incentivise other distortions in trade. For instance, they force governments of foreign countries to provide state aid/subsidies so as to be able to compete at an equally footing internationally, a trade policy tool that is being increasingly looked upon as trade distorting. For example, a significant overcharge that India pays for the import of potash due to the global potash export cartel is financed to a large extent (50-100 percent) from a \$1.5-billion (Rs. 68,400 crore) annual subsidy granted by the government to the fertiliser industry (Jenny, 2011) which has been making headlines because of the huge subsidy bills that have been burdening the exchequer. Often times cartels lead to growth of more cartels. Scholars have described this situation as “tendency of cartels to beget other cartel”. For example,

⁴ Statements of Cambodia's government spokesman Khieu Kanharithhttp reported in <http://news.bbc.co.uk/2/hi/7379368.stm>.

⁵ Insert reference to a CUTS paper.

customers may unite to set up buyers' cartels. Export cartels may inspire setting up of other export cartels as well. For example, quoting the statement of spokesman of the government of Thailand, Vichienchot Sukchokrat, in the case of Thailand's attempts to form a rice cartel with four other Southeast Asian, "*With the oil price rising so much, we import expensive oil but sell rice very cheaply and that's unfair to us and hurts our trade balance*".⁶ Similarly, inspired by the success of OPEC in the 1970s, when Zambia, Zaire, Chile and Peru, members of a cartel called the Intergovernmental Council of Copper Exporting Countries (CIPEC) announced plans to reduce shipments of the metal by 10 percent, other countries started gearing up to together try to lift prices. Countries that possessed iron ore (including Venezuela and Brazil) and seven bauxite producers (Guinea, Guyana, Jamaica, Sierra Leone, Surinam, Australia and Yugoslavia) started discussing plans about forming cartels.

37. Another OPEC inspired cartel also known as the OPEC of natural rubber that deserves some mention here is the Southeast Asian natural rubber cartel formally called the International Rubber Consortium (IRCo). IRCo comprises of the three largest producers of rubber, Thailand, Malaysia and Indonesia. When the natural rubber prices hit an all time low in 2008, IRCo agreed to reduce the amount they were exporting to increase the cost of rubber. The consortium met in 2008 and jointly agreed to reduce production by limiting plantations and tree tapping, and asking businesses not to sell rubber at prices that would defeat their goals. The cartel's goal was to cut production by a sixth of what was originally planned, by approximately 915,000 tonnes. The Global Trade Alert estimated the total trade that could be affected by this measure at US\$ 26.322 bn and across a total of 105 trading partners. The hope was to keep prices high and maintain constant income levels through this measure, just as the Organisation of Petroleum Exporting Countries (OPEC) although it ultimately failed to implement these measures due to several other factors such as the growing demand from tyre industries in China and India and more importantly, abundant production of natural rubber by Vietnam. Rubber prices fell again in 2011 recently and the IRCo is likely to take similar measures to curb rubber exports. Furthermore, IRCo countries have requested Vietnam to join the consortium. If Vietnam decides to accept this proposal, together the four countries could control about 84 per cent of the global supply for natural rubber. Availability of cheap natural rubber may become a thing of the past. This may have critical consequences for global automobile industry to say the least.

9. TRIPs and Export Cartels

38. There is a complex relationship between intellectual property rights (IPRs) and competition which has been greatly debated. It has been argued that inadequate protection of IPRs leads to distortion of a level playing field as protection of IPRs provide incentives to innovate which is a necessary condition for competition (Cottier, 1991).

39. There are provisions in the TRIPs agreement for fair use, compulsory licensing, measures to prevent abusive practices as well as provisions such as Article 40 that allow members to prohibit anti-competitive licensing practices. Therefore, some of the principles of competition have been incorporated in the TRIPs Agreement designed for IPR protection.

40. There are many interfaces between IPRs and competition laws such that they both impact each other. To substantiate this point, let us take the example of how export cartels reinforce the anticompetitive outcomes associated with IPRs (Gonta, 2010).

41. As per the doctrine of national exhaustion which many countries follow, an IPR holder's right to control movement of a good or service is only extinguished by the first sale or marketing of a good or

⁶ Statements of spokesman Vichienchot Sukchokrat, Thailand as reported in <http://news.bbc.co.uk/2/hi/7379368.stm>.

service within the territory of that country as opposed to the doctrine of international exhaustion which allows for a better flow of international trade across borders once the good or service has been first sold in any part of the world (UNCTAD Report, 2004). There is much debate on the doctrines from the point of trade liberalisation and Article 6 of the WTO grants member countries the right to choose the policy of exhaustion that they would like to adopt. Nonetheless, scholars have argued that operation of export cartels reinforces the doctrine of national exhaustion leading to market segregation which inhibits the flow of trade globally, prevents parallel imports and works against free market and competition leading to differential and higher pricing. Cottier and Meitinger (1998) use an illustration to explain this link. For example, an export cartel in country A among producers I, II and III exports to countries B, C and D. Each of the producers is allocated a market in these countries that he must strictly confine to. Now if these countries apply doctrines of national exhaustion, they argue that such an export cartel can even be enforced in down-stream markets, and buyers can be prevented from parallel importing such products in these countries. In other words, competition is eliminated and this is likely to result in higher and differential pricing of the product. They make a good case, therefore, in arguing that a multilateral discipline on export cartels would therefore also address the anti-competitive outcomes of intellectual property protection.

42. Giving due appreciation to the relationship between trade and competition, The Havana Charter enacted in 1948 made the first initiative to draft provisions to regulate restrictive business practices that frustrate market access. Unfortunately the efforts did not come to fruition. Thereafter again in 1996, shortly after the World Trade Organisation was formed, a structured effort was made towards addressing this interface by setting up a Working Group on Interaction between Trade and Competition Policy at its ministerial conference in Singapore. This effort was drawn from Article 9 of the Agreement on Trade Related Investment Measures which has an inbuilt agenda to recommend the adoption of an investment policy and a competition policy. The agenda was duly acknowledged and incorporated in the Doha Ministerial Declaration in 2001. Paragraph 23 of the Doha Declaration voiced the need for a multilateral framework to enhance the contribution of competition policy to international trade and development. Unfortunately, even though countries recognised the relationship between trade and competition, they were divergent on their views of multilateralising competition rules. While EU and Canada and few other countries supported this idea, many developing countries opposed it for want of greater policy space to pursue their developmental industrial policies and their capacity and implementation constraints. The US had its own opposing views but decided to go along to support a package of WTO reforms.

43. Almost a decade after the Doha Round, anticompetitive practices have been affecting the world trade severely. To illustrate this point, we can refer to the famous Kodak-Fuji case when in May 1995, Kodak filed a Section 301 petition under U.S. trade law that requires the USTR to determine whether trade practices by a foreign country are unreasonable and discriminate against U.S. exporters. The petition claimed that Kodak's 7-10 per cent market share in Japan was not a result of consumer choice and marketing efforts but rather a result of four principle Japanese wholesalers, backed by the Japanese government, that are exclusive Fujifilm supporters. In a news conference in Tokyo in July, Kodak's Ira Wolf said that "We understand the risks inherent in going ahead with a 301 case, especially given the feelings of the average Japanese consumer about 301. But we decided there was no alternative....The Office of the Trade and Investment Ombudsman (Japan) is too weak and the Geneva-based World Trade Organization does not cover competition policy."⁷

⁷ Kyodo News Service, 26 July, 1995. The World Trade Organization, which eventually presided over the court decision, announced on January 30, 1998, a "sweeping rejection of Kodak's complaints" about the film market in Japan.

10. Policy options and governance challenges

10.1 Seeking a unilateral solution

10.1.1 Application of the “effects doctrine”

44. According to this doctrine, the "nationality" of firms is irrelevant for the purposes of antitrust enforcement and the effects doctrine covers all firms irrespective of their nationality. This empowers governments in affected countries to take action directly against those cartels, as the United States and the European Union have done. In recent years we have seen several countries, especially South Korea, Mexico, and Brazil, take steps in that direction (Levenstein et al. 2003). However, Hoekman argues that weak competition enforcement may allow incumbent firms to block or attenuate foreign competition and even though in principle, countries may enforce their domestic antitrust laws against an export cartel extraterritorially through the application of “effects doctrine” it is often difficult to do so (Hoekman, 2003). Further, this is a hugely complex provision which would require access to information about foreign exporters which is data often unavailable in addition to challenging the exemption or immunity enjoyed by them. Often this is matched with lack of resources financial and legal for many countries to engage in this exercise effectively (Levenstein et al., 2003). Application of “effects doctrine” is especially challenging in case of countries that have no notification requirement for registration of export associations/cartels within their domestic territories and hence no data is available for the importing country to work on. E.g. information on their geographic coverage, products and extent is nil (World Bank, 2003). Therefore, even if the exemptions for export cartels are not completely banned, provided the notifications are made mandatory and the process is carried out to ensure transparency, it would enable the antitrust authorities and agencies of the importing countries to assess the anti-competitive impact of the cartel on their economy (Sokol, 2008). For example, the Irish Competition Authority (ICA) has used this approach in cases against United States. In assessing the anticompetitive conduct of foreign firms in Ireland, the ICA referred to the filings of the US export cartel associations (Van Geyn, 2011). Finally, developing and least developed countries do not have capabilities and resources to prosecute international cartels. They should be granted technical assistance from their richer trading partners in fighting the menace of export cartels who may provide them the necessary resources and skills as well as help them with various mechanisms and procedures involved in filing such cases.

10.1.2 Private actions for damages

45. Consumers may be given powers to sue cartel conspirators for damages in their national courts. According to Levenstein et al (2003) private actions for damages resulting from violations of competition law are permitted in over 20 countries, It is however costly and cumbersome to sue especially in the absence of data. Further, there are significant legal and procedural hurdles to such suits in many countries. Such private suits in practice are observed to be extremely rare.

10.2 Seeking solution through multilateral trade rules

10.2.1 Adopting a global welfare approach

46. Inclusion of National Treatment Principle (de facto and de jure) on foreign and domestic firms as well as consumers so as to ensure equal treatment to both is the globally recommended approach by most policy makers in the new globalised economic order (Nagaoka, 1998). This principle mandates a level playing field among domestic and foreign competitors and must be imbibed in a country’s competition regime. Its application would help do away with the exemption for export cartels. It is important to note here however, that the provision of national treatment only applies to the internal market of a Member state. Therefore, merely incorporating such a provision as it is within competition regimes of countries would not be sufficient and some modifications need to be made to the provision to ensure its applicability to the case of export cartels.

10.2.2 Strict disciplines on export restrictions that tighten global supply of commodities

47. A growing concern in these markets relates to measures imposed by certain countries through export restrictions that create distortions in the world markets and create further uncertainties in the supply of primary commodities. Such export restrictions that have the effect of restricting the volume of exports and tightening global supply further aggravate the problem of cartelization as discussed earlier in the paper. These measures particularly affect low income countries which may be particularly dependent on imports of agricultural and raw materials and hence may lose a great deal from the absence of strict multilateral disciplines on measures such as export taxes, voluntary export restraints, quota allocations and other forms of export controls adopted by countries to better their terms of trade while worsening that of the others.

10.2.3 Remedies at the WTO against injury caused by export cartels

48. The damage caused by export cartels is in a way similar to the incidence of dumping. Scholars have termed this as a case of reverse dumping which may be penalised as such. Although material injury in such instances would be hard to show, facts such as abnormal high import prices, registration of export cartels and other factors may be taken in order to create a rebuttable presumption of reverse dumping leaving the burden of proof with the exporting country to show that it has not been selling like products at prices much higher than the normal value (Bhattacharjea, 2004).

- **Counter measures:** Another measure may be by way of cross retaliatory counter-measures authorised by WTO as seen in the case of US-Upland Cotton. Cross retaliations are often useful where it is determined that the suspension of concessions in the same sector will have no effect or will not be efficient or in the case when the respondent country is a developed one and the complainant a developing one, such measures may often prove to be more harmful for the developing complainant country. Brazil threatened to impose these measures in the intellectual property sector in response to the damaging cotton subsidies granted by the United States. This was viewed upon as a good strategy as it would benefit the Brazilian consumers, its generics industry, domestic sector and thereby compensate effectively for the losses suffered by the illegal US subsidies as well as threaten a colossal damage to the entertainment, biotechnology, pharmaceutical and other important U.S. industries, thereby forcing compliance from the powerful trading partner. The success of the strategic measure was seen when In April 2010 the two countries came up with a Memorandum of Understanding (MOU) as per which Brazil would not make use of the authorised cross-retaliatory measures and in turn U.S. agreed to take a few corrective measures. Hence this may be another effective remedy that injured importing countries may be able to invoke.
- **A potential for remedy also lies in the Agreement on Safeguards.** Article 11.1(b) provides that Members shall not seek, take or maintain any voluntary export restraints, orderly marketing arrangements or any other similar measures on the export or import side. A footnote to this provision further provides examples of such measures and includes export moderation, export price monitoring systems, surveillance, and discretionary export licensing schemes, any of which afford protection (Becker, 2007). It would be logical to argue that export cartels can fall within the ambit of this provision and hence appealed on grounds before the WTO Dispute Settlement.

49. All these measures would require re-negotiations on various agreements and would have practical problems. As discussed above, governments and trade associations are likely to play a key role in the formation of cartels in the primary sector. This clearly implies that any re-negotiation would involve political dynamics and would require political will power.

10.3 Formation of Countervailing Buyer Cartels

50. Former petroleum minister of India, Mr. Manishankar Aiyer proposed formation of an OPEC-like organisation among Asian oil buying countries and negotiate hard with Saudis and OPEC for better prices, including eliminating the Asian premium of \$1.5-2 a barrel. Such a cartel to be formed as a countervailing power as opposed to a monopoly cartel may be a strategy that buying countries may use in order to counter the exploitative forces of powerful trading partners. Another such countervailing cartel may be formed by consumer countries such as India, China, Brazil and others against the Canpotex Potash Cartel (Mehta and Nayak 2011).

10.4 Multilateral Agreement on Competition

51. This is not a new proposal. As mentioned earlier, an effort in this regard had been already made in 1996 at the Singapore Ministerial when the Working Group on Interaction between Trade and Competition Policy (WGTCP) was formed. This was one of the very first occasions when the issue of export cartels was discussed at the multilateral level and all the Members were able to exchange their views on the matter. The main structural difference between rich and poor countries, was that the rich wanted a multilateral agreement *on* competition, which would have meant some degree of harmonization of domestic competition laws with the international standards. However, developing countries perceived this as a market access push by the rich. Because, if competition laws were designed and operated on the lines of rich country laws, it would have meant providing a level playing field for rich country firms. On the other hand, the poor countries wanted a multilateral agreement *for* competition, i.e. something which could help them to deal with competition violations of rich country firms.

52. On the whole, there were divergent country positions. While some called for an outright ban of exemptions granted to export cartels, developing countries were of the view that this would be a one size fits all approach and not support the interest of lesser developed countries for whom export cartels may be a huge source of export earnings. Unfortunately countries were unable to reach a consensus on the matter. The Cancun Ministerial Conference ended in a deadlock, due to this very issue, and the General Council of the WTO dropped competition policy from the Doha agenda in 2004 (Hufbauer and Kim, 2008).

53. Nonetheless, the WGTCP succeeded in building awareness on competition issues and initiating a new wave of analytical thinking about competition issues and the interface between trade and competition. A good example is the case of India which started preparing a new competition law and also incorporating competition clauses in its bilateral trade agreements. Many other countries also started designing and adopting competition laws after this period. Over 106 countries have adopted a competition law as of today as against only 35 countries who had a competition law in 1995 when the WTO came into being.

54. In today's globalised era where the practices of one country have externalities beyond its own borders, it is necessary to re-visit multilateralisation of competition rules which would effectively address the negative externalities caused by anticompetitive practices of a country beyond its borders. Such a body would also provide a set of rules and intervene when markets fail and the players are caught in a "prisoners' dilemma" which is usually the case in the issue of export cartels.

10.5 Special and Differential Treatment

55. Such a multilateral rule have the potential to hurt lesser developed countries, an option may be to provide special and differential treatment to developing and least developed countries that need export cartels to promote national growth and hence allowing for them to operate such export cartel exemptions albeit for small and medium firms alone while banning such exemptions for industrialised nations. This had been argued before at the WGTCP. Alternatively, if this is not a likely solution then a good way to

accommodate the interests of less developed countries so that such a rule does not hinder their export led growth strategy when it bans cartelization of export activities could be to replace antidumping rules with predatory pricing standards in adjudicating trade disputes. The competition policy rule might permit export prices, consistent with rational price discrimination, to fall all the way to marginal cost and a price less than the home market price would not be construed automatically as a dumping price (Scherer, 1996). This would insulate such countries from reduced export earnings as a result of the multilateral rule and enable them to make the best out of their export led growth strategies and sell at lower prices in export markets without attracting anti-dumping duties. Some argue that there are practical limitations of any multilateral agreement that amounts to a requirement for standardised domestic competition policy rules on the part of developing countries. As a result, a WTO requirement for such policies is bound to have limited impact. There is therefore need for a tailor made approach as opposed to a one size fits all approach. It is needless, however, to say that such provisions would however require intensive effort and negotiation which is a challenge that developing and least developed countries will be faced with as well.

10.6 Creation of an international competition authority

56. In view of the limitations of the WTO agreement, some propose that an International Competition Authority may be established - independent of the WTO - to maintain fair competition in the world economy and keep markets contestable by ensuring that barriers to entry to late-industrialisers are kept at low levels. Critics however argue that even with this authority developing countries may not be able to restrain anti-competitive behaviour by large multinationals due to lack of capabilities in implementing such laws.

11. The Way Forward

57. **Agreements on information sharing:** There may be agreements between countries for sharing information in competition cases. Levenstein et al (2003) report that there have been such agreements between the US and Brazil. Recently such agreements have been concluded between Canada, EU and Australia. Australia and New Zealand already have one. Such agreements may facilitate the enforcement of domestic competition laws and the effects doctrine.

58. **Diversification of exports:** Several recent studies have implied that countries especially the least developed ones should be ill-advised in relying too heavily upon primary commodities as a foundation for economic growth, since the growth rate of real gross domestic product appears to be negatively correlated with the extent of reliance upon primary commodity exports. It is necessary for countries to diversify their exports on the whole and in commodities in particular given the volatility of the primary commodities market. With diversification of exports, the incentive to cartelise is low. We take the case of Malaysia to explain this point. When 43 percent of Malaysia's export earnings depended on tin and rubber, its interest in the global market for these products, susceptibility to price fluctuations as well as interest in international cartels was very high in 1974. Gradually it began to diversify, its exports and its dependence on tin and rubber for export earnings came down to negligible 4.9 percent by 1990. It was then unaffected by changes in prices of tin and rubber in the world market. Also, its interest in cartels was much less. At the same time, this diversification of exports also made it difficult for cartels to negotiate with Malaysia to be a party to the collusive arrangement (LeClaire, 2000).

59. **Competition and capacity building reforms:** Building domestic producer capacity and addressing anti-competitive practices across the value chain. Amartya Sen has argued for many years that famines in different countries are not due to food scarcity but because of the manipulation of food prices and supply by those with power in the supply chain. As discussed in previous sections, the agricultural commodity market is characterised by imperfect market structure, buyer concentration and anti-competitive behaviour among the players in the form of price fixing cartels, market allocations etc.. These

are some of the main reasons behind the high prices of commodities in these markets. What is needed therefore is for domestic governments to correct such market distortions by building the capacity of small commodity producers in order to reduce the impact of asymmetries in power relations between the small producers and large intermediaries/suppliers across the value chain.

60. In addition to this, the governments need to strengthen the domestic laws relating to anti-competitive behaviour. This would correct the imperfections prevailing in the commodities market structure responsible for the high prices. It would further ensure entry of these producers as new market players in the world supply chain on equitable terms and threaten the survival of monopoly commodity cartels. This may be a good attempt to bring about some balance in the supply and demand dynamics of the world primary commodity market. Becker (2007) argues that although a multilateral competition policy would be best suited to challenge export cartels, the current state of the political debate makes it more likely that second-best solutions such as capacity building in lesser developed target states will have to be established.

61. The case of natural soda ash cartel is illustrative here. In 1999, Chemserve, a unit of South African chemicals group AECI (AFEJ.J), and Botswana's Botash lodged a complaint with the South African Competition Commission that the American Natural Soda Ash Corporation (ANSAC) and its local partner CHC Global were fixing the price of soda ash for export. ANSAC admitted to price fixing and agreed to halt exports to South Africa and in a settlement agreed to pay a 9.7 million rand (\$996,900) fine, or 8 percent of soda ash annual sales in South Africa, in 2008. In India also, the Alkali Manufacturers' Association of India (AMAI) complained to the Indian Competition Authority (MRTPC) that ANSAC was acting as a cartel and that it was charging lower prices to eliminate Indian competitors as it has done so in a few other countries in the past. The MRTPC granted an injunction on imports from ANSAC as a cartel. However, ANSAC challenged the MRTPC decision in the Supreme Court. The Supreme Court, in its interim order, upheld the MRTPC decision. However, in its final verdict in the case, the Supreme Court has held otherwise, saying that the MRTPC had no extra territorial jurisdiction. Thus the case against ANSAC was lost. This contrasting experience of India and South Africa highlights the need to strengthen the competition law, which has since been done when India adopted the new Competition Act, 2002 which has extra territorial jurisdiction.

62. **Technical assistance by the WTO:** The WTO could also assist lesser developed countries through its Aid for Trade initiative especially in supporting the diversification efforts of these commodity dependent countries by meeting the adjustment costs of their trade reforms. It should also help build their capacity in terms of building a strong competition regime which would help them fight the negative externalities of the beggar thy neighbour policies of their trading partners.

63. **International Competition Fund:** CUTS⁸ has argued that there is a need for having an International Competition Fund sourced from the fines imposed by (developed country) governments on international cartels, which have a direct impact on developing countries, and making it available for building capacity of developing country stakeholders, who are not compensated for the impacts of these international cartels, given that competition agencies in these countries are either absent or ineffective, and certainly not capable of prosecuting an international cartel led by developed country firms.

⁸ For more about it please see: http://www.incsoc.net/pdf/Better-Cartel-Deterrence-International-Solidarity_en.pdf. INCSOC is an international network with its Secretariat in CUTS.

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