



**15<sup>th</sup> PECC General Meeting**  
**Brunei Darussalam**



**Focus Workshop on Trade**

**September 1, 2003**  
**Room J-3**  
**International Convention Centre**

**Cartels as an International Competition Issues**

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# Cartels as an International Competition Issue

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# Overview

1. Defining hard core cartels
2. Why stronger international action is required to address hard core cartels
3. What action is required?
4. How can PECC help?
5. Moving forward with PECC cartel work

# 1. Defining Hard Core Cartels

- WTO related discussions in international fora (OECD, WTO Working Group and UNCTAD) have failed to produce a consensus on a definition of HCCs
- Many have suggested using as a starting point the 1998 OECD *Recommendation concerning Effective Action Against Hard Core Cartels*

# OECD's 1998 Recommendation:

- Member countries should ensure that their laws effectively halt and deter:
  - price fixing
  - bid-rigging (collusive tenders)
  - output restrictions and quotas
  - allocation of customers, suppliers, territories or lines of commerce
- Vertical and other non-horizontal agreements are not covered, unless they have a horizontal dimension

## 2. Why Stronger International Action is Required

- Cartels cause substantial harm to businesses and consumers around world:
  - Higher prices for products sold by cartels
  - Depressed prices for products bought by cartels
  - Reduced output
  - Reduced product quality and variety
  - Reduced services
  - Less innovation



# Harm is suffered both in developed and developing countries

- 2 recent related studies of cartels reported by OECD competition authorities found:
  - 39 cartels had impacted developing countries
  - 24 of the cartels had lasted at least 4 years
  - Price falls after cartels broken up were in the range of 20-40%
  - Initial cartel formulation often triggered by price falls
  - 16 cartels accounted for at least US\$81B in exports
  - Cartelised products represented approx. 6.7% of imports and 1.2% of GDP of developing countries

[Evenett, Levenstein & Suslow, (2002); Levenstein & Suslow (2001)]

# How Do Businesses Suffer?

- Inability to source key inputs at competitive prices
- Reduced variety of inputs – access to regional/international goods and services is limited or precluded
- Difficulty competing in regional/international markets (difficulty being price competitive)
- Inability to access (domestic/foreign) distribution networks for their own products
- Depressed prices when selling to cartels (issue for all businesses, incl. subsistence farmers)

# Cartels Undermine Market Reform/ Trade Liberalisation

- Import cartels
- Export cartels
- Domestic and international price fixing
- Allocation of customers, suppliers, territories or lines of commerce
- Bid-rigging (big issue in procurement area)

# Developing World Particularly Vulnerable:

- Weak or virtual absence of a “competition culture”
- Greater proportion of “local” markets insulated from trade liberalisation measures
- Limited access to essential inputs
- Public procurement accounts for particularly high proportion of GDP -- (bid rigging)

# Developing World

## Particularly Vulnerable (#2):

- Less transparent; vulnerable to corruption
- Higher concentration
- More limited distribution channels
- Greater incidence of admin./institutional barriers to imports
- More dependent on imports (basic industrial inputs) and/or exports (for growth)
- Weak capital markets indirectly help to preserve incumbent dominant positions

### 3. What Action is Required?

# Build Greater Awareness of Harmful Effects of HCCs

- Promote better understanding of:
  - links with other key pillars of economic development, e.g., trade, investment, market reform, creation of entrepreneurial class of SMEs
  - links with poverty alleviation
  - Why developing countries particularly vulnerable to internat'l AND domestic cartels
  - How HCC conduct is similar to theft & fraud

# Strong Action at Domestic Level

- Prohibitions on HCC conduct
  - Flexibility for countries to deal with in their own way, provided the approach is effective (cf. PECC cartel paper)
- Strong sanctions:
  - Need to take away the prospect of gain
  - Fines should be several times the probable gain, to reflect the low probability of detection/conviction
  - Penalties against individuals provide additional deterrence
- Strong sanctions increase the effectiveness of leniency programs
- OECD is pioneering work in this area: 1998 Recommendation; Phase I Report entitled *Fighting Hard Core Cartels*; Phase II report entitled *Hard Core Cartels* ; Phase III work will further explore sanctions (including criminal) against individuals



# Leniency and Reward Programs

- Leniency programs create a strong incentive to disclose the existence of cartel conduct
- Leniency programs have led to a dramatic increase in the number of prosecutions and the level of fines in North America
- Australia, the E.U., several European countries and Korea have adopted, or are in the process of adopting, North American style programs
- Reward programs give incentives to non-cartel members to provide helpful evidence of cartel conduct

# Strengthened International Enforcement Co-operation

- More bilateral co-operation (e.g., case specific, regular policy dialogue, technical assistance)
  - NB: OECD 1995 Recommendation
- More regional/plurilateral co-operation
  - Latin American Competition Forum
  - Asian Competition Forum?
  - OECD (Competition Committee and Global Forum on Competition)
  - International Competition Network
- Multilateral co-operation?
- Business community has raised legitimate concerns regarding the protection of confidential information and regarding the need for increased co-ordination and co-operation in the area of leniency policies

# Strengthened Advocacy Powers for Competition Authorities

- Needed to assist authorities to advocate for progressive narrowing/elimination of exemptions
  - Consistent with comprehensiveness principle in PECC & APEC Competition Principles
- Clear mandate needed to advocate for reduction/elimination of gov't measures that distort competition
  - Such measures tend to facilitate cartel conduct (see PECC Cartel Paper)

# Much More Technical Assistance and Capacity Building Advice

- Progressive reinforcement of competition institutions (Doha Declaration §25)
  - A regional strategy is needed
  - Countries must include competition in the annual plans/priorities filed with regional development banks, and other donors
  - Greater efforts required to help donor community to understand links between competition and key pillars of economic dev.
  - Greater awareness of strong links between TA/CB, co-operation and effective action against HCCs
- Assistance in understanding the issues involved in discussions related to a potential WTO agreement on competition (Doha Declaration §24)
  - WTO, UNCTAD and OECD have led way

## 4. How Can PECC Help?

# Promote A Greater Understanding of:

- The substantial harm from HCC conduct (disseminate knowledge and information)
- The need for effective action at the domestic, regional and international levels
- The various modalities that should be pursued, e.g.:
  - Domestic substantive provisions
  - Various types of co-operation
  - Incorporation of anti-cartel strategy into IAPs

# 5. Moving Forward with PECC Cartel Work

# Questions Needing Answers (PECC Cartel Paper):

1. What are the areas requiring further research?
2. Should certain behaviours be explicitly proscribed, and if so, which ones?
3. Scope of coverage of potential proscriptions?
4. Degree of stress placed on domestic enforcement and harmonisation?
5. Multilateral approach from the beginning?
6. Extent of S&D treatment to be accorded to developing economies?
7. How to foster greater inter-agency co-operation?



# Promote Proposed Positions in PECC Cartel Paper

- OECD Recommendation as starting point for defining HCC conduct
- Per se treatment of HCC conduct
- Encourage adoption of domestic HCC laws
- Promote comprehensive coverage – all types of HCC cartels should be caught
- More careful analysis of developing country issues
- Some flexibility appropriate re: how any HCC obligations ought to be implemented
- More detailed discussion of co-operation issues