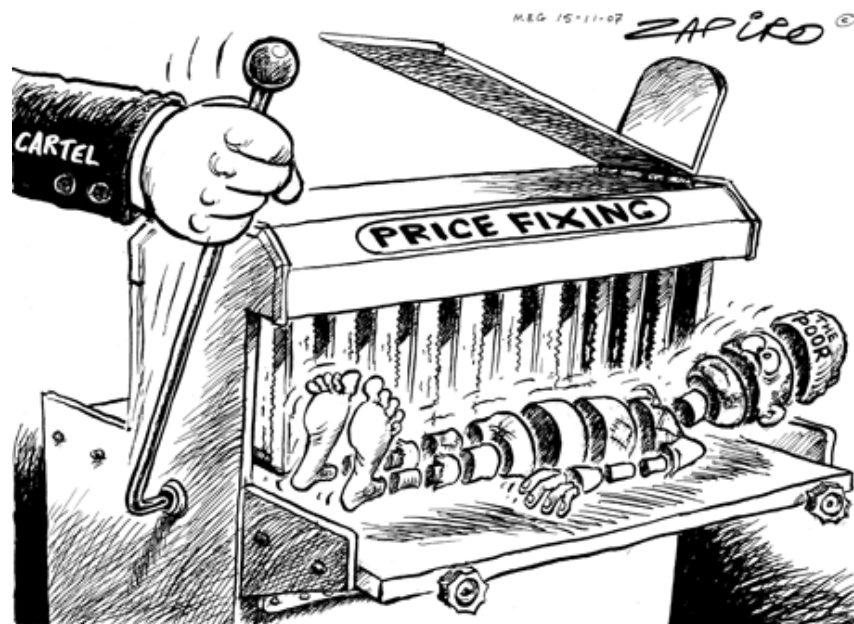


# INTERNATIONAL COMPETITION FUND: SOLUTION FOR EFFECTIVE DETERRENCE AND DISTRIBUTION OF CARTEL FINES



RIJIT SENGUPTA<sup>1</sup> AND UDAI S MEHTA<sup>2</sup>  
CUTS INTERNATIONAL, INDIA



---

1 Centre Coordinator & Deputy Head, CUTS CCIER, CUTS International, India

2 Assistant Policy Analyst, CUTS CCIER, CUTS International, India

## TABLE OF CONTENTS

<b>ABBREVIATIONS</b> .....	<b>3</b>
<b>EXECUTIVE SUMMARY</b> .....	<b>4</b>
<b>I. INTRODUCTION</b> .....	<b>5</b>
<b>II. INTERNATIONAL COMPETITION FUND (ICF)</b> .....	<b>7</b>
<b>III. SOURCES FOR FINANCING</b> .....	<b>9</b>
a) Private enforcement .....	<b>9</b>
b) Public enforcement.....	<b>12</b>
<b>IV. FUND MANAGEMENT</b> .....	<b>12</b>
<b>V. ACTIVITIES SUPPORTED BY THE FUND</b> .....	<b>13</b>
a) Technical Assistance .....	<b>13</b>
b) Educational programmes .....	<b>13</b>
<b>VI. CONCLUSION</b> .....	<b>14</b>
<b>LIST OF REFERENCES</b> .....	<b>15</b>

## ABBREVIATIONS

ADM	Archer-Daniels-Midland
AAI	American Antitrust Institute
BA	British Airways
CUTS	Consumer Unity & Trust Society
DOJ	Department of Justice
FBI	Federal Bureau of Investigation
FTAIA	Foreign Trade Antitrust Improvements Act, 1982
ICF	International Competition Fund
IACPs	International anticompetitive practices
OECD	Organisation for Economic Co-operation and Development
UK	United Kingdom
US	United States of America
WTO	World Trade Organisation

## EXECUTIVE SUMMARY

In absence of any international enforcement in the field of competition law, states need to cooperate for responding to international anticompetitive practices. This paper argues the need for establishment of an International Competition Fund (ICF), to fill the current legal and institutional vacuum in this regard; and also to bolster international cooperation on competition issues – especially between the North and the South.

International cartels harm consumers in both developing and developed countries because of their upward impact on prices; and provide the luxury to firms for being inefficient, thereby damaging the spirit of entrepreneurship in the markets. Cartel busting is often the most important activity of competition authorities around the world. While enforcement is quite effective in many developed countries, it is lacking in the developing world, because of resource constraints and lack of experience.

Although no calculation of the harm of all cartels is possible given their secret nature, a fraction of exposed international cartels running into billions of dollars makes it clear that cartels are a major and invisible drain on the world's economy.<sup>3</sup> The impact in developing countries from cartels can be easily understood by examining data obtained from six cartels. These six cartels overcharged developing countries and their consumers U.S. \$1.71 billion, \$67 million, \$8 million, \$1.19 billion, \$975 million and \$43 million, respectively from collusions in the vitamins, citric acid, bromine, seamless steel tubes, graphite electrodes and lysine industries.<sup>4</sup>

In recent times, record fines of more than \$500m have been levied by the UK and US competition authorities on British Airways (BA) for cartelisation with Virgin on its transatlantic flights<sup>5</sup>. The fines levied on the airlines will be credited to the treasuries in the US and UK and only affected citizens who have filed private action suits against the said airlines will be compensated through damages. However, affected consumers from other countries who have travelled on this route would not be able to claim damages. Given the global impact of such cartels, it is surely only fair and fitting that a portion of these fines be used for the welfare of consumers as a group, as it might be difficult to single out those that are affected and compute their individual damages. The International Competition Fund (ICF) would constitute a corpus so created from such fines, for strengthening consumers' ability to protect their interests in the globalising era, especially from the adverse effects of international anti-competitive practices, including cartels.

Creation of ICF is expected to enhance world-wide deterrence of international cartels, in addition to protecting developing countries and their consumers from their ill-effects. However, a consensus for evolving international cooperation on competition would need to be arrived at before such a fund can be created and effectively administered.

---

<sup>3</sup> OECD, Hard Core Cartels; available at <http://www.oecd.org/dataoecd/39/63/2752129.pdf>

<sup>4</sup> Yinne Yu, The Impact of Private International Cartels on Developing Countries, 2003; available at [http://www-econ.stanford.edu/academics/Honors\\_Theses/Theses\\_2003/Yu.pdf](http://www-econ.stanford.edu/academics/Honors_Theses/Theses_2003/Yu.pdf)

<sup>5</sup> [http://www.bbc.co.uk/worldservice/learningenglish/newsenglish/witn/2008/02/080215\\_ba\\_virgin.shtml](http://www.bbc.co.uk/worldservice/learningenglish/newsenglish/witn/2008/02/080215_ba_virgin.shtml)

## I. INTRODUCTION<sup>6</sup>

Nations in nearly all corners of the world have adopted competition laws, with most of them having recognised cartel investigation as a priority in their enforcement plans. Prior to World War II only the United States had an effectively enforced antitrust law. There is historical evidence to suggest that the first modern antitrust law introduced in Asia was in Japan in 1947. By 1996, 70 countries had adopted competition laws; whereas presently competition legislations exist in over 120 jurisdictions, worldwide.

Adam Smith, the British writer who founded modern economics, wrote in 1776 in *The Wealth of Nations* that, ‘men of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices’. This statement portends that the propensity of business towards cartelisation behaviour to have been recognised (and recorded) since a long time.

Firms generally detest competition, as it drives away profits and takes away their freedom over market ‘maneuvering’ activities, such as price fixing and output restriction, etc. In any market therefore, competing firms have an incentive to coordinate their production and pricing activities mimic competition but essentially collude to increase their collective and individual profits. Collusion among independent firms in the same industry to co-ordinate pricing, production or marketing practices in order to limit competition, maximise market power and affect market prices is referred to as a ‘cartel’.<sup>7</sup>

A cartel can be a result of either explicit agreements or implicit collusion. Explicit agreements occur when the cartel members actually meet to decide how to control the market. Because such collusion is illegal in jurisdictions with effective competition laws, such a formal agreement is likely to be highly secret and would be a result of covert meetings, which might involve nothing more than a ‘casual’ lunch among company presidents, a ‘chance’ meeting at a conference of industry executives, or company decision-makers sulking around back alleys in the dead of the night discussing price charges<sup>8</sup>.

In the past cartels have often appeared to be largely national or regional in scope, now they encompass several continents and fall under the jurisdiction of several competition authorities applying similar rules. The imports of their products by developing countries sold by sixteen international cartels, which operated during the 1990s, amounted to US\$81.1 billion or 6.7% of these countries imports and 1.2% of their national incomes in 1997. The resulting increase in prices was about 20 to 40% of the market price, which illustrates the immense adverse impact cartels have had on developing economies. This means overcharges in the range of US\$16 billion to US\$32 billions, which corresponds to about one third to two thirds of the total development aid received by developing countries in the late 1990s<sup>9</sup>.

---

<sup>6</sup> This paper is based on a discussion paper, “Better cartel deterrence through international solidarity”, INCSOC; Available at <http://www.incsoc.net/pdf/Better-Cartel-Deterrence-International-Solidarity.pdf>

<sup>7</sup> Canadian Economy online, available at <http://www.canadianeconomy.gc.ca/english/economy/cartel.html>

<sup>8</sup> Available at, [http://www.amosweb.com/cgi-bin/awb\\_nav.pl?s=wpd&c=dsp&k=collusion](http://www.amosweb.com/cgi-bin/awb_nav.pl?s=wpd&c=dsp&k=collusion)

<sup>9</sup> Mehta, P (2008), “Busting cartels for development”, OECD Observer

Economic globalisation has made it imperative to improve global governance in competition matters.<sup>10</sup> In this context, the current practice in developed countries of looking at international cartels from a purely domestic perspective and penalising them accordingly may make sense in a local legal context but does not do justice to victims from developing countries without remedial measures (Please see Box 1).

**Box 1: Under deterrence would harm the American market**

In *Empagran S.A. v. F. Hoffman-LaRoche*, (DC Cir 2003), the plaintiff sued the defendant on behalf of all foreign purchasers of certain vitamins and vitamin mixes, for damages arising from a worldwide price fixing conspiracy in vitamins. The injuries alleged were the inflated prices paid for the vitamins in foreign markets, and thus reflected the conduct's effect on foreign commerce.

The DC Circuit upheld jurisdiction under Foreign Trade Antitrust Improvements Act, 1982 (FTAIA), holding that the jurisdiction for injuries suffered outside the US was proper only if some private person in the United States, even if not the particular plaintiff in the case under consideration, had also suffered injury as a result of the defendant's illegal conduct.

Because in this case American vitamin purchasers were injured by the same conspiracy, thus foreign purchasers could also sue under American law for their injuries. The court reasoned that only giving American purchasers relief would insufficiently deter global cartels, because cartels would not have to worry about damages to foreign purchasers, and ultimately this under-deterrence would harm the American market.

**Source:** <http://www.stblaw.com/content/publications/pub434.pdf>

Moreover, such an approach also allows cartels to retain at least a part of their returns from illegal activities. This in turn implies that penalties are not a strong enough deterrent for cartel activities. Thus, it is in the interest of even developed countries to identify the harm done by cartels in developing countries and penalise them for such harm. The benefits of such action would accrue to developed countries in the form of a lower incidence of cartels. The international community therefore needs to identify a measure to protect consumers everywhere, promote economic democracy and deter cartels that cast its adverse impacts across geographical boundaries.

A system that distributes awards for damages to all victims instead of a few also has a definite moral advantage. In advanced countries 'fines' accrue to the national treasury, while 'damages' can be claimed by victims under their national laws. However, such a compensation mechanism still does not do distributive justice. A large proportion of the ill-gotten gains of cross-border cartels are often at the expense of consumers in developing countries.

For example, in recent times, record fines of more than \$500 million have been levied by the UK and US competition authorities on British Airways (BA) for colluding with Virgin on

---

<sup>10</sup><http://europa.eu/rapid/pressReleasesAction.do?reference=SPEECH/02/399&format=HTML&aged=0&language=EN&guiLanguage=en> Speech of Mario Monti, Commissioner for Competition Policy

transatlantic flights<sup>11</sup>. There are other airlines too, such as Korean Airlines, which have been actioned against. BA is also facing action under the EU laws and other jurisdictions. Furthermore, the affected consumers in the US have also filed for class action damages against BA. The fines levied on the airlines will be credited to the treasuries in the US and UK, and citizens who have filed private action suits against the said airlines will be compensated. Many consumers from various countries in the developing world also fly to the US, often via Heathrow airport, yet neither these customers nor their governments will be able to fine the airlines or claim compensation<sup>12</sup>. A portion of the proceeds from such damages should ideally be used in favour of all those affected.

The economic problems arising from cross-border cartels must be solved collectively since there is no international body with powers to enforce such a compliance mechanism. Fortunately there are informal and formal mechanisms which can promote cooperative action by various national competition agencies against cartels.

International cooperation on sustainable development issues should ensure that the adverse effects of anticompetitive practices on development are addressed in such a way that all affected countries are adequately and fairly compensated. This includes promotion of universal access of victims to compensation for damages in the case of private antitrust enforcement and a stress on doing justice to developing countries with or without functional competition regimes in the case of public enforcement.

National governments should demonstrate a commitment to remove the inequities in the distribution of proceeds from ‘fines’ and ‘damages’ of international cartels by adopting suitable legal and administrative measures through a process of international cooperation on competition enforcement.

## II. INTERNATIONAL COMPETITION FUND (ICF)

The battle against international anticompetitive practices (IACPs)<sup>13</sup> is of course one that small countries cannot fight alone. An international partnership against IACPs with accent on strengthening of competition regimes in developing countries will yield the following benefits:

- more rigorous enforcement of competition laws around the world;
- international cooperation on competition;
- direct contribution to the development of affected regions;
- deterrence and punishment of anticompetitive behaviour world-wide; and
- benefits to disadvantaged groups through the award of damages or penalties

In antitrust enforcement competition agencies often adopt ‘international comity’, which reflects a sense of respect among co-equal sovereign nations and plays a role in determining

---

11 Supra Note 5

12 Supra Note 9

13 IACP: anti-competitive practices, which have impacts that are not restricted within the boundaries of one (originating) country.

“the recognition which one nation allows within its territory to the legislative, executive or judicial acts of another nation”.<sup>14</sup>

Thus, in determining whether to seek particular remedies in a given case, each agency must take into account affected significant interests of any foreign sovereign state. Moreover, under many antitrust enforcement cooperation agreements, for instance the US and EC, an antitrust authority may ask the other party’s antitrust authority to take measures against activities that violate the latter’s competition laws and that harm the requesting country’s commerce.

Considerations for fixing the pecuniary amount of fines or (class action) damages should take into account the fact that anticompetitive practices harming the world economy will most probably not be challenged and adequately remedied in developing country jurisdictions.

Competition authorities should, in consonance with the principles of ‘international comity’ and related obligations consider various aspects of sustainable development affected by an international cartel before deciding on the magnitudes of fines to be imposed on such a practice. In doing so the agencies may consult with concerned foreign governments, so that substantial and purposeful harm caused by international cartels to their concerned economies is taken into consideration while computing the fines. In addition, disgorging of monetary amounts by wrongdoers for harm done in developing countries or admissions by firms, which a developing country authority can use to gain local justice, should be a precondition for any settlement.

A decisive step towards remedying the situation would be creation of an International Competition Fund (ICF), as suggested by CUTS. The rationale behind its establishment is not only the promotion of policy, legal and institutional reform to prevent further marginalisation and exclusion of certain groups and regions but also effective deterrence of IACPs, especially international cartels, worldwide. Further, the ICF would provide a much-needed international perspective to antitrust fining (and award of damages) and ensure protection of consumers’ interests (and rights).

The international community needs to be sensitised and mobilised to facilitate the discussion on the modalities of the ICF; and negotiate its ‘modus operandi’ through international cooperation. National policymakers would also need to be sensitised to consider amendments of respective national laws, thereby enabling remittance of fines (and transfer of awarded damages resulting from class action cases) into the ICF. An appropriate guideline should be drafted to provide a starting point for the envisaged reform of international competition enforcement as envisaged under the ICF. Subsequently, international guidelines and recommendations could invite national legislatures to adopt, in accordance with agreed principles, legislative measures for the determination of fines and damages in international antitrust cases as well as distribution of the collected funds.

---

<sup>14</sup> Dan K. Webb, Robert W. Tarun, Steven F. Molo, *Corporate Internal Investigations*, 1993



### III. SOURCES FOR FINANCING

The Fund would essentially be financed by garnered from levied ‘fines’ and damages in international cartel cases. In addition, sums of money could be contributed by wrongdoers as part of a voluntary or mandated settlement of cartel charges. The following two options could be considered:

#### *a) Private enforcement*

Private enforcement provides compensation for the infringement of an individual’s rights by anticompetitive behaviour. Such damage actions complement public enforcement activities by providing additional financial sanctions against the infringer and compensation for those who have suffered losses<sup>15</sup>; thus they have both compensatory and deterring effects.

#### **Class Actions**

Class actions (Refer to box 2) can be an efficient and effective way to use litigation resources, remedy consumer injury, deter wrongdoing, and help maintain the integrity of the marketplace. They are a mechanism for the courts and the parties to adjudicate multiple claims efficiently. Combining individual injuries into a single legal action can also vindicate consumer rights that might otherwise go without remedy, thereby serving important redress and deterrence goals. For example, when a large number of consumers have each been injured of a small amount, a suit by a single consumer is not rational because the costs associated with bringing the suit far outweigh any likely individual redress.

<b>Box 2. The Amino Acid Lysine Antitrust Litigation, 918 F. Supp. 1190</b>
<p>There were five defendant companies that were involved in the illegal cartel; Archer-Daniels-Midland (ADM), Ajinomoto, Kyowa Hakko Kogyo, Sewon and Cheil Jedang. Evidence from cartel participants confirmed that the conspirators anticipated that the rewards from price fixing would far outweigh the costs of operating the cartel. In 1992, a top ADM official expressed the expectation that their agreement would generate \$200 million in joint profits in a global market for lysine that varied from \$500 to \$700 million in annual sales. ADM earned just about \$200 million in profits from the cartel over three years with its one-third share of sales in the worldwide lysine market.</p> <p>By the end of 1992, a high ADM official competitor to rig the markets for a number of the commodities it sold. He informed the agent, Brian Shepard, that he had personal knowledge of the schemes because he was participating in the price fixing in the lysine market. With this information, more than seventy FBI agents simultaneously raided the world headquarters of ADM, and interviewed a number of ADM officers in their homes. These subpoenaed documents, together with hundreds of secret tape recordings and films of the conspirator’s meetings and conversations, built a strong case that five companies had been illegally colluding on lysine prices around the world for at least three years.</p>

---

15

<http://europa.eu/rapid/pressReleasesAction.do?reference=MEMO/05/489&format=HTML&aged=0&language=EN&guiLanguage=en>

The FBI raids were widely reported in the mass media and unleashed many legal actions. Three major antitrust actions were the result of an undercover investigation by the U.S. DOJ that had begun in 1992 with the cooperation of the ADM lysine division president. In 1992, the DOJ sought and obtained convictions for criminal price-fixing by the five corporate lysine sellers. Thirdly, the DOJ prosecuted four lysine executives in a highly publicized jury trial held in Chicago in the 1998; three of the four were found to be guilty and heavily sentenced.

Within a year of the FBI raids, in 1996, about four hundred plaintiffs were certified as a single federal class, and the case called *Amino Acid Lysine Antitrust Litigation* was assigned to a judge in the U.S. District Court in Northern Illinois. The three largest defendants offered the class \$45 million to settle the damages allegedly caused by their price fixing and later that year, final approval of the settlement occurred.

**Source: CUTS International & NLU, Jodhpur (2008), "Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India", available at [http://www.cci.gov.in/images/media/completed/cartel\\_report1\\_20080812115152.pdf](http://www.cci.gov.in/images/media/completed/cartel_report1_20080812115152.pdf)**

The wrongdoer has reaped large rewards, however, and allowing such harm to go unredressed fails to deter such wrongdoing. This not only imposes costs on the injured consumers but also diminishes the trust of consumers in the market regulatory mechanism, ultimately harming all consumers and honest sellers. While enforcement actions by public agencies can also serve these goals of efficiency, redress, and deterrence, the class action device enables private actors to seek resolution for some problems for which government agencies may not have the statutory authority to obtain full redress or the resources to pursue.

Victimised consumers of cartels are numerous and it is impossible to identify all of them. Class actions are a procedural device by which individuals or entities can pursue damages in a representative capacity on behalf of all similarly situated claimants. Indeed, class actions spur private enforcement seeking monetary damages, because it is procedurally more convenient and practical to aggregate the damages of a large group of consumers than to initiate private enforcement actions against cartel members/monopolists when damage done to a single individual is negligible in magnitude.

Though monetary damages and procedures for class actions are slowly becoming the norm in many jurisdictions; it is quite strange to note that only 13 out of 30 OECD countries provide for class actions. In the developing world, countries like India provide for it. Thus, there is a need for special procedures for facilitating class actions to protect consumer interests world-wide. Perhaps, a new instrument such as international antitrust class action, which could be filed on behalf of affected non-resident consumers, could help to fight international cartels. In addition, victims could bring up class actions either directly or via consumer organisations to prevent abusive and speculative lawsuits.

### **Unclaimed Damages: *Cy pres* awards**

Some countries have devised a strategy to deal with monetary awards in antitrust class action cases, where victims are numerous and cannot be identified easily. In such cases, courts often stipulate that the awards be used for promoting public interest.

Though short of compensating the victims themselves, this is widely seen to be an acceptable alternative way of using the money—legally it is referred to as a ‘*Cy pres*’ award, a Latin expression meaning “next best use”. In India, when manufacturers won court cases against the government for excess excise payments, the money was not refunded to the manufacturers, but put into a government-administered Consumer Welfare Fund for investment in further consumer education, advocacy and research. Similarly, in Brazil the fines are put into a government-administered fund and used exclusively for consumer protection or competition advocacy. In Peru, there is a system whereby half the fines collected go to a recognised consumer association, again to be used for consumer education and advocacy<sup>16</sup>.

In the USA, unclaimed awards from the settlement of antitrust class-action lawsuits are put into a trust to be used only for purposes closely related to the nature of the law suit, for instance research and education on competition issues. This creative use of money is called ‘*Cy pres*’ doctrine, which means ‘next best use’. The practice allows for use of the damages paid by the antitrust violator, when the injured cannot be identified and compensated. In June 2007, the George Washington University Law School received a *cy pres* award of \$5.1 million from a class action antitrust lawsuit to endow a centre on competition law. The law school at Loyola University in Chicago received an award to establish the Institute of Consumer Antitrust in 1994<sup>17</sup>.

The above-mentioned case was domestic. However, in the case of international cartels no awards are usually granted outside the domestic jurisdiction because national laws are restricted to national boundaries. Thus, harmed consumers from developing countries are unable to claim any compensation if the perpetrator(s) of such harm are located in an advanced country. This is for the fact that consumers do not have a *locus standi* and cannot even pursue the same within their own jurisdictions, given a non-existent, ineffective or poorly resourced competition agency in their countries.

Creation of the ICF would help remedy the situation by giving the judiciary the opportunity to consider global harm done by international cartels, set the rewards accordingly and direct a portion for programmes to strengthen competition enforcement around the world.

A logical argument for an ICF can be articulated on the economically sound reasoning expressed in the *Empagran S.A. v. F. Hoffman-LaRoche* case in the USA; even though the judgement was reversed by the U.S. Supreme Court. It should be noted that the Supreme Court’s decision was intentionally limited to the specific situation of an “independent foreign

---

<sup>16</sup> Supra Note 9

<sup>17</sup> *Ibid*

effect”, because the case involved complex policy questions better addressed by political branches rather than judiciary.<sup>18</sup>

### ***b) Public enforcement***

Public enforcement compared to private enforcement is more strategic and selective in nature. That is why states should have means to ensure that international cartels are effectively deterred and deprived of their illegal fruits. This can be done by embracing special rules for remedying international cartel cases that would take into consideration the harm to the world economy as an aggravating factor.

In such cases, the fines levied on international cartels should not be solely deposited into treasuries in enforcing countries, as is the case. A portion should also be used for international development purposes, especially for strengthening consumers/citizens ability to protect themselves from international anti-competitive practices, e.g. international cartels, etc; and also demand justice if they are affected from such practices.

Empowering national competition authorities to allocate a certain proportion of the fines levied from international cartels to the ICF will facilitate the use of such funds for the strengthening of competition regimes in developing countries. Funds could also specifically be targeted to the same sector where the initial harm occurred.

## **IV. FUND MANAGEMENT**

Rigorous checks should be in place to ensure that funds collected are spent effectively and in an accountable manner to build functioning competition regimes. In the absence of a specialised international competition enforcer and in view of the complementary relationship between trade liberalisation and competition policy, the World Trade Organisation (WTO) seems to be the best option to house an ICF. The WTO possesses the advantages of a very broad membership and a tradition of enforcing binding rules. Alternatively, OECD or the World Bank could house and oversee the administration of the ICF.

Given that the rationale behind the establishment of the ICF relates to ‘prevention being better than cure’, the Fund will be used to assist countries, notably developing and least developed, in progressively establishing effective enforcement mechanisms at the domestic level. It would also help connect developed and developing countries strengthen their cooperation and contribute towards better addressing anti-competitive practices at the international level. In a nutshell, ICF would provide strengthened and adequately resourced assistance to respond to specific needs.

Moreover, such an international partnership might involve development of a global capacity building facility in dealing with competition issues. Such an artificially created global public

---

<sup>18</sup> Jonathan T. Schmidt, *Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels*, available at <http://www.yale.edu/yjil/PDF/Schmidt.pdf>

good can be used to provide training to competition partitions from across the world and constitute a global hub for interaction among competition authorities and consumer groups from the world over. Thus, unnecessary duplication of training facilities may be avoided, network externalities from global interaction generated and economies of scale and scope in capacity building, otherwise unattainable, facilitated.

## V. ACTIVITIES SUPPORTED BY THE FUND

### *a) Technical Assistance*

Once a competition law is passed and a competition authority is established, the question becomes how to establish the capacity to detect, investigate, and remedy anticompetitive conduct. Unlike most areas of law enforcement, some aspects of competition law enforcement (e.g., merger review) involve prediction of future economic behavior, not simply the assessment of past conduct. A competition authority must learn to detect the likely effect on consumers and the competitive process, identify the real competition issues, conduct effective investigations, and develop remedies.

Successful enforcement of a competition law requires not only technical knowledge, but experience and judgment. In developed countries, this comes from on-the-job experience and institutional knowledge of the process of trial and error that led to past failures and successes. Technical assistance is the process by which a newer competition agency can take advantage of the experience of others (more experienced countries) as it develops that experience and judgment on its own.

However, to attain the benefits of technical assistance, competition authorities based in developing countries don't have the required budget to support such activities. The ICF could be utilised/approached for supporting activities relating to technical assistance for developing countries on competition issues. As a direct result of the support, the competition agencies would be able to get access to technical know how and better trained to identify and curb anti-competitive practices.

### *b) Educational programmes*

The competition agency faces a formidable task of building awareness and support for competition law among the citizens and the business community, especially in transition and developing economies. Given the limitation of budgets, competition agencies are not able to design effective programmes to undertake the activity effectively.

The American Antitrust Institute (AAI) was a recipient of approximately \$500,000 of settlement money to conduct a two-year antitrust education project in California. The project consists of two related phases. In the first phase, a video film was produced for television, demonstrating the value of the antitrust laws for consumers and businesses. The film, "Fair Fight in the Marketplace," was re-edited for classroom use and made part of a package of classroom materials, teacher materials, and web-based additional resources, for

introduction into California high school curricula<sup>19</sup>. Given the example of what AAI was able to do with the support of the settlement money, similar initiatives could be undertaken by credible institutions based in developing countries provided they are able to get financial support, which could be achieved with the creation of ICF.

## VI. CONCLUSION

It is always easier to agree at an international level on the definition of a problem than to take action to remedy it. However, improving economic efficiency and equity are two principles that can lay the foundation for laws dealing with international development. The concept of ICF is based on this principle of equity. Though its implementation poses a challenge, this is of no greater scale than many others for which successful resolutions have been found. Inertia does not help those injured by anticompetitive behaviour, nor strengthen the world economy. The establishment of the ICF would contribute to the promotion of a competition culture, better harnessing of the development potential of globalisation and the disciplining of anticompetitive practices in global markets.

The spirit of a North-South partnership dictates that the international community has a moral obligation to pay attention to the hardships caused to developing countries by international cartels. Therefore, all global actors should adopt a global problem solving approach to increase respect for consumer rights world wide and use their considerable influence to support rather than undermine the efforts of developing countries in this regard.

This paper recommends an open discussion within the international development and competition communities in order to:

- formulate and promote fair principles for penalising and awarding damages in the context of international cartels and explore the possibility of developing an ‘international competition fund’ (ICF);
- strengthen international cooperation and partnership for competition enforcement at the international level and create a consensus on the norms and practices to evolve such a partnership;
- facilitate the enactment of provisions in national (competition) legislations allowing fair and non-discriminatory use of fines and damages, which result from cross-border anticompetitive practices, for the benefit of resident and non-resident consumers.

---

<sup>19</sup> <http://www.fairfightfilm.org/aboutthefilm.html>

## LIST OF REFERENCES

- Canadian Economy online, available at  
<http://www.canadianeconomy.gc.ca/english/economy/cartel.html>
- CUTS International & NLU, Jodhpur (2008), “Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India”, available at  
[http://www.cci.gov.in/images/media/completed/cartel\\_report1\\_20080812115152.pdf](http://www.cci.gov.in/images/media/completed/cartel_report1_20080812115152.pdf)
- INCSOC (2008), ‘Better cartel deterrence through international solidarity’, available at  
<http://www.incsoc.net/pdf/Better-Cartel-Deterrence-International-Solidarity.pdf>
- Mehta, P (2008), ‘Busting cartels for development’, OECD Observer
- Schmidt, J (2006), ‘Keeping U.S. Courts Open to Foreign Antitrust Plaintiffs: A Hybrid Approach to the Effective Deterrence of International Cartels’, The Yale Journal of International Law; Available at <http://www.yale.edu/yjil/PDF/Schmidt.pdf>
- OECD (2000), ‘Hard core cartels’, available at  
<http://www.oecd.org/dataoecd/39/63/2752129.pdf>
- Yu. Y (2003), ‘The Impact of Private International Cartels on Developing Countries’, available at  
[http://www-econ.stanford.edu/academics/Honors\\_Theses/Theses\\_2003/Yu.pdf](http://www-econ.stanford.edu/academics/Honors_Theses/Theses_2003/Yu.pdf)