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Working Group on the Interaction between Trade and Competition Policy

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COMMUNICATION FROM KOREA

The following communication, dated 23 September 2002, has been received from the Permanent Mission of Korea with the request that it be circulated to Members.

Core Principles of Competition

I. INTRODUCTION

1. The Doha Ministerial Declaration calls for an examination of the application of the three core principles of transparency, non-discrimination, and procedural fairness in the context of the interaction between trade and competition policy.

2. There is a majority of views among Members that the application of the core principles to competition policy would facilitate trade and investment and that implementation of the core principles would not be difficult because, by and large, existing competition laws in Member countries already embrace these principles (WT/WGTCP/W/114). Furthermore, because WTO principles apply to internal measures as well as border measures, competition policy, when it affects trade, would already be subject to non-discrimination, transparency and procedural fairness.

3. However, given the unique characteristics in the competition policy area and its differences from standard trade issues, the discussions on the application of the core principles to competition policy has taken place around the following two key questions:

(a) Is it appropriate to apply the existing provisions on the core principles set out in the current WTO agreements to competition policy in a straightforward manner?

(b) If not, in what way should the core principles be applied to competition policy?

4. Application of the three core principles in a competition policy context can be more difficult than their application to trade rules. Unlike trade rules, competition law enforcement is commonly based on the rule of reason, using a broad framework of law. Even though competition cases appear to resemble each other, each case is a unique situation, and there is considerable variation in how key elements, such as "like products", the "relevant market", and the effects on the market are defined for each case. Therefore, it would not be desirable to apply these principles to competition policy in a mechanical way.

5. As the Secretariat's paper demonstrates very well, the three core principles are applied in a variety of ways in different WTO agreements, having made adjustments to the individual natures of each agreement. For example, while the GATT rules on the core principles broadly cover all sectors

of an economy, they are applied to products, rather than to persons. In GATS, while the core principles apply to services and service providers, the Agreement itself only covers service sectors. As for the TRIPS Agreement, the core principles are applied to intellectual property rights and right holders, and it has a very well-developed section on procedural fairness.

6. It is therefore not an unusual practice to draft a separate section on the core principles, making adjustments suitable for the subject-matter at hand and the legal traditions in that field. Some of the unique characteristics of competition policy and their implications on the application of the core principles are explained below.

II. APPLICATION OF THE THREE CORE PRINCIPLES TO COMPETITION POLICY

A. NON-DISCRIMINATION

7. Competition law already prohibits discrimination between like products, types of transactions, and the nature of the transacting parties. This could therefore naturally extend to prohibitions of discrimination based on nationality. Therefore, in principle, there should be no problem in applying National Treatment and Most-Favoured Nation Treatment in a straightforward way to competition policy.

8. What would be extremely difficult in a competition context is to distinguish *de jure* discrimination from *de facto* discrimination. As mentioned in the previous section, competition law enforcement mainly relies on the rule of reason principle. Seemingly like cases may result in different verdicts due to the contextual differences surrounding the case. Suppose, for example, in an international cartel case, a domestic firm has qualified for leniency while a foreign firm has failed to do so under the same leniency programme. If this is because they were judged differently depending on their positions in the market and their impacts thereon, then the distinctions can be fully justified and do not constitute discrimination. By the same token, when the context requires a different treatment, applying the rules in a rigid way may itself result in discrimination. Thus, distinction would require evaluating a case in its totality. It should be noted that different standards used in different countries to evaluate competition effects in cases dealing with cartels, mergers, and abuses of market dominance can be another source of discrimination. This would not be easily rectified unless there is a convergence of enforcement standards. International institutions such as UNCTAD, the OECD, and recently the ICN have been trying to address this issue.

9. In reality, such cases as those cited above rarely take place. Also, Korea does not feel that discussions in the Working Group have advanced sufficiently to address *de facto* discrimination. Korea believes that a possible multilateral framework on competition policy should focus on *de jure* discrimination: discrimination that is written into the law and is based solely on nationality.

B. TRANSPARENCY

10. As a core principle in the multilateral trading system, transparency refers to (a) the obligation to publish, or at least make publicly available, all relevant laws, regulations, and decisions; and (b) provisions on the notification of various forms of governmental action to the WTO and other Members.

11. There appears to be little disagreement on the need to make available to the public and other Members competition-related laws (laws, regulations, enforcement decrees, etc.) in a timely manner. Most countries publish such laws before they take effect. However, it would be desirable to define more precisely in the multilateral framework on competition policy the scope of the information subject to the publication and notification obligations.

12. Korea believes that, in addition to competition-related laws, information relating to investigations, judicial proceedings, the process of seeking a remedy and appeals to the competition authority decisions should all be made publicly available and notified to the WTO.

13. Of particular importance are the rules on granting exemptions to certain cartels from regulation. Some cartels yield the benefit of enhancing efficiency and are therefore granted exemptions from cartel regulations. In view of the well-known harms of cartels, however, all rules relating to exemptions from cartel regulations should be notified to the WTO to ensure transparency and to facilitate review by Members.

14. In the area of competition policy, individual case decisions are particularly important because competition law enforcement is generally based on the rule of reason. Although Members have different practices regarding publication of court decisions, every effort should be made to enhance public availability of court decisions.

15. Korea is open to the idea of reviewing competition policies of Members through a TPRM-type mechanism in such a way that it does not create undue administrative burden. It could enhance transparency and provide momentum to the discussions on substantive issues, contributing to the convergence of views in the long term.

16. Finally, taking into account the various constraints faced by developing countries, efficient technical assistance should be provided to enhance their capacity to implement transparency-related obligations. Appropriate flexibility for developing countries in carrying out the obligations should also be given consideration.

C. PROCEDURAL FAIRNESS

17. Whilst procedural fairness in trade policy is of great importance, it can be more so in the context of competition law enforcement, in that parties to competition investigations and proceedings should have assurance that the relevant procedures adequately protect their rights and interests in the matter. Therefore, a separate, specialized set of provisions for procedural fairness should be available in the possible multilateral framework on competition.

18. In the application of procedural fairness, a notice of the charges, fair and equitable administrative proceedings, and an appeal process are required to provide checks and balances to the claims of the relevant parties. These requirements will help to facilitate the enforcement of a rules-based trade and competition policy. Korea believes that the TRIPS Agreement provides a good reference for demonstrating procedural fairness in competition enforcement because the TRIPS Agreement includes the minimum provisions necessary for procedural fairness, such as the following:

(a) All processes pertaining to competition law enforcement should apply equally to foreign and domestic persons (natural and legal) in a fair and transparent manner.

(b) All parties have the right to appeal against an unfavourable decision made by a competition authority or court.

(c) Both domestic and foreign individuals or firms should be guaranteed the right to appeal to and to request remedy measures from competition authorities or courts against anti-competitive practices.

(d) The proceedings must proceed in a timely fashion in order to ensure prompt measures to protect rights and prevent uncertainty or excess costs resulting from undue delays.

19. While these procedures should be made available to protect the rights of the involved parties, they should also ensure that governments will be able to obtain the necessary information and documentation for a competition investigation. Thus, there should be rules defining the disclosure responsibilities of private entities in a competition case. WTO agreements, such as the Anti-Dumping Agreement and the SPS Agreement, which contain some regulations on disclosure, could be considered as possible models.

III. EXCEPTIONS

20. For national treatment, exceptions similar to those in GATT Articles XX and XXI could be applied for competition policy. It may be argued that core principles should only be applied to hard core cartels, since it is the only substantive area that is being envisioned to be included in a possible multilateral framework on competition policy. However, Korea believes that because of their general nature, principles such as national treatment should be applied to all substantive areas covered by competition-related laws existing within a Member country.

21. For MFN, similar kinds of exceptions as those for national treatment can be applied in general. However, there is an additional consideration for MFN. WTO agreements sometimes allow exceptions for bilateral or regional agreements.

22. The Working Group on the Interaction between Trade and Competition Policy needs to consider whether more exceptions should be provided in the application of the MFN principle to cooperation in competition law enforcement and to the exchange of information. This is because the level and method of international cooperation, voluntary assistance and informational exchange tends to vary depending on a Member country's legal system, competition law enforcement system and stage of development in competition law. Given that most of the existing agreements on competition policy (especially bilateral agreements) focus on cooperation issues, giving MFN exceptions to bilateral agreements on competition policy and competition policy sections of regional agreements could also be considered.

23. As in other WTO agreements, the key exception to be considered in the area of transparency relates to the issue of confidential information. Protection of confidential information is highly important in a competition context, because actions of private firms are involved and because criminal investigations are sometimes involved as well. Each Member should be allowed to determine the level and nature of protection of confidential information. Allowing exceptions to MFN would encourage Members to share more information voluntarily when necessary than would be the case if they were obligated to share confidential information on every occasion.

IV. CONCLUSION

24. All of the core principles of the WTO agreements such as non-discrimination, transparency and procedural fairness are important principles in the area of competition policy. Given the special characteristics of competition policy and its related issues, this paper has emphasized the need to tailor the core principles to the needs of competition policy.

25. In particular, this paper has suggested that the Working Group consider exceptions to the MFN principle, especially with respect to existing bilateral or regional agreements. This paper has also argued that the Working Group should focus on *de jure* discrimination, rather than *de facto* discrimination. Finally, the paper has supported giving special consideration and technical assistance to developing countries in the implementation of the core principles in their national competition laws.

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