

COMMUNICATION FROM KOREA

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Hardcore Cartels and Voluntary Cooperation:
Conceptual and Practical Enforcement Issues

I. INTRODUCTION

1. In its previous submission to the Working Group (WT/WGTCP/W/200), Korea outlined its basic thinking on hardcore cartels and voluntary cooperation, focusing on the means of voluntary cooperation for regulating hardcore cartels under a WTO framework agreement on competition.
2. As a follow-up, this proposal attempts to contribute to a further analysis of conceptual and practical enforcement issues regarding hardcore cartels and voluntary cooperation.

II. THE NEED FOR A MULTILATERAL FRAMEWORK ON HARDCORE CARTELS AND VOLUNTARY COOPERATION

3. With increasingly intense integration of the global market, numerous countries have been experiencing damages caused by the frequent emergence of international cartels. These international cartels cause greater economic loss in developing countries with no competition laws or with relatively little experience in competition law enforcement. Indeed, international cartels pose severe problems for developing countries as well as developed ones.
4. The collection of necessary evidence on the existence of cartels requires investigative cooperation among competition authorities since the member firms of international cartels are often located in a number of different countries. Korea believes that there is a growing consensus in this Working Group regarding the need to minimize cross-border conflicts between competition law enforcement activities of different member countries and to strengthen international cooperation in addressing international cartels.
5. In this sense, it is a reflection of the increasing awareness of the serious harm caused by cartels that the Doha Ministerial Declaration has mandated this Working Group to clarify core elements such as "hardcore cartels" and "modalities for voluntary cooperation."

III. HARDCORE CARTELS

A. CONCEPT OF HARDCORE CARTEL

6. Regarding the concept of a hardcore cartel, there are two existing definitions, namely those found in the OECD's Recommendation of the Council Concerning Effective Action Against Hardcore Cartels (the Recommendation) and UNCTAD's Set of Principles and Rules on Competition (the Set).

7. Even though the two definitions resemble each other closely in substance, the Set's definition of cartels may cover a broader scope than that offered by the OECD's Recommendation. The latter definition seems more appropriate for use in the multilateral framework since it is more effect-oriented, straightforward and clear.

8. Cartels that are thought not to be hardcore, have some efficiency-enhancing effect. For example, they may be cartels for R&D where cooperation between innovators at the pre-commercial stage may bring about synergies and dynamic efficiency. This type of cartel is often allowed when its anti-competitive effects do not overly outweigh the pro-efficiency effect. R&D cartels may be particularly useful for developing countries in that the dynamic efficiency they create is an important factor at the early stages of economic development. Cartels among small producers to achieve economies of scale can also provide effective competition against a dominant player, and therefore have a pro-efficiency effect. Modern competition laws evaluate the competition effect of such non-hardcore cartels by the rule of reason. The evaluative process based on the rule of reason may differ according to different legal traditions and/or particular economic environment or development stages of a member Country.

B. PRACTICAL ENFORCEMENT OF HARDCORE CARTELS

9. To ensure effective sanctions against hardcore cartels, it is crucial for each member Country to establish some sort of law and enforcement mechanism. Furthermore, in the case of international hardcore cartels, cooperation among involved jurisdictions would play a vital role in an effective regulation of hardcore cartels.

10. For effective enforcement, there must be a clear statute against hardcore cartels and an authoritative agency that can make independent judgments from the perspective of competition law. Furthermore, there should be procedural guarantees to ensure a sufficient level of sanctions and remedies imposed on hardcore cartels. However, Korea is of the view that it is not always essential to have a separate, specialized competition law or a separate, specialized agency.

11. Since countries are at different levels of economic development, and have diverse legal traditions with different socio-historical contexts, implementation of hardcore cartel regulations in the actual law enforcement stage can appear in various forms. Therefore, flexibility and progressivity in cooperation between countries must be recognized. For example, given that some developing countries do not have competition laws, or lack sufficient expertise and resources to effectively enforce competition policy, a transitional period could be provided for developing countries before hardcore cartel regulations become fully applicable. However, taking into account the enormous damages caused by hardcore cartels in markets, such transitional periods should be granted only on a temporary basis.

IV. VOLUNTARY COOPERATION

A. CONCEPT OF VOLUNTARY COOPERATION

1. Concept of the term 'Voluntary'

12. The term 'voluntary' incorporates both ethical and legal dimensions. In the ethical sense, 'voluntary' implies that countries, especially developed countries, should fulfill self-imposed obligations of cooperation in good faith and that activities of voluntary cooperation should not be so arbitrary that they contradict the reasonable expectations of other countries.

13. From a legal perspective, 'voluntary' means that it should not be binding. The concept of the term 'non-binding' suggests that member countries should not be forced to cooperate against their own interest. For example, "voluntary" means that the WTO core principle of non-discrimination (especially MFN) does not apply. When country 'A' provides notification or information to country 'B', country A is not obliged to provide the same notification or information to country 'C'.

14. Nevertheless, a requested country should respond to a request for cooperation, whether it chooses to actually offer its cooperation or not. In the case of refusal to cooperate, sufficient reasons should be provided for not cooperating.

2. Concept of the term 'Cooperation'

15. In the literal sense, "cooperation" occurs reciprocally between two countries, but in the competition laws and institutions, there are undeniable disparities between developed countries and developing countries. Strengthened cooperation in competition law enforcement, therefore, suggests that developed countries with longer histories of competition law enforcement should assist the developing countries with regard to capacity building in the area of competition law enforcement.

16. Some concern has been expressed that under this type of voluntary cooperation, a developing country would be 1) unlikely to have as many cases of information to provide to a developed country as the latter would be able to provide, and 2) unlikely to request cooperation from the developed country as much as the latter would do. Then, it may be argued that developing countries would not be able to benefit from the system as much as developed countries in general. However, it is equally likely that if and when a developing country needs cooperation from a developed country, cooperation may be more forthcoming with an external leverage that the multilateral framework can provide, rather than purely on a bilateral basis.

B. MODALITIES OF VOLUNTARY COOPERATION

17. Voluntary cooperation in the field of competition policy can take many forms such as general information sharing and discussion, case-specific cooperation, and technical assistance.

1. Case-Specific Cooperation

18. Due to increasing international anti-competitive activities, case-specific international cooperation between relevant countries would be in need. In the investigation and sanction of a specific case, the countries involved can cooperate in the following ways:

- First, members can exchange information and evidence. Competition or judicial authorities may exchange case information or evidence within the parameters of their domestic laws. When confidential information is involved, the level of exchange should be left to the

discretion of the exchanging parties, taking into consideration the level of protection of confidential information and reciprocity of the other member.

- Second, it is necessary for member countries to cooperate through negative comity. This means that a country will provide notifications, consult or exchange opinions, in anti-competitive cases that harm the interests of another member country. As the cooperation develops, positive comity, which means that a member country can request another member country to take action under the latter's own competition law, may also be considered.
- Thirdly, consultations may be organized to coordinate the law enforcement activities of countries concerned when a certain anti-competitive behavior causes harmful effects and is subject to investigation by many member countries.

2. Technical Assistance

19. While there is growing cooperation between developed countries, cooperation between developed and developing countries through technical assistance is still in short supply. It appears that the global spread of competition culture and the balanced growth of the global economy is premised on increased technical assistance in response to the demand for technical assistance of developing countries.

20. The objectives of technical assistance, such as the spread of competition culture and transfer of competition laws and institutions, can yield significant effects only when they are based on strong confidence between developed and developing countries. Such confidence can be formed as a result of long-lasting multilateral/bilateral communication and cooperation. Korea attaches great importance to strengthening cooperation between countries. In this vein, Korea has held annual International Workshops on Competition Policy since 1996. In the same context, Korea holds the Seoul Competition Forum every other year to disseminate competition culture world-wide by promoting discussion between the developed and developing countries. At a more specific level, Korea runs a program to assist the Chinese competition officials to adopt and enforce competition law. Korea hopes that such programs, including the workshop and forum, will contribute to increasing the quality and frequency of technical assistance while providing opportunities for countries to enhance mutual trust.

3. Establishment and Management of a possible WTO Competition Policy Committee

21. If a multilateral framework on competition policy comes into being under the WTO, it would be desirable to set up a Competition Policy Committee that will enhance exchanges between Member countries and assist efficient implementation of the framework. The following are some of the activities that such a Committee could undertake:

- First, the Committee could facilitate the exchange of information and opinions on the status and trends of competition laws and regimes. It would also provide a forum to conduct analyses and discussions on global competition issues that are of common interest to member countries.
- Second, by organizing "obligatory" peer reviews, the Committee could update the progress of competition policy implementation in Member countries. The "obligatory" peer review can complement the non-binding aspects of the voluntary cooperation system and reinforce the implementation of obligations set by the multilateral framework.
- Peer reviews will allow Member countries to evaluate developments made by countries towards the multilateral framework and propose ways to improve the framework. To this end,

the Competition Policy Committee must establish clear guideline on the designation of a member country for review and the methods of review.

- Third, the Committee should undertake systematic evaluation of the technical assistance programs for developing countries and devise more effective technical assistance plans. To promote technical assistance, the Committee might run a database which will include information on experts, organizations and other relevant details, to effectively organize technical assistance.

V. CONCLUSION

22. Hardcore cartels are a pernicious practice that directly infringes upon the basic principle of free market economy. Therefore, a multilateral competition law framework against hardcore cartels should be operated in a way that secures effectiveness.

23. Voluntary cooperation in competition law enforcement should be made, taking into account the substantial gap between the different levels of competition law enforcement and institutional development among the developed and developing countries. As a result, cooperation in the area of competition law enforcement should take the form of capacity building and technical assistance, where the countries with more experience in competition law enforcement will help the developing countries enhance the level of competition law enforcement. Korea believes that effective world-wide regulation of hardcore cartels will be possible when voluntary cooperation between the developed and developing countries becomes more active.
