

**12th Session of the  
Intergovernmental Group of Experts on Competition Law and Policy  
Geneva, 9 - 11 July 2012**

**Cross-border Anticompetitive Practices:  
The Challenges for Developing Countries and  
Economies in Transition**

**UNCTAD Secretariat**

## Background to this Round Table

- The 11th IGE Meeting reviewed this topic from the perspective of international cooperation in competition cases
- The 11th IGE Meeting decided to further discuss this issue, and requested UNCTAD secretariat to organize another round table on

***“ cross-border anticompetitive practices: challenges for developing countries and economies in transition ”***

# Part 1. International cartel prosecution in developing countries

Experiences and lessons from selected  
jurisdictions

# Experiences of selected countries

We have looked at data and cases provided by some of the jurisdictions who have successfully become active enforcers against international cartels. These include:

- Brazil
- Chile
- Korea
- Mexico
- Turkey



# Experiences of selected countries: General observations

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## **Evolutionary Development**

- In their early days, they started with follow-on investigations
- But now they are regular members who conduct simultaneous dawn raids.

## **Leniency Program**

- In some early cases, they succeeded without leniency applications.
  - But their successful prosecution against international cartels greatly depends on the leniency program.
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# Experiences of selected countries: General observations (contd)

## **International Cooperation**

- Almost all of investigations conducted by them involve international cooperation, especially with developed countries.

## **Active enforcement against domestic cartels**

- Their successful prosecution against international cartels coincided with or was preceded by active enforcement against domestic cartels.

# Challenges faced by developing countries

## No leniency Application

- International cartelists make strategic choices of leniency applications.
- Even in follow-on investigations, no leniency applications were filed (Korea).

## Initiation of Investigation

- Cartels come to their attention only after other's enforcement
- Informal information by the US helped it to decide whether to launch an investigation (Brazil)

# Challenges faced by developing countries (contd)

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## **No physical presence**

- In many cases, there is no branch or subsidiary in developing countries.
- In response to investigations, one of cartelists closed its office (Turkey)

## **Material evidence from others**

- Official decisions open to the public do not contain material information due to confidential concerns.
- KFTC benefited from US court decisions in its early case (Korea)



# Challenges faced by developing countries (contd)

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## **Service of document**

- Where it has a certain legal effect, it could be a serious issue.
- An option is to have a formal help from foreign authorities (Chile).

## **Period of exclusion**

- When the period has passed, no legal action can be taken.
- So the case could collapse or end without fines (Japan)

# Suggestions for a way forward

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- A jurisdiction cannot entirely rely on others' enforcement.
  - Given its resource intensive nature, a young authority needs to focus on international cartels which create specific harm to its market.
  - The first priority is to establish an effective leniency program.
  - A young authority must first step up its enforcement efforts against domestic cartels, from which they could build up reputations and capabilities.
  - Informal cooperation should not be underestimated. An idea is to set up an intelligence network based on what is already available.
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## Part 2 – Cross-border merger control in developing countries

**In the background paper,**

**The term “Cross-border merger” refers to mergers that involve firms established in more than one jurisdiction, or affect markets in more than one jurisdiction.**

# Experiences of selected countries

We have looked at data and cases provided by some of the jurisdictions who have successfully implemented cross-border merger control during the last decade. These include:

- Brazil
- Chile
- Korea
- Mexico
- Singapore
- South Africa
- Turkey



# Experiences of selected countries: General observations

## Evolutionary Development

- Between 2000 and 2011, they speeded up their enforcement actions in cross-border mergers.
- They undertake their own merger reviews.
- The focus has been on horizontal mergers.
- Rare cases of vertical and conglomerate mergers (South Africa and Turkey).

# Experiences of selected countries: General observations (cont'd)

## Physical presence

- In most cases, at least one of the merging parties has a branch or subsidiary in the country concerned, except for Korea. This may imply that relatively advanced competition authorities review international mergers affecting their markets even when there is no physical presence in their country.

## Merger decisions

- Most cross-border mergers were approved subject to conditions.
- **Exception:** Singapore – Of the 28 mergers reviewed since 2007, 18 had a cross-border dimension and were cleared without conditions.

# Experiences of selected countries: General observations (cont'd)

## **International cooperation**

- Enhanced cooperation between competition authorities (Chile, Korea), especially with the US and the European Commission.
- Cooperation in the selection and design of remedies, and methodologies and tools that can be used in estimating the effects of and potential risks of mergers (Chile).

# Challenges faced by developing countries

## Notification

- Risk of non-notification by merging parties – risk being much higher in jurisdictions with voluntary notification system.
- Notification preference for “priority” jurisdictions.
- Timely filing of the transaction and respect for local legislation in mergers between foreign companies.



# Challenges faced by developing countries

## Notification

### Challenges for small economies like Singapore in mergers between large foreign firms:

- Submission of notifications based on data filed to other jurisdictions.
- Difficulty in distinguishing the specific effects of the merger in the country concerned when merging parties are involved in a wide range of activities globally.

# Challenges faced by developing countries

## Access to information

- Difficulties in collecting information, questionnaire distribution and gathering
- Language of communication and data

## Remedies

- Difficulty in enforcing and monitoring remedies.
- Differences in approaches of competition authorities to remedies – these do not block the merger.

# Suggestions for the way forward

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- Young competition agencies must first strengthen their capacities by dealing with domestic mergers, from which they could gain experience.
  - Given their limited resources, young competition authorities need to give priority to those international mergers which significantly affect their market.
  - Promote formal cooperation (Bilateral/regional cooperation agreements).
  - Informal cooperation is important and seems to work well.
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THANK YOU