INTERNATIONAL CARTELS AND DEVELOPING COUNTRIES: A PROPOSAL TO REFRAME COMPETITION LAW

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Abstract

This thesis deals with the question of whether developing countries can effectively protect themselves against the effects of international cartels and what strategies they should develop in order to do so. While combating cartels has been one of the pillars of both domestic and international competition law policy, developing countries continue to suffer the brunt of the negative effects of international cartels. Because most developing countries have little to no functioning competition law policy, they are often the most likely targets of international cartels and therefore the most in need of assistance. Developed countries have the resources and mechanisms in place to detect, investigate, and prosecute international cartels targeting their domestic markets; however, developing countries rarely have such opportunities. This can be especially problematic in instances where cartels such as export cartels, are located in one jurisdiction but only target foreign jurisdictions. Without the financial or human resources, or even an effective competition law enforcement mechanism, to obtain the evidence needed to challenge these cartels, developing countries often find themselves in the hopeless situation of being subjected to the whims of the cartel but unable to do anything about them.

This thesis will discuss both the qualitative and quantitative effects international cartels have on developing countries and the global market. This discussion will also include analysis of case studies conducted on the effects of these cartels. Another chapter will be devoted to the current legislation and strategies that have already been established to combat international cartels in general. The final chapters will cover what has already been done to help developing countries protect themselves and what the appropriate welfare benchmark should be when considering reform options. The final chapter on suggestions for reform will be divided into two sections: domestic reform, and global reform. The section on domestic reform will focus on ways in which developing countries can implement and enforce their own competition law systems as well as encourage the development of a competition culture in the market. Global reform strategies discussed will include a discussion on whether forming a global, harmonised competition law agreement would be feasible and methods on how to foster greater cooperation between jurisdictions.

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Introduction

Research Question

This thesis is primarily concerned with establishing what the effects international cartels have on the global market and more specifically on developing countries and what strategies they can adopt to rectify this issue. This analysis will pave the way to discussing the desirability and shape of more global reform strategies.

The Gap in the Law

International cartels, and especially export cartels are particularly problematic in the global market, even more so than domestic cartels. This is because, as stated above, most competition law systems are only concerned with prosecuting anti-competitive behaviour that has a direct effect on their market. Indeed, as Chapter Three will elaborate, many jurisdictions implicitly or explicitly exempt export cartels from enforcement of their competition laws. For instance, the United States has enacted a number of statutes explicitly exempting export cartels from antitrust law enforcement, most notably the Webb-Pomerene Act (1918), the Export Trading Company Act (1982), and certain sections of the Clayton Act. The European Union implicitly exempts export cartels from EU competition law enforcement by only prosecuting those cases that directly affect the Common Market. The rationale behind explicitly or implicitly exempting export cartels is that these cartels, if created with the right intentions, can facilitate access to foreign markets for small and medium-sized firms who would not otherwise be able to enter. However, this is not always the case and the next chapter will outline the negative effects export cartels can have on the economy.

While some may argue that those countries that are targeted by export cartels can simply make use of their own competition law enforcement mechanisms, this is not always an option. These cartels often target developing countries with the knowledge that many of these countries either do not have their own competition law systems or cannot effectively implement to reach a successful outcome. These issues are exacerbated by the fact that export cartels are domiciled in a different jurisdiction than the targeted country, making it especially difficult even for those countries that have effective enforcement strategies for domestic abuses but may not have any in place for those that occur extraterritorially. Obtaining evidence located in a different jurisdiction is notoriously difficult, particularly for developing countries that lack the necessary resources, unless the foreign national competition law authority agrees to cooperate with them. While international cooperation agreements exist for these purposes, they are often ineffective. The problems associated with these agreements will be discussed in Chapter Six.

Although export cartels can be especially damaging to the market, particularly for developing countries, international cartels as a whole can also have severe detrimental effects that are not always covered by traditional competition or antitrust laws. Unlike export cartels, whose main function is to export products to another country, international cartels can have negative effects on both the domestic jurisdictions in which the members reside as well as the overall global market.[1] International cartel behaviour can be very similar to domestic cartel, only on a much larger scale. Politicians and scholars alike have acknowledged the effects international cartels have on the market as being detrimental to consumers.[2] One of the most detrimental effects an international cartel can have on the global market is excluding competitors from entering or expanding it. To achieve this, international cartel members may divide the market amongst themselves and set predatory prices in order to prevent foreign competitors from entering or employ other anti-competitive behaviours designed to force other firms out of the market.[3] Once they have achieved a monopolistic hold on their respective territories, they are free to raise prices above competitive levels. The next chapter will give a more detailed discussion and analysis of international cartels and the effects their conduct has on the market.

Chapter Three will discuss how domestic competition law authorities regulate international cartels; however, these laws are not sufficient to curb their rise. Developed countries may apply their own competition or antitrust law enforcement mechanisms against any international cartels that target them; whether that should be domestically or extraterritorially. While this may make international cartels slightly easier to prosecute than

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[1] Connor, John M. *Global Price Fixing*, (2007) Springer Science & Business Media at 50.
[2] See Levenstein, Margaret C.; and Suslow, Valerie Y., 'The Changing International Status of Export Cartel Exemptions,' (2004) American University International Law Review, Vol. 20, No. 3.
[3] Kaplow, Louis, *Competition Policy and Price Fixing,* (2013) Princeton University Press at 24.

export cartels that apply the same anti-competitive behaviours on the market, in cases where international cartels only target developing countries, there is often little to no recourse available, beyond seeking cooperation from the host country, which as mentioned above, is not always a guarantee. However, even if the host country cooperates during the investigation, international cartels are also notoriously difficult to detect. Notable economist, John Connor has estimated that the chances a cartel will be discovered if it operates in Europe or the United States, are between ten and twenty percent.[4] Detection outside of these jurisdictions, especially for developing countries, is nearly impossible. Developing countries therefore face the same problems with international cartels as they do with export cartels.

<u>Methodology</u>

I have analysed existing legislation as well as case studies conducted by other academics and economists in order to determine the effects international cartels have on developing countries and whether there is any possibility for reforming the current situation. I also conducted extensive research into the academic literature surrounding this topic along with the case law, most notably from the EU and the United States.

Along with analysing the existing academic literature, I have also looked at economic studies conducted by the OECD. I have not carried out any of my own empirical economic or econometric research, but rather I used the findings of other economists. This is in part because much of those findings remain largely undisputed. Furthermore, the data regarding cartels, particularly export cartels, is confidential. I also conducted interviews with notable academics and economists discussing the issues surrounding export cartels and possible ways to reform the current system.

What is Competition and Competition Law?

Competition can be defined as the struggle between firms for dominance in order to gain

[4] Connor, John M., 'Global Cartels Redux: The Lysine Antitrust Litigation,' (1996) in Kwoka, John E.; White, Lawrence J., *The Antitrust Revolution: Economics, Competition, and Policy,* (2014) Oxford University Press.

consumers' approval and business.[5] Competition law is a system or body of rules designed to protect competition within the market and generally maximise consumer welfare. Perfect competition is however, merely a theoretical model in which to model competition policy on.[6] In practice, the conditions needed in order to achieve perfect competition are almost impossible and highly unlikely to occur. These conditions include but are not limited to: an almost infinite number of buyers and sellers; all products must be identical; buyers must have access to all information regarding market conditions; there cannot be any 'barriers to entry' preventing new sellers from entering the market; and there cannot be any 'barriers to exit' preventing firms from leaving the market should they wish to.[7] On the opposite end of the spectrum is the pure monopoly. Like the perfect competition model, pure monopolies are nearly nonexistent. However, monopolies can have a destructive effect on the market. In a pure monopoly, one single firm has a dominant position in the market. In reality, a firm or several firms working collectively may possess enough market power to enjoy the same benefits as a single monopolist. Simply put, the main issue with monopolies is that it allows firms to increase prices and/or decrease production. Competition law therefore aims to bring the market as close as possible to perfect competition while curbing the rise of monopolies.

Apart from preventing the spread of monopolies that could put firms in a better position to abuse their dominant position, successful competition law systems also contain stringent rules on preventing companies from colluding with one another, or forming cartels.

Competition policy can be defined as a set of policies or laws that are designed to encourage competition along with allocative efficiency in the market.[8] Amongst its other goals, competition policy seeks to: prevent cartels or other anti-competitive arrangements such as price-fixing and market allocation; prevent mergers that would result in a significant lessening of competition (or strengthen any dominance an undertaking may already have); and prevent sellers from making unilateral actions that would significantly enhance their

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[5] Heyne, Paul L; Boettke, Peter J., Prychitko, David L. *The Economic Way of Thinking*, (2013) 13th ed, Pearson Higher Education at 102.
[6] Li, Rita Yi Man; Li, Yi, 'The Role of Competition Law: An Asian Perspective,(2014) Asian Social Science, Vol. 9, No. 7 at 47-53.
[7] Whish, Richard. *Competition Law*, (2015) Oxford University Press at 8.
[8] Motta, Massimo, *Competition Policy: Theory and Practice*, (2004) Cambridge University Press at xviii

market power.[9] It should be noted that not all policies under the "competition policy" umbrella are entirely competition and/or efficiency enhancing. For example, studies on export cartel exemptions have shown that they have very little positive effect on competition in domestic markets but can be detrimental to foreign markets. Therefore, when speaking on adopting competition policy in developing countries, it is important to note that any policy that is to be implemented must be tailored to fit the country's own competition needs. The ways in which competition policy may be implemented in developing countries will be discussed in Chapter Four.

Competition law is an element of competition policy. Other elements of competition policy include deregulation, trade liberalisation, and privatisation. Competition law is a set of laws designed to promote the goals of a country's competition policy. To that effect, competition laws control alleged anti-competitive conduct by their domestic firms, for instance by imposing sanctions on cartel behaviour, regulating potential mergers that may affect the competitiveness of the relevant market, and limiting the potential for abuses of dominant or monopoly positions in the market.

The Relationship between International Competition Law and Trade Law

International cartels can affect both competition on the global market as well as international trade. While these are often considered to be separate areas of law, it will be proposed in this thesis that there is a tangible relationship between the two and that both international competition law and international trade law can be used to remedy the current situation.

International competition law and trade law share similar characteristics, such as both preside over laws that govern behaviour that affects the global market. However, it may be argued that these policies could be considered to be mutually exclusive of one another. Competition laws, both domestic and international, controls behaviour conducted by *private* individuals or companies that negatively affect competition. Traditionally, cartels

[9] *Ibid.*

have been considered to be predominately private. Trade laws on the other hand, preside over *public* conduct, such as tariffs created by the government in order to grant preferential treatment to domestic producers at the expense of foreign competitors. Nevertheless, it will be presented in this thesis that the boundaries between international and trade law are not as clearly defined. Indeed, the World Trade Organisation has, on numerous occasions, considered the possibility of introducing a separate competition law Agreement. These occasions will be discussed in Chapter Six.

This thesis will argue that some private agreements, such as export cartels, due to the fact that some jurisdictions explicitly condone such practices, may fall under public conduct, and thus may be governed by international trade law.

The Importance of Cartel Regulation

A large part of competition law enforcement has to do with cartel regulation and sanctioning cartel behaviour. Chapters Two and Three will discuss the effects international cartels have on the domestic and global market as well as how these cartels are regulated respectively.

<u>Hard-Core Cartels</u>

A cartel is an agreement between undertakings with the intent to restrict or distort competition within the market. Cartel agreements often involve anti-competitive conduct such as price-fixing, i.e. artificially raising the prices of a product beyond what the consumer would normally pay, or dividing the geographic market so each competitor essentially has a monopolistic hold on their part of the market. Cartels are often complex and difficult to trace. Given that these agreements occur in secret, they are very difficult to identify and can therefore last many years before they are detected.

The International Competition Network, consolidating the definitions of cartels contained in eighteen members' competition laws,[10] found three commonalities shared by these jurisdictions.[11] The three elements of a cartel that these members' competition laws agreed upon were:

1. An agreement;
2. Between competitors;
3. To restrict competition.

In an effort to curb the rise of cartel behaviour, the European Commission has a broad interpretation to the meaning of the term 'agreement.' While legally binding agreements such as contracts fall under this definition, the Commission has also defined agreements as those that are more informal. Non-legally binding agreements such as 'gentlemen's agreements'[12] and simple understandings[13] have also fallen under the ambit of Article 101. In addition, many competition and antitrust laws are not limited to merely prohibiting 'agreements.' For instance, Article 101 of TFEU also refers to 'concerted practices' while Section 1 of the Sherman Act covers everything from formal contracts to conspiracies.

The United States also has a wide definition of cartel 'agreements.' Section 1 of the Sherman Act includes 'contracts, combinations in the form of trusts or otherwise, or conspiracies, in restraint of trade or commerce,' when considering the definition of 'cartel.' In *United States v. Container Corp. of America,* the Court extended the meaning of 'agreements in restraint of trade,' to include an agreement between competitors to exchange 'the most recent prices charged or quoted,' despite there being no agreement 'to

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[10] These jurisdictions were: Australia, Brazil, Canada, the European Union, Germany, Hungary, Ireland, Japan, South Korea, Mexico, New Zealand, Russia, South Africa, Spain, Switzerland, the United Kingdom, the United States, and Venezuela.

[11] See ICN, 'Defining Hard Core Cartel Conduct: Effective Institutions, Effective Penalties,' Report prepared by the ICN Working Group on Cartels for the ICN 4th Annual Conference, Bonn, Germany, 6-8 June 2005.

[12] *ACF Chemiefarma NV v. Commission* [1970] Case 41/69, ECR 661, CMLR 43; and *BPB plc v. Commission* [2008] Case T-53/03, ECR II-1333, 5 CMLR 1201.

[13] *Re Stichting Sigarettenindustrie Agreements* OJ [1982] L 232/1, 3 CMLR 702 where an 'understanding' between trade associations was held to be an agreement under Article 101

adhere to a price schedule.'[14] The Court's justification was that the agreement resulted in an illegal situation of price stability and uniformity.

Most antitrust and competition law authorities are concerned with mainly regulating and sanctioning domestic cartels. Domestic cartels are cartels that are domiciled in the competition authority's territory and have a direct, substantial, and foreseeable effect on that territory's market.[15] One of the first competition laws enacted was the Sherman Act, which sought to curb the rise of the 'trust' – oligopolistic cartels that colluded with each other rather than acting independently. The Sherman Act was passed in response to the government's fears of the extent of the trusts' growing wealth and capital during the industrial age; since then, that fear has not abated.[16]

International Cartels

Domestic cartels are not the only type of anticompetitive agreement to plague competitive markets. Undertakings from different countries or territories can also collude together to form an international cartel. International cartels may be even more dangerous than domestic cartels given the fact that their effects can reach beyond one single jurisdiction. Early chapters in this thesis will discuss the effects these cartels have on both domestic and global markets, with particular emphasis on developing countries, as well as ways in which they are regulated. Later chapters will examine the difficulties developing countries face when attempting to combat international cartels on their own and what strategies they can adopt in order to do so more effectively. Because international cartels are a worldwide threat to healthy competition, discussions on reforming the current situation will also include global suggestions, such as the adoption of harmonised competition law provisions.

The most famous international cartel is the Organisation of the Petroleum Exporting Countries (OPEC) oil cartel, created on 14 September 1960. Its stated objective is 'to coordinate and unify the petroleum policies of its member countries and ensure the

[14] 393 U.S. 333 (1969).
[15] See Foreign Trade Antitrust Improvements Act, 15 U.S. Code § 6a; see also General Court, Cast T-102/96 – *Gencor v. Commission* [1999] ECR II-759.
[16] Broder, Douglas F., *U.S. Antitrust Law and Enforcement: A Practice Introduction*, (2012) Oxford University Press at 6.

stabilization of oil markets, in order to secure an efficient, economic and regular supply of petroleum to consumers, a steady income to producers, and a fair return on capital for those investing in the petroleum industry.'[17] Although, as a permanent inter-governmental organisation, it contains more transparency than illegal hard-core cartels, its conduct classifies it as an international cartel in its own right. The fifteen member nations to the OPEC cartel collectively hold 78 percent of the world's total crude oil reserves and together produce approximately 60 percent of the oil that is traded on the global market. Thus, there have been times where OPEC has taken advantage of their dominant position in the international oil trade and reduced oil production while simultaneously increasing its international market price. For instance, in October of 1973, the Arab nations of OPEC, in response to the United States throwing its support for Israel during the Arab-Israeli war, declared an embargo on oil and intentionally reduced the supply of oil to the global market. Within months of this decision, global oil prices rose from $3 USD per barrel to nearly $12; prices in the United States were significantly higher. This triggered an international energy crisis that was later dubbed the "First Oil Shock" and led to widespread economic recessions in many oil-importing countries.

Export Cartels

Export cartels are a unique form of international cartel that occupies a special place in most competition law regimes. Given that the negative effects of export cartels are often solely felt in the foreign jurisdiction they target, they are often exempt from the host country's competition or antitrust rules. An export cartel is a cartel in which the undertakings are located in one territory (or territories) while targeting another. In other words, a cartel that is located in one jurisdiction while exporting to another and limiting their anti-competitive behaviour solely to that market. Export cartels often do not adopt the same types of anti-competitive conduct as traditional hard-core cartels. Much of their conduct is limited to dividing export markets or charging a specific export price.

<u>What makes a Cartel Successful?</u>

Cartel success is dependent on not only external factors such as the market structure but

[17] 'Our Missions,' Opec, available at http://www.opec.org/opec_web/en/about_us/23.htm.

also internal factors such as the distribution of power within the cartel itself, voting structure and the effectiveness of mechanisms used for detecting and deterring cheating as well as the ability of the cartel to create barriers to entry.[18]

In order to create a successful international cartel, certain *market* factors must be in place. For instance, markets where there are relatively few buyers encourage the formation of more cartels than in market where there is a higher concentration of buyers since in a low concentrated market, the buyers are more likely to be loyal to its suppliers or producers.[19] Cartels are also more likely to succeed in a more transparent market, where members are able to monitor each other's behaviour from available information such as product catalogues, pricing bulletins and marketing campaigns. This transparency makes it easier to detect cheating and deal with it in a timely manner. Finally, the market must have higher barriers to entry in order to prevent new firms from entering and saturating it with lower priced products. This also means that the elasticity of both supply outside of the cartel and demand must be low. A low elasticity of supply means non-cartel members cannot enter the market in response to increased prices. A low elasticity of demand means that there should be no close substitutes, otherwise consumers will merely gravitate towards them and the volume of cartelised products sold will decrease.

Aside from market factors, the *cartel itself* must also have certain characteristics in order for it to succeed. Firstly, the time frame – the longer a cartel remains operational, the more likely it is to fail. However, the organisational structure of the cartel is also essential in order to ensure success. For instance, price-fixing cartels can collapse due to the failure to detect and punish members' attempts to cheat by undercutting the agreed price or exceeding the allocated quota.[20] Similarly, failing to discourage free riding on these services, which prevents the cartel from recovering a competitive profit on its costs, also undermines cartels involved in cost-sharing practices such as joint market research and advertising. In order to discourage cheating, cartels must not only employ stringent punishments but must also establish effective monitoring mechanisms, such as joint sales agencies or requiring

[18] Levenstein, Margaret C.; Suslow, Valerie Y., 'What Determines Cartel Success?' (2006) Journal of Economic Literature, Vol. 44, No. 1.
[19] Stigler, George J., 'A Theory of Oligopoly,' (1964) Journal of Political Economy, Vol. 72, at 44-61.
[20] Dick, Andrew. 'When are Cartels Stable Contracts?' (1996) Journal of Law and Economics, Vol. 39 at 249.

regular reporting to one another or third parties. Successful cartels will therefore ordinarily adopt a hierarchical system, separating high-level policy decisions made by the executives from the daily monitoring and negotiations conducted by lower-level managers.[21]

Previous studies on the Effects of International Cartels

It has been proven in numerous studies that international cartels have a devastating effect on the global economy and especially the economies of developing countries. More controversial is the effect export cartels have on competitive markets. Until recently, export cartels have not only been tolerated but actively encouraged by many governments. However, studies conducted as early as the 1970s began to explore the negative implications of these cartels as well.

Studies on the effects of international cartels can be traced as far back as the late 1800s. One of the earliest identified cartels was the Neckar Salt Association in the salt mines industry, which was established in 1828 and whose members originated from three different German states.[22] An American economist by the name of Elisha Andrews is credited for recognising the world's first global cartel: the infamous Parisian copper syndicate, which was active between 1887 and 1889.[23] During this time, the association controlled almost 160,000 tons of copper in different parts of the world.[24] It eventually collapsed due to the rise of large, non-syndicate producers of copper, which drove the price downwards. Unable to fulfil their contracts, the syndicate was disbanded.

Charles Edgerton's study in 1897 on the short-lived but quite successful cartel, the U.S. Wire Nail Association is particularly noteworthy, mainly because it is the first American study on a U.S. based international cartel.[25] His paper on the cartel was written with the help of insider interviews and was published only a year after the cartel was dispersed. In it, he posits that

[21] Levenstein, Margaret and Suslow, Valerie. 'What Determines Cartel Success?' (2006) Journal of Economic Literature Vol.44 at 44.
[22] Henderson, W.O. *Genesis of the Common Market*. (2013) Routledge at 87.
[23] Andrews, Elisha B. 'The Late Copper Syndicate,' (1889) *Quarterly Journal of Economics,* Vol. 3 at 508-516.
[24] Ibid.
[25] Edgerton, Charles E. 'The Wire-Nail Association of 1895-96,' (1897) *Political Science Quarterly*, Vol. 12 at 246-272.

the cartel was a necessary reaction to new technologies that created a surplus in the nail industry. Manufacturers claimed they would have been forced out in a normal competitive environment. Studies into the effects of international cartels have continued right up to the 2000s, most notably with Margaret Levenstein and Valerie Suslow's analysis of international cartels and their effects on developing countries. Their findings will be discussed at length in the following chapter.

International cartels continued to prosper and form in the 1900s. Approximately eighty such associations were in force by 1914, affecting various aspects of international trade in different industries.[26] Cartel members normally reserved their domestic markets but divvied up foreign markets amongst themselves. The nature of these agreements varied from employing export quotas to price-fixing and exploiting patents. The United States' Antitrust Division has been prosecuting such international cartels since the early 1900s, beginning with the case of *United States v. American Tobacco* against British and American firms engaged in a market division agreement.[27] The Division carried on filing civil and criminal cases against international cartels throughout the 1940 and early 1950s.[28] However, between the 1950s and the early 1990s, the Division reduced the number of international cartel cases it chose to prosecute and prioritised domestic cases. The Antitrust Division has since reversed this strategy and since the mid-1990s has once again made prosecuting international cartel cases its prime concern.[29]

The study of export cartels and their effects on the global economy has been a bumpier road. As stated above, exemptions for export cartels are a mainstay of U.S. antitrust law. Given the United States' continued vehement defence of these exemptions, the government was relatively uninterested in the potential negative effects these cartels can have. Nevertheless, studies on the effects of export cartels have been conducted since the early 1990s. Andrew Dick and Spencer Weber Waller's writings on this topic are particularly noteworthy. Waller's papers were primarily concerned with reactions from businesses

[26] Henderson (2013) at 87.
[27] 221 U.S. 106 (1911).
[28] American Bar Association, *Antitrust Law Developments*, Volume 2. (2007) American Bar Association at 799-800.
[29] Ibid.

following the enactment of the ETC Act. In summary, he found that many businesses were reluctant to obtain an exemption under the new law due to a fear of disclosing confidential business secrets.[30] As a result, the number of exemptions granted decreased from 4,200 in the early 1990s to 3,000 by 2006. Dick's studies were focused on the impact export cartels had on the competitive market. While he did find that some small and medium-sized firms took advantage of the exemptions in order to enter the market, almost 78% of all ETC associations could be attributed to the four largest export trading companies and 93% of associations could be attributed the nine largest.[31] He also found that prices in some industries during which export cartels were active were on average higher than in years when firms acted independently.[32]

This thesis will consolidate the studies that have been conducted on the qualitative and quantitative effects international and export cartels have on competitive markets, with particular emphasis on developing countries. It will also detail the laws that have been put in place to sanction these cartels as well as the attempts developing countries have made to protect themselves. In a broader context, it will also build on proposed strategies for reform that have been discussed in previous studies. Finally, it will propose additional suggestions for reform in order to help developing countries combat international cartels on both a domestic and global level.

Developing Countries and International Cartels

This thesis will focus primarily on the effects international cartels have on developing countries and strategies that may be employed in order to better address these effects. In doing so, I will be analysing the impact these cartels have on developing countries generally as well as highlighting case studies involving specific developing countries, such as the potash cartel that targeted India and China. These discussions are contained in Chapter Two. In the following chapter, I will also concentrate on certain developing countries such

[30] Waller, Spencer Weber, 'The Ambivalence of the United States Antitrust Policy Towards Single-Country Export Cartels,' (1990) Northwestern Journal of International Law & Business, Vol. 10 No. 1 at 98.
[31] Dick, Andrew R. 'Are Export Cartels Efficiency-Enhancing or Monopoly-Promoting?' (1989) UCLA Economics Working Papers Series, No. 601.
[32] Ibid.

as Brazil and China in order to compare and contrast the differing ways developing countries have implemented and enforced their competition laws to varying degrees of success. In doing so, I intend to establish a foundation for the argument that, in general, most developing countries face nearly insurmountable challenges when attempting to establish a competition law system of their own, thereby exacerbating the negative effects they suffer when targeted by an international cartel.

Characteristics of Developing Countries

The characteristics of what constitutes a developing country must first be outlined before any sort of discussion can take place regarding the effects international cartels have on developing countries and the struggles they experience in combating these cartels on their own. At face value, the most important characteristic of a developing country is the low standard of living, in relation to income, economy, and general standard of life in comparison to developed countries. A developing country is most commonly categorised by its level of gross national income (GNI) per capita. In 2016, the World Bank classified countries with a GNI below $1,045 USD as low-income economies.[33] This threshold encapsulates almost half of all the jurisdictions in the world and approximately two-thirds of the world's population. GNI measures competition both as an input and an output. It identifies the purchasing power of consumers that impact the extent of possible competition in a few markets. It also indicates the level of competition within the market: competition incentivises market players into improving their productivity and efficiency through innovation, practices that increase a country's GNI levels. Thus, low levels of GNI indirectly suggest there is limited competition in the market.

Relying on GNI as the sole indicator of developed or developing status has been the subject of criticism in recent years. GNI is a static, aggregate indicator, which does not examine the sources and factors that contribute to the low productivity levels characteristic of developing countries. Some have therefore advocated for a more comprehensive test incorporating other factors in the assessment. For example, the United Nations Resolution

[33] World Bank, 'Country and Lending Groups,' available at http://data.worldbank.org/about/country-and-lending-groups (last accessed 15 August 2016).

identifies three criteria in order to determine whether a country falls into the category of least developed: low GNI, an element of human resource weakness, and an element of economic vulnerability.[34] Therefore, while GNI should be included in the consideration on whether countries should be classified as developing or not, it should by no means constitute the only method of classification.

Developing countries also typically have high barriers to trade, which can impact the level of competition within the market. For instance, one of the most crucial barriers to trade that developing countries share is their low level of physical infrastructure including utilities (energy, water, and sewage networks); transportation (roads, rails, and ports); and communication and information technologies. The World Bank stated, "infrastructure [is] crucial for generating economic growth, alleviating poverty, and increasing international competitiveness."[35] Without a proper infrastructure, firms have difficulty conducting day-to-day business activities. For instance, poor transportation networks leads to increases in logistical costs, thus limiting a firm's access to other markets.[36]

Another feature many developing countries share is the level of participation their governments maintain through state owned enterprises.[37] Until recently, many developing countries had high levels of governmental intervention in their economies. Many jurisdictions are still in the transitional phase of privatisation, deregulation, endorsing foreign direct investment and liberalising trade. Converting to a more market-oriented economy and adopting more free market principles is an important step in implementing and applying competition laws.[38]

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[34] United Nations Office of the High Representative for the Least Developed Countries, 'Landlocked Developing Countries and Small Island Developing States,' available at www.unohrlls.org/en/ldc/164/, last accessed 10 August 2015.
[35] World Bank, *World Development Report*, (2004) at xi, 2.
[36] Escribano, A.; Guasch, L.; and Pena, J., 'Assessing the Impact of Infrastructure Quality on Firm Productivity in Africa: Cross-Country Comparisons Based on Investment Climate Surveys from 1999 to 2005,' (2010) World Policy Research Working Paper 5191, pp. 36–37 and 67, available at http://elibrary.worldbank.org/doi/pdf/10.1596/1813-9450-5191.
[37] Dinavo, Jacques Vangu, *Privatization in Developing Countries: Its Impact on Economic Development and Democracy*, (1995) Greenwood Publishing Group at 57.
[38] Krause, Lawrence B., *Liberalization in the Process of Economic Development*, (1991) University of California Press at 107.

Developing countries are also generally characterised by high levels of economic vulnerability. Many developing countries are dependent on the agricultural industry in order to sustain their economies, leaving them at the mercy of natural disasters and changes in global prices.[39] They also tend to have extreme inequalities in the distribution of wealth and opportunities with little to no flexibility.[40] A small group in society, which also tends to control both the economic and political power, holds much of the wealth in a developing country. Depending on the levels of corruption within the society itself, this can prove problematic when trying to establish a competition law system. The challenges developing countries face when attempting to implement a competition law system of their own will be addressed in Chapter Four.

Thesis Outline

Chapter Two will discuss the qualitative and quantitative effects international cartels have on both the domestic and global market. It will also analyse some of the case studies of international cartels that have been conducted on these effects, particularly those in relation to developing countries.

Chapter Three will cover how existing competition law systems enforce sanctions against international cartels. Particular focus will be made on the EU competition law system and the U.S. antitrust law system. This discussion will include an explanation of not only how individual jurisdictions regulate cartels operating within their own territories but also how they extraterritorially apply their laws against foreign cartels. An examination of the explicit and implicit exemptions the United States and the EU respectively have made for export cartels will also be made.

Chapter Four will analyse existing competition law systems of developing countries as well as the challenges developing countries face when attempting to implement a competition

[39] World Bank, *Global Economic Prospects and the Developing Countries: Volume 12*, (2002) World Bank Publications at 38.
[40] OECD, *Perspectives on Global Development 2012: Social Cohesion in a Shifting World*, (2011) OECD Publishing at 95.

law system. It will also discuss the goals that developing countries must consider during this process and how they differ from those of developed countries.

Chapter Five will discuss whether there is a case for reform. It will begin by determining the most appropriate welfare standard that should be adopted depending on whether reform strategies should take place domestically or globally. It will then set out the current regulatory framework before discussing the calls for reforming the current situation developing countries have made. The last section will outline some of the goals any reform strategy that is adopted should accomplish.

Finally, Chapter Six will evaluate the different reform options that can take place and determine which would produce the best outcomes. On a domestic level, reform can take the form of consolidating domestic competition laws and providing adequate support for developing countries to implement their own enforcement mechanisms against international cartels. Global reform strategies may take the form of negotiating for a global, harmonised competition law agreement specifically designed to tackle international cartels; or more realistically, developing ways in which to encourage countries to establish more regional agreements with one another, ideally between developed and developing countries, in order to foster support.

Chapter Two

Qualitative and Quantitative Effects of International Cartels

Introduction

An analysis of the effects of private international cartels is crucial in understanding both the impact these cartels have on the parties involved as well as the implications on international trade, particularly for developing countries. This analysis is also vitally important in order to establish whether the laws are sufficient to address the specific issues developing countries face when dealing with international cartels. It is the position of this thesis that they are not. This chapter will therefore reference key economic terminologies in order to shed light on the current situation.

This chapter will provide an in-depth analysis of both the qualitative and quantitative effects on both markets. Examinations on quantitative effects will also include a discussion on the economic effects of international cartels in both the domestic market and international markets. Qualitative effects are defined as effects that do not have a quantifiable measurement in affected jurisdictions, such as food shortages and increased tensions between trading partners. Quantitative effects are defined as effects that have a quantifiable measurement in affected jurisdictions, such as increased prices.

While it is widely accepted that hard-core international cartels have a detrimental effect on both the domestic and global markets, the same cannot be said regarding export cartels. Governments have long recognised the destructive nature of hard-core domestic cartels on their economy and thus the laws banning such behaviour are entrenched in every established competition law system. Hard-core international cartels are no different, and most of them are formed with the sole intention of employing anticompetitive tactics in order to reap additional profits to the detriment of consumers. Studies conducted on the effects hard-core international cartels therefore mainly serve to confirm the rationale behind laws sanctioning cartel behaviour and solidify the belief that developing countries must be protected from these cartels as well. Studies on the effects of hard-core international cartels almost always result in findings of losses suffered by the consumer, the question therefore becomes a matter of what type of loss has been suffered and how much.

On the other hand, some governments are less willing to recognise the same detrimental effects can arise through export cartel behaviour. Studies conducted into the effects of export cartels can yield two different results: either the cartel will have similar detrimental effects on the market as a traditional hard-core international cartel, in which case it should be treated no differently under the law; or it will be shown that the cartel's membership is predominately comprised of small and medium-sized firms, in which case, the benefits of allowing these firms access to a market they otherwise would not be able to may outweigh any anticompetitive effects. However, this does not necessarily mean all such cartels are inherently beneficial to the market. Therefore, the benefits these firms enjoy from cooperating with one another must be weighed against any identifiable harms it produces. These effects, both the positive and the negative, will be discussed later in this chapter.

It is because of the possibility that the domestic market may derive some benefits from these cartels that governments often exempt export cartels from their competition laws prohibiting cartel behaviour. Until recently, the detrimental effects of export cartels on the global market were often disregarded in favour of the possibility that *some* of these cartels may have a beneficial effect on the domestic market. Therefore, studies into the effects of export cartels often emphasise that while some of these cartels may have a few benefits, these must be weighed against any harms that may result. The controversy here lies in the fact that the harms are often only felt in the foreign market while the domestic market still gains some moderate benefits. Governments are therefore more unwilling to sanction export cartels if their own consumers suffer no losses and convincing them to do so has been an uphill battle.

Quantitative Effects of International Cartels

The OECD defined 'hard-core' cartels as anticompetitive agreements made by competitors in order to fix prices, restrict output, submit collusive tender, or divide or share the market.[41] These are distinguished from more 'legitimate' cartels such as joint ventures. For instance, production joint ventures and research and development joint ventures are frequently encouraged because they often add to competition and promote efficiencies and innovation gains. In these circumstances, consumer and aggregate welfare as well as producer welfare are more likely to grow.[42] The OECD in the past has condemned hard-core cartels in the 1998 Recommendation as examples of some of the most egregious violations of competition law, emphasising that behaviours such as raising prices and restricting supplies would mean some goods and services would be completely unavailable to some purchasers and unnecessarily expensive for others.[43] These effects can have a much greater significance in markets of developing countries as unwarranted price increases can drastically reduce the purchasing power of poorer consumers.

Given that developed countries are often in the best possible position, in terms of resources and established competition law regimes, to prosecute international cartels, much of the empirical data on the effects these cartels have on the market has been compiled from cases where they were successfully prosecuted by these countries, mainly the United States and the European Union.

Levenstein and Suslow conducted a case study comprising of forty-two private international cartels operating in the 1990s and successfully prosecuted by the U.S. and EU, primarily focusing on the effects these cartels had on developing countries.[44] The average length of time these cartels were found to be operating was approximately five years, however, some cartels in the study ran for significantly longer periods of time, such as the Central West African shipping cartel, which ran for twenty years. Of the forty-two cartels Levenstein and Suslow analysed, twenty-two (52 percent) were found to have had regional effects, i.e. within the United States, Europe or particular developed countries. Sixteen (38 percent) were discovered to have had either direct effects on developing countries; 'international'

[41] OECD, 'Recommendation of the Council concerning effective action against hard core cartels,' (1998), Paris: OECD.
[42] Ibid.
[43] Ibid.
[44] Levenstein, Margaret and Suslow, Valerie. 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy.' (2003) Antitrust Law Journal, Vol. 71, No. 3.

effects; effects in 'the U.S. and elsewhere'; or in 'Europe and specific third markets.'[45] Levenstein and Suslow then narrowed their study to focus on the effects on developing countries by calculating the volume of goods developing countries imported from international cartels.

They estimated that the total value of 'cartel-affected' imports to developing countries was approximately $51.1 billion USD. They compared this figure with the total amount given in foreign aid to all developing countries in 1997, which was $39.4 billion USD. This figure of $51.1 billion formed 3.7 percent of all imports to developing countries in 1997 as well as 0.79 percent of their combined GDP. When compared with the figures extracted from developed countries, it becomes clear that international cartels have a far more negative effect on developing countries than they do on their developed counterparts. While the total value of cartel-affected imports to developed countries is significantly higher ($140.8 billion USD as opposed to $51.1 billion), this figure accounts for only 3.4 percent of their imports and 0.6 percent of their GDP.[46]

In another study conducted by the OECD in 2000 on hard-core cartels, it reported by the Competition Law and Policy Committee (CLP) that in the United States alone, ten international cartels were discovered to have cost individual consumers and businesses an uncalculated hundreds of millions of dollars for every year they were operational.[47] These cartels also affected over ten billion dollars in American commerce with overcharges totalling over one billion dollars. The OECD noted that in order to calculate the total harm on a global scale, these figures would need to be increased by the harm of these ten identifiable cartels had outside the United States and include the harm of any other successfully prosecuted international cartels as well as the successfully prosecuted domestic cartels, many of which have international effects as well as domestic effects. In order to be wholly accurate, the calculation must also include undiscovered and unproven cartels, a much larger and uncertain number. However, given the data available for discovered cartels, it is clear that the negative effects felt by the United States can be translated into

[45] *Ibid* at 806.
[46] *Ibid* at 816.
[47] OECD, 'Hard Core Cartels' (2000), Paris: OECD.

much more devastating effects for developing countries.

It is impossible to calculate the total quantitative effect international cartels have had on the global market. This is mainly due to the fact that international cartels are almost impossible to detect. Therefore, for every cartel that has been identified and whose effects can be accurately measured, there may be many more lurking in the shadows. The OECD estimates that at least one in three international, or hard-core, cartels remain undetected.[48] However, a sample of the various international cartels that have been identified can give some illustration to their overall effect. In the vitamins cartel, which involved members from France, Germany, Japan, Switzerland, and the United States, cartel members increased prices of vitamins required in the manufacturing of livestock feed and other products such as bread, rice, and juice by up to 35% for U.S. consumers. The graphite electrodes cartel raised prices by 45% and up to 90% in many parts of the world. The price of lysine, an ingredient added to animal feed, rose by 70% during the first six months of the cartel's formation.[49]

While it could be argued that producers in developing countries would be able to increase their prices in response to the rising cartel prices, in many circumstances, this is not a feasible solution. There may be differences in the quality of the product or differences in manufacturing or distribution costs that would prevent domestic producers in developing countries from matching the cartel prices. On the other hand, domestic producers can also suffer harm in instances where cartel members prevent imports into their market and decrease the price to below market value. Graphite electrode producers in India found themselves in this very situation.[50] Indian graphite electrode producers argued that electrodes were dumped into India at a price of $2200 per tonne as opposed to the international price of $3200 per tonne. Unable to compete with the low prices set by the cartel; Indian producers were being pushed out of the market. In response to the complaint filed by the Indian Graphite Electrode Manufacturers Association, the government imposed anti-dumping duties on imports coming from the United States, several European countries,

[48] OECD. *Fighting Hard-Core Cartels: Harm, Effective Sanctions and Leniency Programme* (2002) Paris: OECD at 73.
[49] Sweeney, Brendan J. *The Internationalisation of Competition Rules*. (2009) Routledge
[50] 'CVD on Graphite Electrodes Imports Likely,' Financial Express, 20 April 1997 at 2.

and China.[51]

Qualitative Effects of International Cartels

The qualitative effects international cartels can have on a market can be separated into two categories: effects on consumers and effects on producers. The main effect felt by consumers in a country importing cartel-affected goods is of course increases in price, particularly if the cartel is successful. Producers on the other hand, even those that are excluded from the cartel, may reap some benefits such as the ability to sell under the cartel-pricing scheme, without having to follow any production quotas the cartel may impose.[52] However, the long-term negative effects producers may suffer, which will be detailed below, may outweigh these benefits.

Turning first to the qualitative effects international cartels can have on consumers. In the short-term, consumers may benefit from decreases in price due to local price wars.[53] However, these effects are short lived and the overall negative effects vastly exceed the temporary benefits. Once a cartel has 'settled' and is operating at maximum efficiency, consumers subjected to higher prices choose either not to pay for the cartelised product, thus going without, or they pay the cartel price and thereby unwittingly transfer wealth to the cartel members.[54]

The benefits for producers of free riding under an international cartel's price umbrella have already been mentioned, however, producers, particularly those in developing countries, can also suffer harmful effects as a result of an international cartel's activities. For instance, cartels can prevent producers from entering the market by using tariff barriers and anti-dumping duties amongst other strategies.[55] International cartels can also impose non-tariff barriers to limit entry. One such example of a cartel imposing a non-tariff barrier to entry

[51] Goel, Sharad. *HEG, Graphite Note Elated over Dumping Duty on Electrodes*, The Economic Times, 16 June 1997.
[52] Levenstein, Margaret C.; Suslow, Valerie Y. 'How do Cartels Use Vertical Restraints? Reflections on Bork's *The Antitrust Paradox*,' (2014) Journal of Law and Economics, Vol. 57, No. 53.
[53] Ibid.
[54] OECD, 'Hard Core Cartels: Recent Progress and Challenges Ahead,' (2003) Paris: OECD.
[55] Levenstein and Suslow (2003) at 820.

can be seen in the price-fixing scheme in the EU steel beam market, which operated between 1988 until 1994. According to Karl Van Miert, the EU competition commissioner at the time, steel manufacturers who were engaging in price fixing in the steel beams market 'restricted the flow of information … in order to freeze out any new competitors.'[56] Exactly what type of information the steel makers were restricting is unknown from the published record of the steel beam case; however, cartels have commonly used information regarding technology as well as patent pools in order to create barriers to entry.[57]

Creating barriers to entry through preventing producers in developing countries from entering international markets or obstructing exports from developing countries results in harm in both markets. First, the consumers of the other markets are offered a smaller selection of products. Second, particularly for developing countries, whose development is wholly driven by exports, barriers to entry decelerate that growth.

Cartels have also used anti-dumping duties and tariffs as barriers to entry. In an especially memorable case, ferrosilicon producers in the United States formed a price-fixing cartel in 1989 and began using the anti-dumping laws in U.S. and Europe to their advantage by barring entry to non-cartel members.[58] By refusing to lower their prices in response to increasing imports, the cartel members lost market share. They then filed an anti-dumping complaint, citing their loss of market share as evidence of harm to the American ferrosilicon industry and anti-dumping duties were subsequently imposed against five countries in 1993. The cartel's activities only came to light when the Department of Justice filed indictments in 1995 and 1996. The anti-dumping duties were then lifted in 1999.

International cartels can continue to haunt producers in developing countries even after the cartel has been dissolved. Barriers, like those discussed above, created by the cartel may exist long after the cartel itself has been broken up. These barriers may then force developing country producers into joint ventures that further limit their distribution or

[56] Goldsmith, Charles & du Bois, Martin. *European Commission Fines Steelmakers $116.7 Million*, Wall Street Journal Europe, February 17, 1994 at 3.
[57] Levenstein and Suslow (2003) at 821.
[58] Pierce, Richard J. Jr., 'Antidumping Law as a Means of Facilitating Cartelization,' (2000) Antitrust Law Journal, Vol. 67 at 725.

restrict sales to certain markets.[59] These joint ventures could then pave the way for former cartel members to invite the producers into a new cartel under terms favourable to those members. While these agreements allow developing country producers access to the global market, this may come at the cost of the level of competition they may otherwise have obtained in the industry. From the perspective of the former cartel members, joint ventures may be a way for them to retain their market dominance without having to resort to creating a formal cartel.

This strategy can be seen in the conduct of the firms following the break up of the citric acid price-fixing cartel in 1995.[60] Hoffman-LaRoche subsequently made a number of investments in China for a range of products it manufactures, including a citric acid facility partnered with Wuxi Zhongya, one of China's three largest citric acid producers. Other former cartel members, Cargill and Tate & Lyle, have invested in Brazil, where the high-quality and low-cost sugar supply is drawing in citric acid manufacturers. These investments can be seen as either a way for the firms to maintain their dominance in the market or else that as the price of citric acid falls following the downfall of the cartel and the Chinese market has grown, western producers are more willing to allow entry by Chinese producers by exchanging their technology for access to low-cost production methods.[61]

On the other hand, developing country producers as well as those who are more established could also have other, more welfare-enhancing, motives for establishing a joint venture such as sharing technology, local market expertise or gaining access to capital.[62] However, these motives do not necessarily cancel out the more sinister reasons for entering into such an agreement. Joint ventures can both enhance welfare as well as restrict competition. It is therefore vital that such agreements are carefully monitored, particularly those in industries with a history for international price fixing, in order to allow consumers in developing and developed countries to experience the welfare-enhancing benefits that come from cooperation while protecting them from the harms.

[59] Levenstein and Suslow (2003) at 824.
[60] *Ibid.*
[61] Jarvis, Lisa. 'Outlook for Citric Acid Dismal as Prices Nosedive' Chemical Market Reporter, Vol. 263, Issue 13 at 6
[62] Levenstein and Suslow (2003) at 826.

Effects of International Cartels on International Trade

Aside from the effects international cartels and export cartels have on competition within the domestic and foreign markets, these cartels can also have a detrimental effect on international trade. The effects export cartels have on trade have already been explored above, and while that discussion may also be applied to international cartels, a more in depth analysis is also required.

While national cartels are predominately the domain of domestic competition laws, by their very nature, international cartels must be analysed from both a competition and international trade perspective. The conduct and effects of domestic cartels are limited solely to the jurisdiction in which it is domiciled. On the other hand, international cartels often have members from many different jurisdictions and thus their effects are often felt on a global scale. International cartel behaviour between trading partners can therefore affect both competition on the global market as well as the relationships in international trade.

International cartels can also effectively create monopolies in the countries they are affecting. Cartels that allocate different geographical areas to their members ensure that not only do those cartel members not compete with each other in the same market, but also that by employing the strategies described above, the cartel itself remains the dominant seller on the market.

This type of behaviour can be illustrated in the titanium dioxide cartel.[63] In 1920, the major manufacturers of titanium dioxide colluded in order to divide the global markets between themselves as well as eliminate free competition from the industry itself. The participating American firms were allocated the North and Central American markets. The Germans were assigned to Middle Europe and one French manufacturer was given exclusive access to France and French territories. In this way, international trade in titanium dioxide was

[63] *United States v National Lead Co.,* 63 F. Supp. 513, 522 (1945).

entirely controlled by the cartel.

By participating in the cartel, the American firms were prohibited from exporting to Europe, a large market that under normal competitive conditions, they would have easily been able to do. Due to the conditions of the cartel and the market itself, not only were the export activities of the American manufacturer controlled by the various agreements but also so were the activities of other potential manufacturers and exporters of the product. The same conditions applied to the other international manufacturers in the cartel. As a result, the efforts of the cartel to allocate areas of the international markets to its respective members led to the effect of creating domestic monopolies in those markets. The cartel was subsequently identified and successfully prosecuted and the individual members were ordered to disband and enter the global market as free agents.

However, international cartels do not normally come under the jurisdiction of the WTO given that they usually involve private corporations and there is little to no government involvement. This can be contrasted with how export cartels are treated as jurisdictions such as the United States continue to allow the formation of export cartels while prohibiting other domestic and international cartels. The possibility that there may be a case brought before the WTO against the U.S. for its explicit export cartel exemptions will be discussed in Chapter Six. Furthermore, while it may be argued that international cartels create or maintain barriers to trade, they do not necessarily result in the forms of restricting trade that the WTO ordinarily regulates.

Export Cartels

Pure export cartels, or cartels whose sole purpose is exporting to other markets, are perceived to have *little* to *no effect* on the markets in which they operate. Therefore, these jurisdictions are often not as incentivised to pursue an export cartel operating in their own territories than they would a hard-core cartel.

Most countries that explicitly allow for exemptions for export cartels allege that these exemptions *promote cooperation* between small and medium-sized firms so that they can overcome the barriers to foreign trade.[64] By combining their market power, these firms can share market research and advertising. They can also reduce the costs needed in order to fulfil any labelling, packaging and quality requirements of importing countries.[65] While this strategy may work for small and medium sized firms, there is little evidence that export cartels are predominately formed by those with a small share of the market. Indeed, in some cases, the opposite may be true. For instance, in 1991, just before Japan abolished its export cartel exemptions, almost a quarter of all Japanese exports were conducted by export cartels.[66]

Export cartels can also have an effect on the domestic market, i.e. the markets in which they operate. For instance, Schultz posits that if the domestic and importing markets are similar, or if there are constant returns to scale[67], firms tend to reduce production in both markets.[68] In this situation, due to a decrease in production, an export cartel can lead to an increase in prices in both the domestic and foreign market, thereby placing a heavier burden on consumers in both of these markets.

Developing countries are in the most vulnerable position of often not having the capacity to prosecute an export cartel that is not in their jurisdiction. For instance, the Mexican competition law authority, Comisión Federal de Competencia (*CFC*) or Federal Competition Commission, has a limited ability to sanction foreign export cartel that create anticompetitive effects on the market due to a lack of power granted by existing legislation.[69] Given these difficulties in prosecuting export cartels, studies conducted on the qualitative effects of export cartels are often concentrated on developing countries.

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[64] Sweeney, Brendan. 'Export Cartels: Is There a Need for Global Rules?' (2007) Journal of International Economic Law, Vol. 10, No. 1 at 88.

[65] Sweeney at 88.

[66] Matsushita, Mitsuo in Graham, Edward M. and Richardson, J. David (eds.). *Global Competition Policy*. (1997) Washington D.C.: Institute for International Economics.

[67] See Mankiw, Gregory N. *Principles of Macroeconomics,* (2004) 3rd ed. South-Western at 247.

[68] Schultz, Charles. 'Export Cartels and Domestic Markets,' (2002) Journal of Industry, Competition and Trade, Vol. 2, No. 3 at 53.

[69] OECD, 'Competition and Commodity Price Volatility: Contribution from CUTS,' (2011) OECD Global Forum on Competition, DAF/COMP/GF/WD(2012)17; see also Wise, Michael. 'Review of Competition Law and Policy in Mexico,' (1995) OECD, Journal of Competition Law and Policy, Vol. 1, No. 25.

Quantitative Effects of Export Cartels

Consumers in importing countries can be burdened by *increased import prices* imposed by effective export cartels. A study conducted by the Organisation for Economic Cooperation and Development's (OECD) Competition Committee between 1996-2000 found that 16 larger cartels out of a 119 case sample of export cartels had a direct impact on international commerce that exceeded $55 million USD.[70] While such an amount may not appear significant in comparison to the larger global trading economy, such seemingly insignificant figures can quickly exacerbate what began as a minor issue. The OECD's Committee of Experts on Restrictive Business Practices (CERBP) noted that export cartels could create or maintain barriers to trade.[71] Consumers are forced to pay higher, non-competitive prices if an export cartel operates to increase export costs or limit the quantity of imports.[72] These effects are more likely to occur in situations where export cartels operate in oligopolistic industries, producing homogeneous products.[73]

Export cartels operating in developed countries and exporting to developing countries are often more harmful than beneficial.

This is because firms in developing countries are usually 'price takers,' in that they have little to no control over the prices set by these cartels and are therefore forced to accept them without the possibility of negotiation.[74] It is almost intuitive that the less competition an export cartel faces in a developing country's market, the more able it is to exert its market power. Therefore, countries with industries that have yet to develop are more likely to suffer harm from an export cartel than countries where there is a strong and diverse industrial economy.[75] In a developing country, an export cartel operating from a developed

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[70] OECD, Competition Committee. *Report on the Nature and Impact of Hard Core Cartels and Sanctions against Cartels under National Competition Laws,* DAFFE/COMP(2002)7, (Paris: OECD, 2002) at 2; see also, Desmarais, Frederic. 'Export Cartels in the Americas and the OAS: Is the Harmonization of National Competition Laws the Solution?' (2009) Manitoba Law Journal, Vol. 33, No. 1 at 50.
[71] OECD, *Hard Core Cartels* at 50.
[72] Larson at 463.
73 Bhattacharjea, Aditya. 'Export Cartels – A Developing Country Perspective,' (2004) Journal of World Trade, Vol. 38, No. 2 at 351.
[74] Desmarais at 58.
[75] Immenga at 126.

country can be extremely detrimental. Cartel practices such as the refusal to sell certain materials or equipment or setting minimum prices can affect the prices and supply of such goods used in exporting and domestic industries of developing countries.[76] There is also the possibility that an export cartel in a developed country that has a proportionately larger market share may engage in monopolistic attacks against the members' weaker competitors in the developing market. Because a developing country is not likely to have an established competition law regime, it is often far more difficult for it to successfully prosecute an export cartel operating in a developed country since any evidence of collusion would likely be contained in another jurisdiction.

Supporters of export cartels often assert that because some export cartels have a low world market share, they have very little impact on the world economy. While this may be true, other export cartels can possess a low market share globally but at the same time hold a high share in certain countries' markets.[77] Historical trading routes between developed and developing countries may account for the discrepancy in global and individual countries' market shares, demonstrating that export cartels may have a disproportionately negative effect on developing countries' markets.[78]

Finally, export cartels have a greater chance of success of exercising market power in developing countries where the domestic industries are typically less competitive.[79]

The Potash Cartel

Canada's potash export cartel, which was in operation for forty years, faced significant criticism from the media and academics alike. It was disbanded in 2013.

PotashCorp used its jointly owned subsidiary Canpotex in order to coordinate sales with American companies Mosaic Co. and Agrium Inc. into export markets beyond North

[76] OECD, *Export Cartels,* at 52.
[77] Sokol, D. Daniel. 'What do We Really Know about Export Cartels and what is the Appropriate Solution?' (2009) University of Florida, Levin College of Law: Legal Studies Research Paper at 6.
[78] Sokol at 6.
[79] OECD, *Competition and Commodity Price Volatility*, (2012) Paris: OECD at 7.

America.[80] Uralkali, Russia's largest producer of fertilizer quickly followed with a similar strategy of price fixing and production cuts. These cartels accounted for approximately 70% of the global trade in potash.[81] Due to the nature of potash itself, the geographical supply is highly concentrated, with Canada owning 52% of the world's known reserves, Russia owning 21%, Belarus owning 9% and Germany owning 8.4%.[82] Therefore, countries without such reserves would be more heavily dependant on imports in order to meet their needs.

It was reported that during a period of eighteen months, between January 2008 and October 2009, the price of potash increased by more than 400%.[83] In order to maintain its high prices, both Uralkali and PotashCorp announced temporary production cuts in January 2012.[84] These decisions had a devastating effect on developing countries such as India and China, who rely on exports in order to sustain their demands and are one of the largest consumers of potash in the world.

In response to the potash export cartel, India temporarily ceased its imports in 2009 and threatened to do so again in 2010.[85] However, the country is entirely dependent on potash imports in order to meet the food needs of its population. As a result, its withdrawal from importation had little effect on the potash producers given their awareness that India could not sustain it for long without endangering its own crops. In such a situation, imposing Indian competition law and sanctioning the potash cartel would likely create more problems than solutions.[86] India's competition law system at the time was not equipped to handle transnational anticompetitive conduct. Not only did it face the same difficulties all developing countries do with regards to the issues of obtaining evidence and the lack of resources needed to initiate an investigation but also even in the event of a successful outcome, it may not be assured that any imposed fine would be successfully enforced as the

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[80] The Conference Board of Canada. 'Saskatchewan in the Spotlight: Acquisition of Potash Corporation of Saskatchewan Inc. – Risks and Opportunities,' 1 October, 2010 at 5.
[81] Trebilcock, Michael. 'Cartel hypocrisy,' Financial Post (27 January 2011).
[82] Jenny, Frederic. 'Export Cartels in Primary Products: The Potash Case in Perspective.' (2012) in *Trade, Competition, and the Pricing of Commodities*, Centre for Economic Policy Research at 108.
[83] Presentation by Jenny, Frederic. 'Price Instability and Competition Law: the Case of the Potash Cartel,' (2012) OECD Global Forum on Trade and Competition at 4.
[84] Kayakiran, Firat. 'Uralkali Ready to Cut Potash Output to Shield Price: Commodities.' Bloomberg (London, 25 January 2012).
[85] Jenny, Price Instability and Competition Law at 9.
[86] Ibid.

cartel remained outside of its jurisdiction. Furthermore, it was thought that export cartel members would have reacted to such a strategy by raising export prices to India in order to recover any monetary fines that might have been successfully enforced against them. It would also have been difficult to guarantee that sanctioning one export cartel would prevent cartelists from employing similar anticompetitive behaviours in India in the future.[87]

The effects the potash cartel had on the Indian market could have been cumulative. Assuming India needs an average yearly supply of 6.5 million tons of potash between 2011 and 2020, its annual overage paid on imports would have been approximately $1.71 billion USD.[88] Additionally, should the government have continued paying a yearly subsidy totalling $1.5 billion USD in order to ensure potash fertilizers was more affordable for Indian farmers, due to the restrictive conduct of the potash producers, between 80%-100% of this subsidy would have financed or strengthened the monopolistic hold potash producers have in India.

In China, the overall effects the potash cartel had on the economy were not quite so dire. Based on the assumption that China will import an average of 4 million tons of potash per year between 2011 and 2020, the minimum yearly overcharge it would have paid would have been approximately $500 million USD.

In spring 2011, Mofcom, the Chinese merger control authority approved the merger of two Russian potash producers, Uralkali and Silvinit on three conditions.[89] Firstly, the merged entity must adhere to the established sales process and procedures when exporting to China. Secondly, the merged entity must maintain its levels of sales and supplies in order to meet the demands of China's consumers, both in relation to product volume and product range. Thirdly, the merged entity must continue to employ traditional price negotiation procedures with Chinese consumers and also account for the historical and current trading situation that shape the unique features of the Chinese market.[90] Unlike India, China is not wholly dependent on imports in order to meet its needs for potash as it has the capacity to

[87] Jenny, Price Instability and Competition Law at 9.Ibid.
[88] Jenny, Price Instability and Competition Law at 7.
[89] Jenny, Frederic. 'Does PotashCorp's merger with ICL pose great threat to India's food security?' The Economic Times (India, 4 January 2013).
[90] Jenny, Price Instability and Competition Law at 7.

produce a limited quantity. Over time, China could potentially produce enough potash in order to meet its demands without importing from Canada, thus increasing its bargaining power with such export cartels.

<u>Qualitative Effects of Export Cartels</u>

Aside from the heavy economic toll on developing countries' markets, export cartels operating in the primary products sector such as potash and phosphorous, both necessary for the production of fertiliser, can also exact a heavy burden on the basic necessities for life. It follows therefore that if Indian consumers of potash are forced to pay a higher price on potash imports, they may not be able to afford the quantities of potash needed in order to sustain India's food supply.

In addition to rising prices in potash fertilizers, there is also evidence that an export cartel on potash can directly contribute to food shortages, particularly in developing countries. Jenny has identified three factors that are likely to contribute to the increase in demand for potash in the next few years.[91] First, higher incomes in developing economies, such as China and India, necessitate increased demand in food consumption. Secondly, global population will increase from seven billion to more than nine billion by 2050. Thirdly, due to industrial development, the amount of land available for agricultural purposes is steadily shrinking, placing a greater burden on the remaining farmland. This is especially problematic for developing countries as agricultural yields are typically much lower than those in developed countries. The problem is further exacerbated by the fact that potash has no convenient substitutes and therefore, in the long run, demand is fairly inelastic.[92]

In an article published in 2011 by Chinadaily.com Feng Mingwei, the deputy general manager of Sinofert Holdings Limited, the largest fertiliser importer in China stated, 'our dependence on imported potash fertiliser is a threat to our national food security.'[93] The issue with China's food supply was attributed to the monopolisation of the international

[91] Jenny, Export Cartels in Primary Products: The Potash Case in Perspective at 109.
[92] Jenny, Export Cartels in Primary Products: The Potash Case in Perspective at 109.
[93] Cai, Muyuan. 'Fertilizer costs threaten China's food security,' Chinadaily.com.cn (25 July 2011).

exporters and the resultant increases in the international prices of potash.

However, China also holds a significant share of the world's remaining phosphate rock reserves. Together with Morocco, China owns approximately 60% of the world's supplies of phosphorous and controls between 20% and 30% of the its global trade.[94] As of 2008, China has imposed a 100-175% export tax in order to limit phosphorous exports and keep its supply within its own borders. This strategy strengthens the control of the three most dominant firms in the market: Cargill, which holds or controls over 30% of the American reserves of phosphates, the Potash Corporation of Saskatchewan, which possesses about 50% of the U.S. domestic supplies and Office Cherifien des Phosphates (OCP), the Moroccan phosphate monopoly. Canpotex, which enjoys an explicit exemption under section 45(5) of the Canadian Competition Act 1985, together with Cargill have colluded to form PhosChem, an American export cartel allowed under the Webb-Pomerene Act of 1918 also controls a large portion of the world trade in phosphate, indicating their intention to access and perhaps monopolise the world market.[95] The data are particularly problematic given the demand for phosphorous is predicted to increase, peaking around the year 2033, while the current global reserves may be exhausted in between fifty and one-hundred years, thus compounding the shortage of phosphate fertilisers.[96]

As already noted, in addition to effects on competition, export cartels can also have significant effects on international trade. Later chapters of this thesis will elaborate on the role competition law can play in international trade law as well as the difficulties associated with applying a policy that is mainly used to govern the actions of private individuals (competition policy) to a policy used to regulate government conduct (trade policy). The WTO has, in some cases, defined government conduct to encompass condoning the behaviour of private individuals. It may therefore be argued that explicit exemptions for export cartels may constitute governmental acceptance of private conduct. Thus, it is possible for competition policy to be used as a means to an end for trade policy.

[94] Jenny, Export Cartels in Primary Products: The Potash Case in Perspective at 116.
[95] OECD. Global Forum on Competition. *Competition and Commodity Price Volatility*, DAF/COMP/GF/WD(2012)17 (Paris: OECD, 2012) at 7.
[96] Cordell, Dana; Drangert, Jan-Olof; White, Stuart. 'The Story of Phosphorous: Global Food Security and Food for Thought.' (2009) Global Environmental Change, Vol. 19 at 298.

Competition policy is defined as the regulation of competition law within a jurisdiction. Its main aims are to promote competition within the market and safeguard the interests of consumers by encouraging lower prices and increased choice. Trade policy relates to laws that regulate the exchange of goods or services involved in international trade including (but not limited to) taxes, subsidies, and import and export regulations.

> In a world of international trade, competition and trade policy also become the same subject. Trade policy at its heart involves choices over the level of the level of competition between domestic and foreign producers a state will permit or encourage … Absent a closed economy, competition and trade policy are the two sides of the same coin.[97]

In 2000 in a submission to the WTO Working Group on Trade and Competition Policy, the European Union stated that export cartels, 'had a clear distortionary effect on international trade as well as a harmful impact on development.'[98]

An export cartel can create or maintain barriers to trade by forcing consumers to pay *higher*, *non-competitive* prices. Immenga proposed three possible outcomes when assessing an export cartel's effects on world trade.[99] Firstly, that the importing country may benefit from quality improved exports or lower export prices. The possibility of such benefits has been reflected through a number of Japanese export cartels.[100] Secondly, the importing country may suffer harm through the imposition of price restrictions such as quantitative restrictions and increases in export price. These losses can potentially outweigh any perceived benefits the exporting country may gain from allowing the formation of an export cartel in the short term. However, losses arising in this situation can be eventually recouped. For instance, exemptions granted to an export cartel might give exporting producers time to invest in their product and become internationally competitive through the imposition of export restrictions, such as raising prices. Once this happens, the cartel

[97] Stephan, Paul B. 'Competitive Competition Law? An Essay Against International Cooperation,' (2003) University of Virginia School of Law, Law and Economics Research Paper (03-3) at 5.
[98] Bhattacharjea at 334.
[99] Immenga, Ulrich, 'Export Cartels and Voluntary Export Restraints Between Trade and Competition Policy,' (1995) Pacific Rim Law & Policy Journal, Vol. 4, No. 1 at 128.
[100] Ibid.

would then reduce the overall disadvantages suffered by importing countries by lifting the temporary restrictions placed on exports. Lastly, importing countries' losses caused directly by aggressive behaviour from export cartels can ultimately outweigh the benefits accrued in the exporting country due to 'deadweight losses' or loss of economic efficiency.[101] This occurs when consumers in the foreign market are unable to afford the rising price set by an export cartel and are ultimately excluded from the market. Retaliation from foreign governments such as anti-dumping provisions, the establishment of import cartels, or subsidies can also be attributed to export cartels.[102] While only the last of these outcomes contains long-term negative effects, Immenga suggested this was likely the most common given previous evidence of other trade restraints such as the numerous anti-dumping cases that have come before the WTO panels.[103]

Economic theory can also be used to assess whether there are any indirect economic effects on international trade that can be attributed to export cartel activity. Through the application of game theory and the prisoner's dilemma, Immenga concluded that exemptions for export cartels, whether explicit or implicit, could encourage the formation of more cartels and restrict international trade in three ways.[104] Firstly, foreign exemptions granted to export cartels create incentives for the domestic importing country to grant similar exemptions in order to give their firms the same opportunities when trading internationally.[105] Secondly, export cartel exemptions can increase the trend towards the creation of international cartels, decreasing international output and trade volume. The formation of more international cartels occurs because indirect international collusion made up of member firms of an export cartel operating in the same country are often more stable in the sense that collusion is likely to be more convenient than in a direct international cartel with member firms coming from different countries. Lastly, mechanisms or regulations that grant explicit immunities for export cartels in one country can incentivise more active control of export cartels in bordering countries by blurring the distinction

[101] See Mankiw at 166.
[102] Immenga at 129.
[103] Immenga at 129.
[104] Immenga at 129.
[105] OECD, Committee of Experts on Restrictive Business Practices, *Export Cartels* (Paris: OECD, 1974) at 50.

between 'encouraging' and 'compelling' the formation of export cartels[106] - which can be a crucial element for the application of both antitrust and trade laws.

If an export cartel affects the imports of the foreign country to which the cartel is exporting, the importing country may be tempted to take *retaliatory* action. For instance, industries in the importing country may form a buyers' cartel in order to offset the effects of any export association.[107] Jurisdictions with established competition law regimes can also apply their laws extra-territorially and prosecute cartels exporting into their territories. These instances of litigation can create significant trade tension and in any event, cases where an export cartel is challenged by an importing country are seldom successful. One of the best examples of a case in which a country challenged a foreign export cartel led to an international incident is the *Daishowa* case.

The *Daishowa* Case

In *Daishowa International v. North Coast Export Co.*, a group of U.S. wood pulp exporters formed an export cartel as *permitted by the exemptions* in their domestic antitrust laws.[108] Japanese wood pulp importers took retaliatory action through the formation of an import cartel in order to boycott American wood pulp production. At the same time, they sought to challenge the validity of the U.S. export cartel under U.S. antitrust laws, alleging price fixing and refusal to supply. The U.S. exporters counter-sued the Japanese importers through the extraterritorial application of their antitrust laws. A federal district court held that under U.S. domestic laws, the American export cartel was exempted from antitrust law but the Japanese import cartel was not. Damages were subsequently awarded to the U.S. exporters. Unsurprisingly, this decision was perceived as decidedly unfair by the Japanese and triggered an international diplomatic incident.[109]

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[106] Sweeney, Brendan, 'Export Cartels: Is there a Need for Global Rules?' (2007) Journal of International Economic Law, Vol. 10, No. 1; see also Rikesh, Deepa. 'Extraterritoriality versus Sovereignty in International Antitrust Jurisdiction,' (1994) World Competition, Vol. 14 at 44.

[107] Victor, Paul. 'Export Cartels: An Idea Whose Time Has Passed,' (1992) Antitrust Law Journal, Vol. 60 at 571; see also Taylor, Martyn D. *International Competition Law: A New Dimension for the WTO?* (2006) Cambridge University Press at 233.

[108] *Daishowa International v. North Coast Export Co* (1982-83) Trade Reg Rep (CCH) 64, 774.

[109] See discussion in Fels, Allan. 'Trade and Competition in the Asia Pacific Region,' Speech by the Chairman of the Australian Trade Practices Commission, Adelaide, 28 September 1995.

The Export Trading Company Act

While the effects export cartels have on developing countries can be devastating, jurisdictions such as the United States maintain that export cartels comprised of small and medium-sized firms have negligible effects on both the domestic and foreign markets. In fact, despite the United States' long tradition of defending their export cartel exemptions, export cartels operating out of the U.S. are on the decline. In 1982, the United States introduced the Export Trading Company Act (ETC Act), whereby all export cartels had to apply for a certificate of review with the Secretary of Commerce in order to be registered as an export trading company (ETC). The laws leading up to the enactment of the ETC Act as well as the other regulations that govern export cartel exemptions in the United States will be discussed in the next chapter.

Congress initially hoped the ETC Act would encourage the formation of more export cartels. Several years after the implementation of the ETC Act, Spencer Weber Waller examined the limited public data on ETCs and concluded that the Act made very little difference given the response by the business community.[110] While Congress originally anticipated over 20,000 subscriptions to the exemptions under the ETC Act, in 1987 only 307 firms were members of an ETC. After the Department of Congress allowed trade associations to form ETCs, those figures swelled to 4,200 in the early 1990s.[111] Levenstein and Suslow added that by 2006, the number of companies who were members of the 78 active ETCs had decreased to 3,000.[112] Waller attributed the initial lacklustre response by the business community to the ETC Act to a number of factors: the abrupt appreciation of the dollar in the 1980s; a fear of disclosing confidential business secrets in order to obtain a Certificate; and a lack of an established precedent in interpreting the immunities granted by the Act.[113]

He concluded that the effectiveness of the ETC Act was negligible, both in terms of

[110] Waller, Spencer Weber. 'The Failure of the Export Trading Company Program,' (1992) North Carolina Journal of International Law and Commercial Regulation, Vol. 17, No. 2.
[111] Waller at 247.
[112] Levenstein & Suslow (2007) at 357.
[113] Waller at 246.

encouraging the exports of small and medium-sized firms and in facilitating the exercise of market power.[114] Furthermore, as roughly 20% of the ETCs in his study only comprised of one member, he concluded that the majority of ETCs did not function as horizontal agreements between competitors but that rather they acted as 'export facilitators' or 'export service providers' in order to broker exclusive or nonexclusive vertical agreements to sell its customers' products in export markets.[115]

In 2006, Levenstein and Suslow compiled a dataset of 195 ETCs, all those created since 1983, when the first Certificate was granted and through to the end of 2004.[116] In 2006, there were 78 active ETCs. Out of the 195 ETCs in the study, 141 were issued Certificates explicitly allowing members to jointly set export prices.[117] However, in nearly every case, the right to collude on export prices was issued in conjunction with an explicit restrict on sharing information regarding costs as well as other restrictions intended to prevent spillover anticompetitive effects in the domestic market.[118]

Given the vast majority of ETCs have the power to fix export prices, Levenstein and Suslow's empirical research focused on the theory that export cartels in the U.S. were created in order to exercise their market power. However, they found that the majority of these ETCs operated in mostly unconcentrated or moderately concentrated markets and thus were unlikely to have sufficient individual market power to maintain joint export price increases and were likely rather combining their market power in order to enter a new market.[119]

They also calculated that the net effect of all ETCs was on average minimal on the supposition that any reductions in exports made by ETCs with the ability to set export prices is balanced by increases in exports by the remaining ETCs that do not have the authority to set prices, approximately 20%.[120] If this is the case, it may indicate that any positive effects gained by ETCs in some markets is offset by the lessening of competition in other moderate

[114] Levenstein and Suslow (2007) at 357.
[115] Waller at 251-52.
[116] Levenstein and Suslow (2007) at 357.
[117] Ibid at 361.
[118] Ibid at 363.
[119] Ibid at 370.
[120] Ibid at 370.

to highly concentrated markets made up of ETCs with price-fixing powers. However, they noted that an analysis of the full impact of all ETCs, both positive, such as increased quantities of exports and better quality control and negative, such as higher prices, would require access to information Congress has denied public access to as this information would also contain confidential business practices firms would be reluctant to divulge.[121]

Conclusion

While it is widely accepted that international cartels and export cartels have an overall negative effect on the market, very little has been done to protect developing countries from being subjected to unnecessarily cartelised products. The next chapter will primarily focus on the current laws and sanctions different jurisdictions have in place to prevent the spread of international cartels and punish those found guilty. However, these sanctions normally govern only those international cartels that affect that jurisdiction's market and do little to help developing countries, which may not have as sophisticated a regime to effectively prosecute any cartel found importing into their market.

In the case of export cartels, these are often encouraged and remain outside of the laws that normally sanction the formation of other international cartels, thereby compounding the problems experienced by developing countries. Countries that still employ exceptions for export cartels, such as the United States, continue to defend the practice, arguing that these exceptions allow small and medium sized firms access to the global market (which they otherwise would not have). However, as noted by Waller in the 1990s and Levenstein and Suslow in the 2000s, the introduction of more laws encouraging the formation of export cartels only had the opposite effect. Indeed other countries such as Australia that continue to employ export cartel exemptions have also recorded a decline in the number of export cartel agreements from a 'peak' of sixty-nine in 1975 to only four in 2002.[122] Japan, which abolished its export cartel exemptions in 1997, also experienced declines in the number of export cartels in operation, which declined from 180 in 1973 to two in 1998 and none in

[121] Ibid at 371.
[122] Levenstein, Margaret; Suslow, Valerie. 'The Changing International Status of Export Cartel Exemptions.' (2005) American University International Law Review, Vol. 20, No. 3 at 793.

1999.[123] The decline in the number of export cartels over the years is evidence that, despite the well-meaning intentions of export cartel exemptions, very few small and medium sized firms are taking advantage. On the other hand, export cartels such as the potash cartel, that had such a detrimental effect on both China and India, are allowed to slip through the cracks.

[123] Ibid at 793.

Chapter Three

How Are International Cartels Governed in Different Jurisdictions?

Introduction

The previous chapter dealt with the effects international cartels, both hard-core and export cartels, have on the global market. This chapter will analyse how the law addresses these effects as well as how hard-core international cartels and export cartels are governed in different jurisdictions.

Many jurisdictions with effective competition or antitrust law regimes have sanctions in place for private international cartels, which will be detailed in this chapter. Both the United States and the European Union impose heavy fines on firms found guilty of forming such a cartel. However, scholars such as Evenett and Connor and Lande have criticised this method of deterrence, arguing that it is not enough to prevent the formation of private international cartels. Evenett noted that modern competition policies cannot fully deter such cartels because they are 'oriented towards addressing harm done in domestic markets … [or] merely prohibit cartels without [sufficiently strong sanctions]."[1] While imposing strict fines may help to deter the formation of domestic cartels, international cartels whose operations take place across multi-continental markets may take advantage of monopoly positions in jurisdictions with weak cartel enforcement.[2] In this way, they may be able to offset the losses of any potential fine imposed against them.

While developed countries have both the experience and resources to investigate and sanction international cartels, many developing countries remain at a distinct disadvantage. Chapter Five will discuss various strategies developing countries can employ in order to establish an effective competition law system of their own so as to better protect themselves against international cartels. However, this does not mean that no developing countries have competition law systems. Countries such as Brazil and China have adopted

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[1] Evenett, Simon J., Levenstein, Margaret, and Suslow, Valerie, 'International Cartel Enforcement: lessons from the 1990s,' (2001) The World Economy, Vol. 24 at 1222.
[2] Connor, John M., 'Global Antitrust Prosecutions of Modern International Cartels,' (2004) Journal of Industry, Competition and Trade, Vol. 4, No. 3 at 239.

their own competition law systems and have on occasion, successfully imposed damages on international cartels targeting their jurisdictions.

As previously stated in Chapter Two, export cartels enjoy a special place in the category of international cartels, whereby rather than face sanctions for creating such a cartel, export cartel associations are often exempt from competition law regimes. The way in which export cartels affect the world, either pro or anti-competitively, can depend on the way in which these cartels are regulated in their home jurisdictions. In general, jurisdictions with explicit exemptions for export cartels tend to regulate them more closely with regards to their effects on the domestic market. As a result, export cartels in these jurisdictions are more likely to report pro-competitive effects on the domestic market after collusion. In contrast, in jurisdictions with implicit exemptions for export cartels, it is far more difficult to ascertain the effects an export cartel will have on the market since they normally operate without the knowledge of relevant competition law authorities.

Regardless of the differences in the way jurisdictions regulate hard-core international cartels and export cartels, developing countries still face serious difficulties when faced with either. While there have been some attempts at addressing the problems these cartels pose on developing economies by some countries, international cartel enforcement remains largely separated into two camps, developed jurisdictions and developing jurisdictions, with little effective cooperation between them.

International Cartel Enforcement in the United States

The formation of an international cartel in the United States falls under the jurisdiction of the Sherman Act.[3] Cartel behaviour such as conspiracies to fix prices, restrict output, divide markets, or exclude other competitors are prosecuted under Section 1, which governs restraints of trade, and Section 2, which deals with conspiracies to monopolise. However, unlike typical monopolisation cases, the emphasis is not on whether or not the defendants have successfully monopolised the market but more on their conduct and actions.[4] In other

[3] Sherman Act. 26 Stat. 209, 15 U.S.C. §§1-7.
[4] §1 Sherman Act, 15 U.S.C. §1; §2 Sherman Act, 15 U.S.C. §2.

words, it is the *motivations* and *intentions* behind the defendant's conduct that is relevant, not the end result. If the cartel violations are serious enough and the evidence of the intention to collude is compelling enough, the corporations and individuals may also be charged by the Department of Justice (DOJ) as a criminal case. The DOJ can employ a variety of sanctions on those found guilty of collusion. For instance, injunctions or cease-and-desist orders can prohibit specific conduct, however, this is seldom used for cartel cases. More commonly, government-imposed sanctions take the form of corporate fines, individual fines and incarceration of guilty managers.[5] When imposing fines on a guilty party, the DOJ refers to the Federal Sentencing Guidelines.[6] At the first instance, a base fine is calculated by taking 20% of the company's sales of the cartelised product during the years the cartel was active. While in principal, this figure can be taken from the cartel's global activities, in practice, only U.S. sales are accounted for. Following this calculation, this figure can increase or decrease based on a number of factors. Factors such as the size of the company, if bid rigging was involved, the amount of participation from the senior officers and whether there had been any previous convictions for similar offences can all increase the base fine.[7] Mitigating factors such as cooperation with the DOJ's investigations, accepting responsibility and the implementation of an antitrust training factor can lower the fine imposed.[8] The highest multiplier that can be applied to the base fine is 4.0 while the lowest is 0.75, which means a company can be fined by as much as 80% of affected commerce.[9]

Companies can also apply for leniency. The DOJ awards the first company in a cartel to come forward full relief from their fine while the second and third companies to apply can receive smaller, but still substantial discounts.[10] In practice, discounts for cooperation in international cartel cases range from 40-90% of the maximum fine allowed by the Guidelines.

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[5] See ICN, 'Setting of Fines for Cartels in ICN Jurisdictions,' Report to the 7th Annual ICN Conference, April 2008.
[6] United States Sentencing Commission, 'Guidelines Manual,' §3E1.1 (November 2015).
[7] Ibid.
[8] Ibid.
[9] Ibid.
[10] See OECD, *Fighting Hard-core Cartels: Harm, Effective Sanctions and Leniency Programmes*, (2002) OECD Publishing.

Due to its long history of cartel enforcement and its stringent antitrust policies, the United States has a proven record of successfully prosecuting international cartels found operating both within their jurisdiction as well as foreign-based members, beginning in the early 1900s. While the Antitrust Division reduced its international cartel enforcement procedures between the 1950s and the early 1990s in favour of domestic cases, since the 1990s, the Division has made the prosecution of international cartels its highest priority.[11] The number of international cartel cases brought before the DOJ made up almost two-thirds of its criminal antitrust prosecutions in 1998.[12] Over 90% of the $3 billion in criminal fines collected by the Antitrust Division between 1997 and 2007 resulted from successful international cartel prosecutions.[13] During this period, these cartels affected a variety of different industries, including vitamins, textiles, construction, graphite electrodes, fine art auctions, ocean tanker shipping, marine construction and transportation services, rubber chemicals, synthetic rubber, and dynamic random access memory chips and made up more than $10 billion of U.S. commerce.[14]

The Antitrust Division is not limited to prosecuting cartels solely within the United States. In 2005, the Division obtained fines of $10 million or more from individual companies based in a number of foreign jurisdictions, such as Sweden, Germany, Japan, Belgium, Switzerland, the United Kingdom, Luxembourg, Norway, Korea and Liechtenstein.[15] During this time, approximately fifty-six grand jury investigations involved international cartels, which also involved twenty-five countries in six continents.[16] Additionally, individual defendants from nine foreign countries served prison sentences in the U.S. for violating antitrust laws that year.[17] The United States also has explicit treaties allowing for extradition for antitrust violations with Canada, Ireland, and Japan and in 2004, for the first time, a Japanese

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[11] International Competition Policy Advisory Committee, Final Report to the Attorney General for Antitrust, (2000) available at www.usdoj-gov/atr/icpac/finalreport.htm.

[12] *ICPAC Meeting Addresses Comity, Cooperation, and Antitrust Enforcement*, (1998) Antitrust & Trade Regulation Report (BNA) Vol. 75 at 326

[13] Hammond, Scott D, 'An Update of the Antitrust Division's Criminal Enforcement Program,' Remarks before ABA Section of Antitrust Law Cartel Enforcement Roundtable (16 November 2005).

[14] *Ibid*.

[15] *Ibid.*

[16] *Ibid.*

[17] Barnett, Thomas O. 'Seven Steps to Better Cartel Enforcement,' Presentation to the European University Institute's 11th Annual Competition Law & Policy Workshop (2 June 2006) at 5, available at www.usdoj.gov/atr/public/speeches/216453.htm.

manager was extradited for a criminal cartel offense.[18]

The U.S. has also entered into bilateral agreements in order to cooperate in antitrust or competition law matters with Germany (1976)[19], Australia (1982 and again in 1999)[20], the European Community (1991 and 1998)[21], Canada (1984 and 1995)[22], Israel (1999)[23], Japan (1999)[24], Brazil (1999)[25], and Mexico (2000)[26]. The terms of these agreements differ however, they commonly allow for the parties to share information, coordinate parallel investigations, and consult one other in periodic meetings in order to address issues regarding enforcement.

International Cartel Enforcement in the European Union

The European Union shares many characteristics with the United States in regards to international cartel enforcement. For instance, it too imposes strict fines on cartel members as well as provides scope for leniency. However, unlike the United States, individual persons or managers responsible are not personally liable for financial penalties

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[18] Connor, John M., 'Global Antitrust Prosecutions of Modern International Cartels,' (2004) Journal of Industry, Competition and Trade, Vol. 4, No. 3 at 258.
[19] Agreement Relating to Mutual Cooperation Regarding Restrictive Business Practices, 23 June 1976, reprinted in Trade Reg. Report (CCH) Vol. 4, No. 13 at para. 501.
[20] Agreement between the Government of the United States of America and the Government of Australia Relating to Cooperation on Antitrust Matters, 20 June 1982, reprinted in Trade Reg. Report (CCH), Vol. 4, No. 13 at para. 502A.
[21] Agreement between the Government of the United States of America and the European Communities Regarding the Application of their Competition Laws, November 1991, reprinted in Trade Reg. Report (CCH) Vol. 4, No. 13 at para. 504; Agreement between the Government of the United States of America and the European Communities on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws, 14 June 1998, reprinted in Trade Reg. Report, Vol. 4, No. 13 at para. 504A.
[22] Memorandum of Understanding as to Notification, Consultation, and Cooperation with Respect to the Application of National Antitrust Laws, 9 March 1984, reprinted in Trade Reg. Report (CCH) Vol. 4, No. 13 at para. 503A.
[23] Agreement between the Government of the United States of America and the Government of the State of Israel Regarding the Application of Their Competition Laws, 15 March 1999, reprinted in Trade Reg. Report (CCH), Vol. 4, No. 13 at para. 506.
[24] Agreement between the Government of the United States of America and the Government of Japan Concerning Cooperation on Anticompetitive Activities, 7 October 1999, reprinted in Trade Reg. Report (CCH), Vol. 4, No. 13 at para. 507.
[25] Agreement between the Government of the United States of America and the Government of the Federated Republic of Brazil Regarding Cooperation between their Competition Authorities in the Enforcement of their Competition Laws, 26 October 1999, reprinted in Trade Reg. Report (CCH), Vol. 4, No. 13 at para. 508.
[26] Agreement between the Government of the United States of America and the Government of the United Mexican States Regarding the Application of their Competition Laws, 11 July 2000, reprinted in Trade Reg. Report (CCH), Vol. 4, No. 13 at para. 509.

or prison sentences and there are also no provisions for private compensatory suits within the EU. While some EU Member States such as the United Kingdom, France, Ireland, and Norway have criminalised price fixing, cases that resulted in incarceration in the EU remain rare.

Under European competition law, Article 101 of the Treaty on the Functioning of the European Union governs anticompetitive behaviours, which have substantial negative effect on the common market and affect trade between Member States. These behaviours include price fixing, controlling output, market sharing, and the imposition of dissimilar trading conditions in order to create a competitive disadvantage, and tying. International cartels would fall under Article 101 provided their conduct prevents, restricts or distorts competition in the common market.

Domestic and international cartels are sanctioned mainly through the imposition of fines. In the European Union, fines are imposed according the European Commission's 'Guidelines on the method of setting fines'[27] published in 2006. The level of these fines has increased considerably since the 1990s, particularly after 2006. This increase has been attributed to a combination of the severity of cartel behaviour, the growing size of the affected markets, and the Commission's tougher stance on competition law offences. Connor reports that the average fines increased by 25% after the publication of the 2006 Guidelines when compared with those imposed under the 1998 Guidelines[28], however, it may be argued that much of this difference could be ascribed to inflation.[29] He also highlighted the fact that the majority of the 'starting points' for fines imposed by the Commission are at the lower end of the scale outlined in the Guidelines and they tend to be less severe than those imposed during the same period in the United States by the DOJ.

While the Guidelines sets the process used to calculate a fine to be imposed on a cartel, the Commission has a great deal of discretion, making it difficult to predict the amount of the

[27] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. (2006) OJ C210/02.
[28] Commission Guidelines on the method of setting fines imposed pursuant to Article 15(2) of Regulation No 17 and Article 65(5) of the ECSC Treaty, (1998) OJ C9/3.
[29] Connor, John M. 'Cartel Fine Severity and the European Commission: 2007-2011,' (2013) European Competition Law Review, Vol. 34 at 58.

imposed fine. In order to calculate a fine, the Commission follows a two-step process: first, it sets a basic amount; and second, it adjusts the amount either upward or downward depending on several factors.

In order to establish the basic amount, the Commission accounts for the value of the goods or services that pertain, directly or indirectly, to the competition violation within the EEA within the last business year.[30] If the cartel extends beyond the EEA and the EEA value is not representative of the relevant weight of each undertaking in the cartel, the figure can be adjusted accordingly. This initial calculation includes a proportion of the total value of sales multiplied by the duration of the cartel itself. The proportion of the value of sales is maximised at 30%. Most fines on average begin at 17% and only a few ever go as high as 25%.[31] While these figures seem very low, especially given the covert nature of hard-core cartels, under the 2006 Guidelines, the Commission still retains considerable amounts of freedom to increase the fines further. The duration of the cartel is measured in years and the multiplier is calculated in six-month increments. For instance, cartels that last for two years would result in a multiplier of 2. A cartel that runs for two years and three months would result in a multiplier of 2.5. In addition, the Commission also imposes an 'entry penalty' calculated between 15% and 25% of the value of sales for merely entering into a cartel.

Once the basic amount is established, the Commission can choose to increase or decrease the applicable fine according to various factors. Aggravating factors that may increase the level of the fine imposed include: where a cartel member continues or repeats the same or similar offence; refusing to cooperate with the authorities; or being a leader or initiator of the infringement, or encouraging others to join.[32] While the Guidelines allow for a fine increase of up to 100% for repeat offenders, in practice the Commission normally applies a

[30] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. (2006) OJ C210/02, para 13.
[31] Connor, John M. 'Cartel Fine Severity and the European Commission: 2007-2011,' (2013) European Competition Law Review, Vol. 34 at 58.
[32] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. (2006) OJ C210/02, para 28.

30% increase, with a further 30% added for each additional previous offence.[33] The Commission may also increase the fine in order to deter future or repeat offenders. This can occur where the cartel has a high turnover outside the affected market. In this situation, the standard calculated fine might look relatively insignificant when compared to its overall financial resources. Mitigating factors that may decrease the level of the fine include: evidence of limited involvement in the conspiracy or maintaining competitive behaviour during the conspiracy; cooperating with the Commission; or instances where the anticompetitive behaviour has been authorised or encouraged by public authorities or legislation.[34]

Once the relevant factors have been considered and the initial fine has been adjusted accordingly, the Commission must consider two final caveats before they can issue the final figure. Under Regulation 1/2003 prevents the Commission from imposing any fine that exceeds 10% of an undertaking's total turnover in the previous business year.[35] While this is not a severe limitation in the majority of cases, in instances where a single product undertaking is involved in a cartel, issues may arise especially when the basic amount in these cases tend to start at 20% of the sales value. Connor suggests that almost 8% of cartel members had their fines reduced by this cap between 2007 and 2011.[36] Additionally, the Commission may also consider reducing the fine if the undertaking is unable to pay due to financial constraints.[37]

The *Vitamins* Cartel

The *Vitamins* cartel is a good example of the EU's approach to prosecuting international cartels. Competition Commissioner Mario Monti claimed the cartel was:[38]

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[33] Connor, John M. 'Cartel Fine Severity and the European Commission: 2007-2011,' (2013) European Competition Law Review, Vol. 34 at 63.
[34] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. (2006) OJ C210/02, para 29.
[35] Regulation 1/2003, (2003) OJ L1/1, Article 23(2).
[36] Connor, John M. 'Cartel Fine Severity and the European Commission: 2007-2011,' (2013) European Competition Law Review, Vol. 34 at 63.
[37] Commission Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003. (2006) OJ C210/02, para 35.
[38] European Commission. 'Commission imposes fines on vitamins cartels,' (2001) Press Release IP/01/1625.

> The most damaging series of cartels the Commission has ever investigated due to the sheer range of vitamins covered which are found in a multitude of products from cereals, biscuits and drinks to animal feed, pharmaceuticals and cosmetics.

As one of the largest international cartels of its time, the Vitamins cartel consisted of eight interdependent price-fixing and market sharing cartels and included thirteen undertakings from Switzerland, Japan, and EU member countries of Germany, France, and the Netherlands. Each cartel had a specific number of participants and durations, although the entire conspiracy took place between September 1989 and February 1999. During the decade the cartels were in operation, they had devastating effects on global competition in twelve vitamin markets, affecting consumer markets such as cereals, biscuits, drinks, animal feed, pharmaceuticals, cosmetics, and many others.[39] Because the Swiss based company of F. Hoffmann-La Roche Ltd, the largest producer of vitamins in the world with around a 50% share of the overall market, was the main instigator and participated in all the cartels, it was given the highest cumulative fine of €462 million. The next largest fine of €296.16 million was imposed on German company BASF Aktiengesellschaft, another central figure in the cartels. The other six companies, who were involved in only a limited number of vitamin products, were penalised as follows:

1. Takeda Chemical Industries Ltd (Japan): €37.05 million
2. Daiichi Pharmaceutical Co Ltd (Japan): €23.4 million
3. Eisai Co Ltd (Japan): €13.23 million
4. Merck KgaA (Germany): €9.24 million
5. Solvay Pharmaceuticals BV (Netherlands): €9.10 million
6. Aventis SA (France): €5.04 million

It is worth noting here that the Commission imposed fines on F. Hoffmann-La Roche and BASF in 2001 following an investigation conducted by the U.S. DOJ in 1999, leading to Hoffmann-La Roche and BASF pleading guilty and receiving fines for a record $500 million

[39] *Ibid.*

and $225 million respectively.[40] The Department also charged a Swiss executive from Hoffmann-La Roche with participating in the cartel and for lying to its investigators in 1997 while attempting to conceal the conspiracy. He pleaded guilty to both charges and was ordered to serve four months in prison. He was also personally liable to pay a $100,000 fine.[41]

The dual fines imposed by both the European Commission and the U.S. Department of Justice serves as an excellent reminder that in international cartel cases, often multiple jurisdictions have an interest in punishing those found guilty. In such cases, these jurisdictions may choose to work together and impose penalties in conjunction with one another.

Optimal Deterrence – what is the most effective way?

Sanctions such as fines and prison sentences are usually imposed in order to deter the formation of cartels and discourage such anti-competitive behaviours. While a critical analysis of the effectiveness of such strategies in deterring cartel formation is beyond the scope of this thesis, this section will briefly discuss the effectiveness of the different strategies adopted by the United States and the European Union in deterring the rise of international cartels.

As stated in this chapter, most of the sanctions applied by national competition law authorities are mainly concerned with cartels that have a direct effect on their own jurisdictions. As a result, any sanctions they impose are more likely to deter the formation of cartels within their own jurisdictions or cartels that directly affect their own markets. Therefore, traditional deterrence mechanisms may not necessarily be effective in deterring the formation of international cartels that choose to target developing countries.

However, national competition laws may not be entirely effective in deterring the formation

[40] The United States Department of Justice, *F. Hoffman-La Roche and BASF Agree to Pay Record Criminal Fines for Participating in International Vitamin Cartel*, (1999) Press Release.
[41] *Ibid.*

of cartels even within their own jurisdictions. For instance, while the imposition of heavy fines is the most common way for national competition law authorities to deter and punish cartel behaviour, some guidelines designed to control the imposition of fines may have the opposite effect. Many national competition laws that sanction cartels by imposing fines include provisions limiting the maximum level of the fine that can be applied in any given case. The EU guidelines on fines set an upper limit of 10 percent of a company's overall annual turnover.[42] Depending on a particular company's annual turnover, limits on the maximum amount of imposed fines can actually *reduce* the fine that is ultimately enforced.[43] Some scholars, such as Connor, have also suggested that any sort of upper limit on imposed fines, save for those that correlate with the size of damages, can actually *encourage* the formation of cartels, as well as increase their stability and endurance.[44] According to Connor, a firm that is a member of a cartel can simply calculate the maximum fine it will receive for participating in the cartel and deduce that the company can keep any future gains above that upper limit. In addition, even if a competition law system contains provisions increasing the level of fines for repeated offences, once a firm has passed the upper limit, it can participate in as many cartel arrangements as it likes without increasing its liability.[45]

On the other hand, Jones argues that corporate fines alone are not sufficient to punish cartel behaviour. By imposing a fine, she states, the individuals responsible are not held accountable for their decision to enter into a cartel agreement and the fine itself may have negative spillover effects, which would punish innocent shareholders, employees, and creditors.[46] Instead, she argues that the United States' historical approach of imposing criminal sanctions on both corporations and individuals has been one of the most successful systems at combating cartels.

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[42] European Commission. 'Guidelines on the method of setting fines imposed pursuant to Article 23(2)(a) of Regulation No 1/2003' (2006) Official Journal of the European Union, 2006/C 210/02.
[43] See Smuda, Florian, 'Cartel Overcharges and the Deterrent Effect of EU Competition Law,' (2014) Journal of Competition Law & Economics, Vol. 10, No. 1.
[44] Connor, John M, 'Optimal Deterrence and Private International Cartels,' (2007) available at SSRN: https://papers.ssrn.com/soL3/papers.cfm?abstract_id=787927, last accessed 1 March 2017.
[45] Ibid.
[46] Jones, Alison, 'The UK Response to the Global Effort Against Cartels,' (2014) Journal of Antitrust Enforcement, Vol. 2, No. 1 at 7.

Whelan argues that prison sentences are often more stigmatising and are more likely to draw media attention than fines and as a result, are more likely to be heeded by individuals.[47] Indeed, the OECD notes that individuals in the United States have offered to pay increased fines in order to avoid prison sentences but that there has not been a case where an individual preferred time in prison over paying a fine.[48] The case of *United States v McDonough*[49] provides an even more extreme example whereby a defendant committed suicide after being convicted of price-fixing and was subsequently sentenced to a short period of time in prison.[50]

Despite evidence that criminalising cartel behaviour may be the most optimal way to deter the formation of new cartels, there are still some who question the effectiveness of such a strategy. Some scholars have argued that cartel behaviour remains 'morally ambiguous', in the sense that it does not hold the same gravitas as other white-collar crimes, such as embezzlement. Therefore, applying criminal law sanctions to anti-competitive behaviours is not only unjust but also undermines the moral authority of the law. Criminal law should thus be used to 'direct the moral standards of society'[51] and this morality is compromised when cartel offenders are labelled as criminals alongside other more 'traditional' crimes. On the other hand, it can also be argued that criminal law should be able to create new moral standards in society and that as cartels become more sophisticated in hiding from detection, so too must our laws be in hunting them down.

Nevertheless, the question of whether criminal sanctions are an effective mechanism in deterring the formation of new cartels remains inconclusive.[52] There is little empirical evidence as to whether increasing the use of criminal sanction leads to a corresponding

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[47] Whelan, Peter. *The Criminalization of European Cartel Enforcement: Theoretical, Legal, and Practical Challenge,* (2014) Oxford University Press at 55.
[48] OECD. 'Hard Core Cartels: Third Report on the Implementation of the 1998 Recommendation,' (2005) Competition Law & Policy, OECD.
[49] 706 F. Supp. 692 (1989).
[50] See Werden G.J.; Simon, M.J., 'Why Price Fixers Should Go to Prison,' (1987) The Antitrust Bulletin, winter, at 936.
[51] Burns, Joseph. *A Study of the Antitrust Laws, Their Administration, Interpretation and Effect,* (1958) Central Book Company at 112.
[52] Cseres, Katlin; Schinkel, Maarten-Pieter; Vogelaar, Floris O.W. *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States,* (2006) Edward Elgar Publishing at 117.

decrease in cartel behaviours. Indeed, the main motivation behind criminalisation appears to be the stigma and embarrassment that comes with being handed a prison sentence, and this feeling of shame may fade over time. As Werden and Simon write, after several months into a prison sentence, 'one gets used to things, even prison.'[53] Moreover, one must take into account the rising costs of imprisoning individuals for the state in question.

There is a vast amount of literature that has been written regarding the most optimal strategies to deter the spread of cartels. Most of these strategies are designed to deter the spread of domestic cartels and assume that a jurisdiction already has an effective competition law system in place. Given that many developing countries lack proper competition law enforcement mechanisms, other strategies may be more suitable in combating the spread of international cartels. These strategies will be discussed throughout this thesis.

International Cooperation in International Cartel Enforcement

Countries with effective competition or antitrust regimes are increasingly collaborating together in the war against international cartels in different ways, such as the development of extradition treaties, and participating in organisations that share information regarding effective cartel enforcement tools and mechanisms. In February of 2003, searches and drop-in interviews were coordinated for the first time in an international cartel investigation among enforcement authorities in the United States, the European Union, Canada, and Japan.[54] As mentioned above, the United States has also formed bilateral and multilateral agreements with various countries regarding antitrust cooperation. However, despite this evidence of some countries' willingness to cooperate with one another in bilateral and multilateral agreements, such cooperation is not yet the most effective tool in combating the spread of international cartels. One of the biggest obstacles in forming an operational bilateral or multilateral treaty is the reluctance some countries have of exchanging business

[53] Werden and Simon (1987) at 935.
[54] Jacobson, Jonathan M. *Antitrust Law Developments: Volume 2*, (2007) American Bar Association at 807.

information.[55] Many antitrust and competition authorities fear that if confidential information such as corporate secrets and future business plans are made public or is shared with other authorities, it may be used inappropriately or released to competing firms.[56] As a result, many agreements concerning competition law matters restrict the exchange of confidential business information while at the same time maintaining broad interpretation of what is considered confidential.[57]

In 2012, the OECD recommended *positive comity* as a solution when addressing the problem of international cartels.[58] Positive comity entails that one country requests another to begin enforcement or investigation methods in order to rectify anti-competitive behaviour that is substantially and negatively affecting the interests of the pursuing country. Prior to this Recommendation, the OECD noted that previous Recommendations included similar approaches however; the term '*positive comity*' was never used. For instance, the 1995 OECD Recommendation stated that countries should:

> (1) Give full and sympathetic consideration to another country's request that it open or expand a law enforcement proceeding to remedy conduct in its territory that is substantially and adversely affecting another country's interests, and (2) take whatever remedial action it deems appropriate on a voluntary basis in considering its legitimate interests.[59]

The OECD also distinguished between positive comity and investigatory assistance. Positive comity refers to the active involvement by the requested country in investigating anti-competitive conduct and providing remedies if possible in order to satisfy the

[55] Naik, Asmita; Koehler, Jobst; Laczko, Frank*, Migration and Development: Achieving Policy Coherence*, (2008) International Organization for Migration at 30.
[56] Ibid.
[57] Ibid.
[58] OECD. 'Improving International Co-operation in Cartel Investigations.' (2012) Global Forum on Competition, DAF/COMP/GF(2012)16.
[59] OECD, 'Recommendation of the Council concerning Co-operation between Member Countries on Anticompetitive Practices Affecting International Trade,' (1995) OECD: Paris at paras. I.B.5.b-c.

requesting country.[60] On the other hand, investigatory assistance involves a request for assistance in the requesting country's own enforcement methods and often involves sharing or gathering information on behalf of that country.

The OECD outlined a number of benefits positive comity depending on the extent to which competition and antitrust authorities are willing to cooperate with one another. These benefits include:[61]

1) Improved effectiveness: Positive comity can allow a requesting country to invoke a requested country's laws and as a result provide a remedy for illegal conduct the requesting country may not be able to rely on its own for jurisdictional reasons.
2) Improved efficiency: Positive comity involves the requested country to conduct its own investigation, where it is in the best position to gather necessary evidence. In doing so, efficiency is improved by reducing the costs of investigations and the risk of inconsistencies.
3) Reducing the need for sharing confidential information: As the proceedings are managed by whichever competition authority has the best access to the evidence, there is less chance or need to share confidential information.

Initially, competition and antitrust authorities reacted enthusiastically to the concept of positive comity, cumulating in the signing of the 1998 EC-US Positive Comity Agreement. However, despite this initial enthusiasm and the associated benefits, positive comity has seldom been employed.[62] Some reasons positive comity has not been an entirely effective instrument is that it is not a principle of national law and therefore has no legal force. Additionally, despite the fact that it is entirely voluntary, some countries fear that positive comity requests may restrict their control over the use of their own often limited resources and would affect their discretion when prioritising their enforcement mechanisms. Aside

[60] OECD, report on 'Positive Comity – Making International Markets More Efficient through 'Positive Comity' (1999) Competition Law Enforcement, OECD: Paris at 22-23
[61] Ibid.
[62] OECD, 'Improving International Co-operation in Cartel Investigations,' (2012) Competition Law & Policy, OECD: Paris at 23.

from these fears, there may be other reasons for the lack of positive comity requests, or at the very least, formal requests.[63] For instance, the development of more domestic competition enforcement systems and effective competition laws may mean countries are more able to resolve competition issues without having to call on another authority's support. Alternatively, discrepancies in terms of size or power between different authorities may also contribute to the reluctance to issue a positive comity request. Smaller or less powerful competition authorities may be less likely to interact with one another or have a recurring need to compared to US and EU authorities who interact and assist each on a regular basis. Additionally, larger authorities may not be as incentivised to respond to requests from smaller authorities. Moreover, smaller jurisdictions in return may not have the resources necessary in order to assist foreign authorities or it may be politically unappealing for them to have to rely on foreign authorities to remedy behaviour that is harming their own consumers.

Aside from the OECD, the International Competition Network (ICN) has also been instrumental in helping antitrust enforcers coordinate with each other in order to stop the spread of international cartels. The ICN is a virtual organisation made up of over sixty national and multinational antitrust and competition law enforcement agencies. The Cartel Working Group, established by the ICN in May 2004, is aimed at addressing "fundamental issues associated with cartel enforcement."[64] The ICN and its members formed the Cartel Working Group because they acknowledged "[at the] heart of antitrust enforcement is the battle against hard-core cartels directed at price fixing, bid rigging, market sharing and market allocations."[65] Since then, the Working Group has developed and published an Anti-Cartel Enforcement Manual[66] and Template[67], both of which assess the best of the

[63] Marsden, Philip, 'The Curious Incident of Positive Comity – the Dog that didn't bark (and the Trade Dogs that just might bite),' (2011) in *Cooperation, Comity, and Competition Policy,* ed. by Guzman, Andrew T., New York: Oxford University Press at 307.
[64] Everett, Simon J., and Gaw, Michal S. 'Report on the Third Annual Conference of International Competition Network,' available at www.internationalcompetitionnetwork.org/media_report_2004.pdf.
[65] International Competition Network, Working Group: Cartels, available at www.internationalcompetitionnetwork.org/index.php/en/working-group/cartels.
[66] International Competition Network, Anti-Cartel Enforcement Manual, (2005) available at www.internationalcompetitionnetwork.org/bonn/CartelsWG/SG2_Enforcement_Techniquest/Anti-Cartel_Enforcement_Manual.pdf.

enforcement techniques employed by different jurisdictions against cartels. It also holds an annual meeting of cartel enforcement officials around the world in order to develop future initiatives and ways competition and antitrust regimes may work together in investigating and prosecuting cartels.

Export Cartels

Jurisdictions that exempt export cartels from their antitrust or competition law regimes usually employ one of two strategies, either through explicit or implicit exemptions. Explicit exemption clauses that require notification or authorisation in order for export cartels to be registered as valid are often more stringently regulated than clauses that do not because such requirements often stipulate that export cartels wishing to be exempted from ordinary antitrust or competition laws show they meet certain criteria. For instance, in the United States, in order to obtain a certificate of review granting such an exemption, an export cartel must show their conduct does not have a substantial negative impact on the domestic market, among other criteria such as a yearly review of their conduct. By requiring that export cartels register themselves with the Federal Trade Commission (FTC), the U.S. has ensured that antitrust authorities are aware of export cartels operating in their jurisdiction.

Implicit exemptions, such as those adopted by EU member states, contain no such necessities. EU competition law only regulates anti-competitive behaviour such as cartels if they have a direct impact on the domestic market. While this is similar to many other requirements imposed by explicit exemption clauses with registration requirements, implicit exemptions such as these do not undertake reviews of export cartel conduct nor do they have any system of registration. As a result, it is often very difficult to prove an export cartel's existence let alone its effects on the market, both domestically and internationally.

While implicit export cartel exemptions contain problems with identification, both explicit and implicit exemptions share similar goals and intentions: to allow small and medium sized

[67] International Competition Network, Antitrust Enforcement Template, (2005) available at www.internationalcompetitionnetwork.org/bonn/Cartels_WG/SG2_Enforcement_Techniques/Anti-Cartel_Enforcement_Template/pdf.

firms a foothold into the export market while preventing larger firms from exploiting the domestic market. However, the same issue arises with both types of exemptions: both remain largely indifferent to the effects these cartels have on the foreign market.

The United States

Export cartels are allowed to function often because of explicit exemptions granted by a country's competition or antitrust law regime. The United States first addressed the issue when it enacted the *Webb-Pomerene Export Trade Act* (WPA) in 1918.[68]

Section 2 of the WPA (contained in section 62 of the United States Code Title 15) states that:

> Nothing contained in the Sherman Act … shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association.

WPA export cartels automatically received immunity from antitrust laws upon filing the names and addresses of their members and a copy of the cartel's articles of agreement with the Federal Trade Commission (FTC) within 30 days of formation. Failure to do so would subject the cartel to the standard antitrust penalties under the Sherman Act. Once registered, cartels only had to satisfy minimal requirements related to annual reporting in order to remain. The FTC sent out a brief annual questionnaire to all registered cartels asking the value of their exports and their primary functions.

The main purpose of this Act was to increase overseas sales through lowered distribution costs.[69] The rationale behind this purpose was that if small and medium-sized firms, who

[68] Webb-Pomerene Export Trade Act, 15 U.S.C. §§61-66.
[69] Larson, David A. 'An Economic Analysis of the Webb-Pomerene Act,' (1970) Journal of Law and Economics, Vol. 13, No. 2 at 462.

would otherwise lack the capacity to export outside the U.S., could reduce their distribution costs through collusion and thus gain that capacity. It also sought to prevent foreign cartels exerting undue pressure on small American firms.[70]

However, despite its lofty goals, the WPA ultimately did not achieve many of them. At its peak, Webb-Pomerene associations accounted for roughly 19% of U.S. exports. By 1976, this figure had dropped to 1.5 percent.[71] Some of the criticisms the Webb-Pomerene Act faced included its failure to include services, thereby limiting its coverage.[72]

Cartels established under the Webb-Pomerene Act relied solely on self-enforcement by allowing export cartels to police their members' own behaviour as neither the federal government nor the courts dealt with enforcement of export cartel contracts.[73] In order to combat cheating, Webb-Pomerene export cartels usually negotiated contracts outlining dispute resolution procedures, including methods for investigating possible infringements. Export cartels often implemented these dispute resolution tactics by creating a governing body with powers to audit members' financial statements and shipping records.[74] Cartel members that did not provide regular reports or allow themselves to be audited were normally subjected to fines and, in extreme cases, expelled from the cartel.

However, because cartels were self-regulated, export cartels during the WPA regime often dissolved for one of two reasons, failures to adequately implement enforcement mechanisms and when the costs to maintain the cartel outweighed the value of benefits enjoyed by its members.

Price-fixing export cartels often collapsed because of their failure to detect and punish members' attempts to cheat by undercutting the agreed price or exceeding the allocated quota.[75] Similarly, failing to discourage free riding on these services, which prevents the

[70] Larson at 462.
[71] Victor, Paul. 'Export Cartels: An Idea Whose Time Has Passed' (1992) Antitrust Law Journal, Vol. 60 at 573.
[72] Fugate, Wilbur L. 'The Export Trade Exception to the Antitrust Laws: The Old Webb-Pomerene Act and the New Export Trading Company Act' (1982) Vanderbilt Journal of Transnational Law, Vol. 15 at 696.
[73] Dick, Andrew. 'When are Cartels Stable Contracts?' (1996) Journal of Law and Economics, Vol. 39 at 245.
[74] Dick (1996) at 245.
[75] Dick (1996) at 249.

cartel from recovering a competitive profit on its costs, also undermines cartels involved in cost-sharing practices such as joint market research and advertising.

In the second scenario, cartels that attempted to exercise their export market power were only able to raise prices by a minimal amount due to increased fringe competition and entry barriers in their respective industries. For instance, WPA cartels in cement, pine lumber and wire rope claimed their dissolutions were a direct result of foreign price competition and entry.[76]

The Webb-Pomerene Act's effectiveness faced further limitations through judicial interpretation in subsequent cases. The most high profile case following the WPA's enactment was the *Alkali* case. The *Alkali* case addressed the issue of whether the Attorney General could bring an independent case against Webb-Pomerene associations for antitrust violations occurring in foreign trade.[77] By applying section 6(e) of the Federal Trade Commission Act[78], which uses similar language to that of section 5 of the Webb-Pomerene Act (contained in section 65 of Title 15), the Commission may, upon the Attorney General's application,

> Investigate and make recommendations for the readjustment of the business of any corporation alleged to be violating the antitrust Acts in order to bring that corporation into accordance with the law.

Under section 6(i) of the same Act, the Commission is also authorised to conduct investigations of possible violations of foreign antitrust laws and report their recommendations to Congress.

The defendants of the *Alkali* case included two export associations, an American corporation, Alkasso and a British corporation, Imperial Chemical Industries Ltd. (ICI). Along with other foreign producers, these corporations concluded agreements amongst

[76] Dick (1996) at 250.
[77] *United States v. United States Alkali Export Association*, (1945) 325 US. 196 at 198.
[78] Federal Trade Commission Act, 15 U.S.C. §46(e).

themselves to allocate world markets in alkalis. Alkasso, as the primary export association, was made up of eleven of the most important alkali-producing companies in the U.S. Alkasso and ICI agreed to sell at fixed prices in markets not specifically allocated. Alkasso also agreed not to export to Europe, including the United Kingdom, Australia and New Zealand.[79] In 1936, Solvay S.A., a Belgian corporation, became a party to the arrangement between Alkasso and ICI. This arrangement established some exclusive territories and some joint territories and created percentage quotas for the latter.[80] As a result of the agreement, Alkasso became the sole export agent for effectively all alkali producers in the United States and therefore, the American foreign trade in alkalis was wholly dependant on the whims of the international cartel.

The defendants in the *Alkali* case relied completely on the exemptions contained in the Webb-Pomerene Act in order to justify their actions by arguing that the antitrust laws were not applicable to dividing territories outside of the U.S., establishing exclusive foreign markets or fixing prices with foreign competitors in foreign markets.[81] The Supreme Court decided the case by interpreting the Sherman Act as prohibiting such conduct in foreign markets, regardless of whether or not the cartel agreement included the U.S. as one of its territories. The judges rejected the defendants' arguments on the basis that these activities were a violation of the Sherman Act and therefore separate from the immunities granted by the WPA. The defendants' conduct was therefore in restraint of the export trade of domestic competitors of the association and that such agreements stifled potential competition on the domestic market. The Supreme Court's conclusion was ultimately that the practices of allocating exclusive markets, fixing prices on an international scale, and selling through joint agents with foreign competitors were not 'agreements in the course of export trade.'[82] The reasoning behind this decision was that such conduct gave the defendants excessive control over the worldwide market for alkalis, which went beyond the scope of the WPA exception.[83] After the *Alkali* decision was passed, firms became increasingly uncertain over what conduct was allowed and prohibited under the WPA,

[79] *United States v. United States Alkali Export Association* at 65.
[80] *United States v. United States Alkali Export Association* at 65.
[81] *United States v. United States Alkali Export Association* at 65.
[82] *United States v. United States Alkali Export Association* at 70.
[83] *United States v. United States Alkali Export Association* at 198.

which likely contributed to the decrease in notifications.

Confusion over what was prohibited and what was allowed was further exacerbated under the WPA due to mixed signals given by the government. Congress and the FTC restricted export cartel activities to three areas; however, they effectively nullified these restrictions by either adopting overly narrow interpretations or failing to adequately enforce them.[84] For instance, when the WPA was enacted, Congress assured critics that the export cartels would not affect domestic markets 'adversely or intentionally.' However, in 1924, an FTC advisory opinion stated that an export contract that 'incidentally or indirectly' restricted domestic prices would not violate the Act so long as such restrictions did not have a substantial effect on the domestic market.[85] On other occasions, the courts also explicitly rejected claims that cartels registered under the WPA should be held liable for additional superficial restraints on domestic trade, most notably in the *Minnesota Mining and Manufacturing Co.*, case.[86] This ruling can be distinguished from the previous *Alkali* case since the *Alkali* case showed evidence of market allocation in the U.S. market. There, the U.S. export association, Calkex was proven to be an active participant in the international alkali cartel despite the fact that it had never signed any of the export agreements. As a result, dividing the U.S. market and ensuring American producers had but one agent with which to handle their exports, the Supreme Court ruled that Alkasso had violated s.1 of the Sherman Act.

WPA export cartels are free to negotiate exclusive dealing agreements that essentially prevent domestic non-cartel exporters' access to foreign markets, despite the fact that the Act prohibits 'restraints of export trade of any domestic competitor.'[87]

In subsequent cases regarding the WPA, the issue of what constituted 'export trade' was also discussed. The *Concentrated Phosphate* case involved a civil action claiming violations of Section 1 of the Sherman Act against a WPA association and its members.[88] The

[84] Dick (1996) at 247.
[85] U.S. Federal Trade Commission (FTC), 'Webb-Pomerene Associations: A 50-Year Review' (1967) at 102-6.
[86] *United States v. Minnesota Mining and Manufacturing Co.,* 92 F. Supp. 947, 965 (D. Mass. 1950).
[87] Dick (1996) at 247.
[88] *United States v. Phosphate Export Association*, (1968) 393 U.S. 199.

association was bidding on an Agency for International Development (AID) contract.[89] AID had purchased merchandise from the association for the South Korean government. The Supreme Court held that the purchase was a domestic transaction and excluded it from the scope of the Webb-Pomerene Act's definition of 'export trade,' thereby preventing the defendant from claiming any protection under the WPA and allowing the government to proceed with its civil suit.[90] The Court based its judgment due to the fact that the money never left the U.S.;[91] the Korean government did not receive the money freely but rather there were stipulations that AID could spend or have final say over how the funds were to be spent;[92] and that the bidding process to secure the contract granted substantial competitive advantages to American companies.[93] While the Court made the ruling based on the 'export trade' requirement in the WPA, it never clarified the exact definition of the term, compounding the confusion surrounding the Act.[94]

After the criticisms and subsequent limitations of the WPA, Congress enacted the *Foreign Trade Antitrust Improvements Act* (*Foreign Trade Act*) and the *Export Trade Company Act* (ETC Act) in 1982 in order to address the problems of the Webb-Pomerene Act.[95] The Foreign Trade Act is contained in Title IV of the ETC Act. The ETC Act allows firms to apply for a certificate of review issued by the Secretary of Commerce in order to serve as an exemption for activities conducted during the course of export trade. The certificate provides immunity from criminal and civil actions brought by the government for conduct covered in it.[96] In order to obtain such a certificate an application must be submitted to the Secretary of Commerce containing any information that was relevant to the overall market in which the export cartel would be operating. The Secretary of Commerce would then

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[89] *United States v. Phosphate Export Association* at 206.
[90] *United States v. Phosphate Export Association* at 206.
[91] *United States v. Phosphate Export Association* at 204.
[92] *United States v. Phosphate Export Association* at 205.
[93] *United States v. Phosphate Export Association* at 209.
[94] 15 U.S.C. (1982) §61 defines 'export trade' as:

> solely trade or commerce in goods, wares, or merchandise exported, or in the course of being exported from the United States or any Territory thereof to any foreign nation; but the words 'export trade' shall not be deemed to include the production, manufacture, or selling for consumption or for resale, within the United States or any Territory thereof, of such goods, wares, or merchandise, or any act in the course of such production, manufacture, or selling for consumption or for resale.

[95] Waller, Spencer W. 'The Failure of the Export Trading Company Program' (2009) North Carolina Journal of International Law and Commercial Regulation, Vol. 17, No. 2 at 239-40.
[96] Fugate at 699-700.

publish a notice in the Federal Register announcing an application for a certificate of review had been submitted with the names of each person submitting the applications, and the conduct for which the application was submitted. This was intended to ensure greater transparency and certainty for firms seeking to obtain exemptions from the application of antitrust laws for their export cartels, something the previous legislation was sorely lacking in. Despite the ambitious expectations Congress had of the ETC Act, it failed to generate the results that were initially predicted at its inception.

The ETC Act

Along with the Act's purpose and definition of terms, Title I of the ETC Act contains the ways Congress intends to fulfil the Act's goals:

> In particular by establishing an office within the Department of Commerce to promote the formation of export trading associations and export trading companies, by permitting bank holding companies, bankers' banks … to invest in export trading companies, by reducing restrictions on trade financing provided by financial institutions and by modifying the application of the antitrust laws to certain export trade.[97]

In response to the critics that claimed the WPA failed to adequately explain how the Sherman Act applied to export trading companies,[98] the ETC Act allows exporters to acquire advance clearance of planned activities with the Commerce Department and total exemption from criminal prosecution under antitrust laws.[99] These protections are only granted through the certificate of review from the Commerce Department.[100]

The ETC Act also expands on the benefits granted by the WPA, particularly in terms of

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[97] 15 U.S.C. (1982) §4001(b).
[98] See Export Trading Company Act of 1981: Hearings before the Sub-Committee on International Finance and Monetary Policy of the Senate Committee on Banking, Housing and Urban Affairs, (1981) 97th Cong., 1st Session 286 (statement of Milton M. Schulman, Chief Executive Officer of Miller Industries, Inc.).
[99] 15 U.S.C. (1982) §4016(a).
[100] 15 U.S.C. (1982) §4016(a).

financing. Title II of the Act allows certain kinds of banks to invest in ETCs, breaking a well-established Congressional ruling prohibiting banks from taking equity interests in commercial ventures.[101] This change was heralded as 'revolutionary' by one commenter.[102]

Title III of the ETC Act outlines the requirements needed in order to issue a certificate of review – applicants must show that the practices will:

1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant;
2) not unreasonably enhance, stabilise, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant;
3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant; and
4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise or services exported by the applicant.[103]

Certain standards must also be maintained in order to keep the protections and privileges granted by the certificate. The certificate is automatically voided if the application contains fraudulent statements.[104] The certificate also only protects against conduct sanctioned by the Act.[105]

Given the dearth of cases regarding the ETC Act, the Commerce Department issued guidelines in order to help companies in their applications for certificates of review.

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[101] Clawson, Suzanne Hulst. 'The Export Trading Company Act of 1982: Export Trade Comes of Age in the United States,' (1983) South Carolina Law Review, Vol. 34 at 772.
[102] Ferchill, Cary. 'Banks and the Export Trading Company Act of 1982,' (1983) Fordham International Law Journal, Vol. 6 at 267.
[103] 15 U.S.C. (1982) §4003(a).
[104] 15 U.S.C. (1982) §4013(f).
[105] 15 U.S.C. (1982) §4013(a)(1)-(4).

Commentators also affirmed that the Department would likely use the WPA judicial decisions in conjunction with the ETC Act in order to determine whether an applicant satisfied the standards needed to obtain a certificate.[106] However, this approach is not without its conflicts. These conflicts originate from the almost contradictory policies the Webb-Pomerene Act puts forth and that the ETC Act attempts to reconcile: mainly the goal of increasing exports and the requirement that the certificates not be used to fraudulently protect domestic anticompetitive behaviour.[107] A number of these issues were addressed in *Horizons International, Inc. v. Baldridge* where the district court discussed the issue of whether an applicant's size affected its application for a certificate.[108] Here, the court relied on the ETC Act's legislative history and its guidelines and discussed the divide in the ETC Act authorities regarding applicants holding large market shares in the domestic market.[109] *Minnesota Mining*, which was cited in the ETC Act guidelines, established the precedent that an export trade association that held 80% of the relevant market could still receive immunity under the WPA from Sherman Act liability.[110]

However, the *Horizons* court deviated from the ruling in *Minnesota Mining* by turning to the ETC Act guideline instructions detailing that the Justice Department's Merger Guidelines be applied to the transaction.[111] Under the Merger Guidelines, the Hirfindal-Hirschman Index (HHI) is used to assess the potential anticompetitive effects of a merger.[112] In using the HHI rather than *Minnesota Mining*, the court in the *Horizon* case established a far stricter standard for associations applying for a certificate of review. Other commentators have argued that the HHI standard 'prejudices applicants that combine with others to hold a large share of the relevant market.'[113] By applying a strict numerical standard, applicants may face additional burdens they would not otherwise be subject to under a more subjective standard.[114]

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[106] Prozan at 519.
[107] Prozan at 532.
[108] *Horizons International, Inc. v. Baldridge*, 624 F. Supp. 1560 (E.D. Pa. 1986).
[109] *Horizons International, Inc. v. Baldridge* at 1572-73.
[110] *United States v. Minnesota Mining & MFG. Co.,* (D. Mass. 1950) 92 F. Supp. 947.
[111] *Horizons International, Inc. v. Baldridge* at 1566.
[112] Merger Guidelines, (1984) 49 Fed. Reg. 26,823, 26,830-1.
[113] Prozan at 533.
[114] Prozan at 533.

The Foreign Trade Act

The Foreign Trade Act, which falls under the ETC Act and is specifically located in Title IV states:[115]

> Sections 1 to 7 of this title shall not apply to conduct involving trade or commerce (other than import trade or import commerce) with foreign nations unless –
>
> 1) such conduct has a direct, substantial, and reasonably foreseeable effect –
>   a. on trade or commerce which is not trade or commerce with foreign nations, or on import trade or import commerce with foreign nations; or
>   b. on export trade or export commerce with foreign nations, of a person engaged in such trade or commerce in the United States; and
> 2) such effect gives rise to a claim under the provisions of sections 1 to 7 of this title, other than this section.
>
> If sections 1 to 7 of this title apply to such conduct only because of the operation of paragraph 1(b), then sections 1 to 7 of this title shall apply to such conduct only for injury to export business in the United States.[116]

The Act also stipulates that the Sherman Act 'shall not apply to conduct involving trade or commerce…with foreign nations…'[117] unless it is 'import commerce.' Import commerce is excluded from the Foreign Trade Act unless it satisfies the 'domestic injury exception.' The domestic injury exception is applied to alleged anticompetitive conduct normally excluded by the Foreign Trade Act when: 1) the conduct has a direct, substantial and reasonably foreseeable effect on United States commerce and 2) that effect on United States commerce 'gives rise' to a claim under the Sherman Act.[118]

Therefore, under the Foreign Trade Act, export cartels are exempted from U.S. antitrust laws unless the conduct has a direct impact on the domestic market. However, critics have

[115] 15 U.S.C. §6a.
[116] 15 U.S.C. §6a.
[117] 15 U.S.C. §6a.
[118] 15 U.S.C. §6a(1)A), (2).

pointed out some problems in the way the exception has been worded. The second requirement of the domestic injury exception requires that the effect of the defendants' conduct on the American markets give rise to a Sherman Act claim, despite the general rule that conduct involving trade or commerce with foreign nations is excluded from the Sherman Act and thus may not be subject to such a claim.[119]

The Supreme Court has affirmed that the requirement that a domestic effect give rise to a Sherman Act claim requires that the conduct 'have an effect of a kind that antitrust law considers harmful.'[120] This suggests that a foreign plaintiff's antitrust or competition injury can satisfy the second stage of the domestic injury exception when considered on its own.[121]

Foreign plaintiffs have attempted to utilise this interpretation in cases where they have suffered injuries based on American domestic behaviour. In *Empagran II*, the foreign plaintiffs relied on the argument that 'because vitamins are fungible and readily transportable', suggesting there was one global market for vitamins, the inflated prices buyers were subject to abroad would not have existed but for the inflation in the domestic market.[122] The Court of Appeals held that 'but for' causation between the domestic effects and the foreign injury claim was not sufficient to satisfy the Foreign Trade Act exception since the exact wording of the exception 'gives rise to' demonstrated a need for a direct causal relationship, that is 'proximate cause' between the two.[123]

Applying the proximate cause standard, the court stated that the foreign plaintiffs in *Empagran II* could not prove that the domestic injury exception had been satisfied. The analysis of the proximate cause requirement included a discussion that the standard was not between the domestic defendants' price fixing and the foreign plaintiffs' injury, but

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[119] Taffet, Eric. 'The Foreign Trade Antitrust Improvements Act's Domestic Injury Exception: A Nullity for Private Foreign Plaintiffs Seeking Access to American Courts,' (2012) Columbia Journal of Transnational Law, Vol. 50, No. 1 at 220.
[120] *Empagran I* at 162.
[121] Taffet at 220-21.
[122] *Empagran S.A. v. F. Hoffman-La Roche, Ltd.*, (D.C. Circuit 2005) 417 F.3d 1267 at 1269 [hereinafter *Empagran II*].
[123] *Empagran II* at 1270-71.

rather between the domestic effect of the price fixing and the plaintiffs' foreign injury.[124] The court emphasised that this step was crucial in establishing 'only an indirect connection between the U.S. prices and the prices [the plaintiffs] paid … abroad.'[125]

The rest of the ETC Act was meant to allow companies to export their goods more economically by forming export-trading companies, which act as 'international intermediaries between buyers and sellers.'[126] However, shortly after the Act was passed, critics noted that the ETC Act appeared to be following in the footsteps of the WPA when it came to its shortcomings.[127]

The United States has always been the strongest advocate for export cartel exemptions. As such, throughout the history of antitrust development, Congress has sought to perfect the system. Unfortunately, there is a still a great deal of work to be done.

Foreign Export Cartels in U.S. Antitrust Law

While the U.S. may explicitly exempt export cartels in their own jurisdiction, they are far less lenient towards foreign cartels exporting into their markets. Foreign export cartels that harm the American market may be subject to prosecution under section 1 of the Sherman Act. *United States v. ALCOA* established the effects doctrine where the Second Circuit Court held that the Sherman Act would be applied 'even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends.'[128]

Since almost every act carried out by parties in foreign countries that trade with the U.S. affects U.S. trade, the Sherman Act is only applied in cases where the conduct had a

[124] *Empagran II* at 1271.
[125] *Empagran II* at 1271.
[126] Martyniszyn, Marek, 'Export Cartels: Is it Legal to Target your Neighbour? Analysis in Light of Recent Case Law,' (2012) Journal of International Economic Law, Vol. 15, No. 1; see also Unkovic, Dennis; LaMont, Nancy Jean. 'The Export Trading Company Act of 1982: Invitation to Aggressive Export Expansion,' (1983) Dickson Law Review, Vol. 87 at 207.
[127] Prozan, Michael. 'A Review and Update of the 1982 Export Trading Company Act,' (1988) Brooklyn Journal of International Law, Vol. 14, No. 3 at 516.
[128] *United States v. Aluminium Co. of America.,* 148 F.2d 4`6, 443 (2nd Cir. 1945).

substantial effect on the United States.[129] Nevertheless, the extraterritorial application of U.S. antitrust laws in the *Hartford case* caused diplomatic tensions between the United States government and foreign governments who protested that their interests where being adversely affected. Due to the broad interpretation subsequent cases have given to the effects doctrine,[130] several governments enacted blocking statutes in order to protect their domestic firms against private litigants and the American government in antitrust cases.[131] These statutes prohibit the disclosure, inspection ore removal of documents found in the territory of the enacting country by foreign authorities. The U.K. Protection of Trading Interests Act also goes a step further in its clawback provision, which allows for the recovery of the non-compensatory share of treble damage awards given by U.S. courts.[132]

In response to the political tension caused by the effects test, U.S. courts developed a balancing test for foreign conduct in order to ascertain the conflict of interests and their impact on the parties involved. The balancing test was first used in *Timberlane Lumber Co. v. Bank of America*, where it was stated, 'an effect on United States commerce, although necessary to the exercise of jurisdiction under the antitrust laws, is alone not a sufficient basis on which to determine whether American authority should be asserted in a given case as a matter of international comity and fairness.'[133] The Ninth Circuit Court determined six relevant factors to be considered when applying the balancing test:[134]

1) The degree of conflict with foreign law or policy;
2) The nationality or allegiance of the parties involved and the locations of primary places of business of corporations;
3) The extent to which law enforcement by either jurisdiction can be expected to achieve compliance;
4) The relative significance of effects on the United States as compared with those elsewhere;

[129] *Hartford Fire Insurance v. State of California*, 113 S. Ct. 2891, 2909 (1993).
[130] *Westinghouse Electric Corp. v. Rio Algom. Ltd.* (in *re Uranium Antitrust Litigation*), 617 F.2d 1248 (7th Cir. 1980).
[131] Immenga at 108.
[132] U.K. Protection of Trading Interests Act 1980, *reprinted in* Antitrust & Trade Regulation Report (BNA) No. 959, at F-1, 2 (1980).
[133] *Timberlane Lumber Co. v. Bank of America*, 549 F.2d 597, 613 (9th Circuit, 1976).
[134] Immenga at 112-3.

5) The extent to which there is an explicit purpose to harm or affect American commerce and the foreseeability of such an effect;
6) The relative importance to the violations charged of conduct within the United States as compared with conduct abroad.

The Third Circuit Court expanded the 'jurisdictional rule of reason' in *Mannington Mills Inc. v. Congoleum Corp.* by considering additional factors such as 'possible effects upon foreign relations if the court exercises jurisdiction and grants relief.'[135] The test as set out in *Timberlane* was also incorporated in 1987 in the Restatement (Third) of Foreign Relations Law.

While the balancing test appears to be more suitable than the unmodified effects test, it faced criticism in *National Bank of Canada v. Interbank Card Association*.[136] Citing the *Hartford* judgment, the Second Circuit Court stated that it failed to properly address the conflicts between the effects test and the balancing test.[137] Other criticisms included a failure to address whether or not a court must exercise jurisdiction in cases where the Foreign Trade Act standard for subject matter jurisdiction is met, for instance if the Foreign Trade Act replaces 'comity balancing.'[138] The problems associated with the balancing test stem from the uncertainty in how the various national interests and other factors should be weighed and balanced. Moreover, there has been some criticism over whether or not the courts are the most appropriate fora for assessing national and foreign interests since these conflicts are normally political rather than jurisdictional.[139]

<u>The EU and its Member States: the unspoken approach?</u>

Export cartels can also be implicitly exempted from a jurisdiction's competition law rules. As previously stated, implicit exemptions, like those in the EU, occur where a competition law or antitrust statute is applied only to anticompetitive behaviour that affects the

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[135] *Mannington Mills Inc. v. Congoleum Corp.,* 595 F.2d 1287, 1297 (3rd Cir. 1979).
[136] *National Bank of Canada v. Interbank Card Association*, 666 F.2d 6, 8 (2nd Cir. 1981).
[137] *Hartford Fire Insurance v. State of California*, 113 S. Ct. 2891, 2911 (1993).
[138] Fox, Eleanor M., 'U.S. Law and Global Competition and Trade – Jurisdiction and Comity,' (1993) Antitrust Report at 3, 5.
[139] Immenga at 113.

domestic market, with no mention of conduct affecting foreign markets.[140]

Article 101 of the Treaty of the European Union (TEU) prohibits 'all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between member states and which have their object or effects the prevention, restriction, or distortion of competition within the common market.' Therefore, in the European Union, export cartels that restrict exports from one member country to another are prohibited.

While the European Union does not explicitly exempt export cartels from its competition law regime, the nature of the way in which the European Commission prosecutes cartels means that export cartels are often indirectly or implicitly exempt. The European Commission will often only pursue anticompetitive behaviour if it has a significant effect on the Internal Market. This is known as the effects doctrine.[141] The Commission has acknowledged the importance of the effects doctrine in EU law in both the *Wood Pulp*[142] case as well as in the *Dyestuffs*[143] case. Given that a pure export cartel will only have a substantive effect on a foreign market, it is unlikely that any export cartel operating within the EU would be brought to the attention of the Commission unless it specifically affects trade between member states. These effects on trade can occur if traders in third-party countries are prevented from re-importing into the EU.

Given the implicit nature of EU exemptions, there are no notification or registration requirements an export cartel must comply with and no supervision of any export cartel operating in the EU exists. As a result, there is a dearth of empirical data on the economic effects of export cartels within the EU.[144]

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[140] Evenett, Simon; Levenstein, Margaret & Suslow, Valerie. 'International Cartel Enforcement: Lessons from the 1990s,' (2001) World Economy, Vol. 24 at 1230-31.
[141] Whish, Richard; Bailey, David. *Competition Law*. (2012) Oxford University Press at 496.
[142] Cases 114/85 etc *A Ahlström Oy v Commission* [1988] ECR 5193, p 5227, [1988] 4 CMLR 901, p 932.
[143] Cases 48/69 etc [1972] ECR 619, pp 687-94, [1972] CMLR 557, pp 593-609.
[144] Martyniszyn, Marek. 'Export Cartels: Is it Legal to Target your Neighbour? Analysis in Light of Recent Case Law' (2012) Journal of International Economic Law, Vol. 15, No. 1 at 182; see also Sokol, Daniel D. 'What do We Really Know About Export Cartels and What is the Appropriate Solution?' (2008) Journal of Competition Law and Economics, Vol. 4 at 967.

Almost every EU member state now grants implicit exemptions for export cartels. Ireland's application of its competition laws is also a good example of a system where export cartels are implicitly exempt. Section 4(1) of the *Competition Act* of *2002* prohibits collusion between undertakings and their associations that restrict or distort competition within the State of Ireland.[145] The Act subsequently does not mention agreements that restrict or distort competition in other jurisdictions.

While pure export cartels are not explicitly mentioned in EU competition law rules, mixed export cartels, that is export cartel agreements conducted between EU members and non-EU members, must apply for an exemption under Article 101 of the TEU and are generally supervised through the individual member states' competition laws.

Foreign Export Cartels in the EU

In the *Wood Pulp* case, an American export cartel fixed prices in the EU and was regarded as having had an affect on the Community. The Court applied Article 101 extraterritorially and held that the territoriality principle also covered where the effects of the agreement took place within the Community.

Conversely, the Commission considered in cases where a foreign government was involved, whether it would prevent the application of Article 101 during their investigation of a Franco-Japanese ball bearings agreement. In 1972, French and Japanese producers agreed to increase prices for Japanese exports destined for the French market in order to adapt them to French prices. While the Commission presumed there was a violation of Article 101, it did not impose any fines. Instead, it issued a press release detailing four different kinds of export restraints:[146]

1) Measures taken in pursuance of trade agreements between the Community and Japan do not fall under Article 101;
2) Measures that were imposed on Japanese firms by the Japanese authorities are

[145] Competition Act, No. 14, 2002, s. 4(1), available at http://www.irishstatutebook.ie/ZZA14Y2002S4.html (last visited 10 March 2013).
[146] Cases 114/85 etc *A Ahlström Oy v Commission* [1988] ECR 5193, p 5227, [1988] 4 CMLR 901

not subject to Article 101. Nevertheless the prohibition applies to additional agreements and concerted practices;

3) Article 101 is applicable to measures resulting solely from agreements, concerted practices, or decisions by associations of firms, entered into, or engaged in either unilaterally by Japanese firms or in concert with European firms;
4) Measures resulting from agreements or concerted practices between Japanese firms that were merely authorised by the Japanese authorities under Japanese law could be subject to Article 101 because the firms would be free not to enter into the agreements or engage in the concerted practices.

The European Court of Justice reiterated these categories in the *Wood Pulp* case but distinguished them from the facts of the case.[147] The Pulp, Paper and Paperboard Export Association of the United States, which was expressly exempted from antitrust laws by the WPA claimed the rule of non-intervention had been violated when the Commission imposed fines under Article 101.[148] The Court did not address the non-intervention rule, as there were no conflicting requirements between the United States and EC authorities. Rather, it ruled that the statutory exemption granted to American export cartels did not 'require such cartels to be concluded.'[149] Therefore, Article 101 was applied and enforced in the absence of government intervention or coercion.

The Controversy Surrounding Export Cartel Exemptions

One of the most prevalent arguments against export cartel exemptions is that such exemptions compromise international trade policies that would otherwise promote better market integration and freer international trade.[150] In a 2003 submission regarding the Free Trade Area of the Americas (FTAA), the Canadian Bar Association remarked:[151]

[147] Ibid.
[148] Ibid.
[149] Ibid.
[150] Suslow at 797.
[151] Canadian Bar Association National Competition Law, Submissions Concerning the FTAA Competition (Apr. 2003).

> With respect to export cartels, the CBA Section has difficulty seeing how Canada, the U.S. or other jurisdictions could seek to preserve export cartel exemptions in the context of an FTAA with a meaningful competition policy component. The fact that this was not addressed in Chapter 15 of NAFTA [the North American Free Trade Agreement] is one of the many reasons why more vigorous provisions on export cartels need to be explored.

Tensions between jurisdictions that support export cartel exemptions and those that are vehemently opposed to them are brought to light when conflicting parties enter into trade negotiations with each other. In the mid-1990s, the United States rejected specific requests from Mexico to repeal the WPA and ETC Act. The final version of NAFTA even explicitly protects these aspects of U.S. law:[152]

> No changes in U.S. antitrust laws, including the Export Trading Company Act 1982 or the Webb-Pomerene Act, will be required to implement U.S. obligations under the NAFTA. These laws have contributed to the export competitiveness of U.S. industries and they remain appropriate in the context of a free trade area. Nothing in the Agreement requires any NAFTA government to take measure that would adversely affect such associations.

Conflict surrounding export cartel exemptions have also reached the World Trade Organisation (WTO). Both the Singapore Ministerial Conference in 1996 and the Doha Ministerial Conference in 2001 stressed the need to enhance the contribution of competition policy to international trade and development. They also stressed the need to examine issues raised by members relating to the interaction between trade and competition policy, including anti-competitive practices, such as export cartels, in order to

[152] North American Free Trade Agreement Implementation Act, NAFTA Administrative Action Statement, ch. 15(B) (3 Sept. 1993).

identify areas that needed further consideration in the WTO framework.[153]

Another major concern opponents of these exemptions have is that the intended beneficiaries, that is small and medium-sized firms, are not using the exemptions but rather that large international companies are benefitting instead. As established in the analysis on the effects of export cartels in Chapter Two, export cartels with higher market shares, such as the case of the potash cartel, can have devastating effects on developing countries.

It has also been argued that export cartel exemptions can have far-reaching consequences for developing countries. Delegates from developing countries often expressed support for the eradication of export cartel exemptions in industrialised or developed countries while still allowing developing countries this right. At a 2002 WTO meeting, the delegate from Thailand maintained that most cartels exporting to developing countries damage their economies and should therefore be illegal; however, developing countries themselves should be able to exempt export cartels in order to increase their bargaining power.[154] In 2003, at a meeting of the WGTCP, Thailand argued that exporting firms:

> should not benefit from a blanket exemption from competition laws, which would exclude them from scrutiny under a case-by-case approach.[155]

At the same meeting, China stated that it agreed with Thailand's views and that

> the future multilateral framework on competition policy should incorporate restrictions on the maintenance of export cartels by developed country members.[156]

In response to these statements, the United States vehemently defended its right to exempt

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[153] Transcripts of both conferences can be found at http://www.wto.org/english/thewto_e/minist_e/min96_e/wtodec_e.htm#investment_competition and http://www.wto.org/english/thewto_e/minist_e/min01_e/mindecl_e.htm#interaction; last accessed 10 April 2013.
[154] World Trade Organisation., *Report on the Meeting of 26-27 Sept. 2002*, WTO Doc. WT/WGTCP/M/19 (Nov. 15, 2002) at 6.
[155] World Trade Organisation. *Report on the Meeting of 20-21 February*, WTO Doc. WT/WGTCP/M/21 (26 May 2003) [hereinafter WTO Feb. Rep.] at 16.
[156] *Ibid.*

export cartels from antitrust persecution. At a 2003 WTO meeting, a United States representative argued:[157]

> These arrangements typically were conceived as mechanisms for domestic entities that lacked the resources to engage in effective export activity acting individually. As such, they often had pro-competitive effects in that they added another player to the relevant markets that might bring innovation or lower prices. Moreover, they were not secret and therefore did not bear the hallmarks of what was traditionally considered to be a hard-core cartel.

While the American system, with its heavy emphasis on registration and regulation, may be in a better position to manage its domestic export cartels, this may not be true in jurisdictions where such exemptions are applied more freely. A globalised agreement could prevent developed countries from using export cartels to exploit the weaknesses of developing countries whilst allowing developing countries the freedom to support their own businesses through the use of export cartels.

Furthermore, under the current WTO law system, business practices run by purely private firms unsupported by any government that restrict access to the markets cannot be held liable under the GATT or GATS. The WTO is also currently limited to investigating government measures affecting the competitive market in their jurisdiction. Thus, anticompetitive behaviour committed by private firms on foreign markets as well as government tolerance of anticompetitive behaviour affecting export markets by firms based in their territory do not fall within the ambit of the WTO's jurisdiction. There is a potential solution regarding this particular issue.

In the *Japan – Film* case, the Panel assessed the possibility of ruling on private conduct if there is sufficient government involvement.[158] However, they also remarked on the difficulties in imputing private conduct to that of the government and stressed that this

[157] WTO Feb. Rep. at 15.
[158] *Japan – Measures Affecting Consumer Photographic Film and Paper*, WT/DS44/R, adopted 22 April 1998 at para. 10.56.

possibility would have to be examined on a case-by-case basis. The difficulty in making such an assessment lies in determining whether the facts in each case meet the level of government involvement that would constitute as 'sufficient', thus making private party actions challengeable measures.[159] For instance, the question of whether a government's policy of exempting export cartels from their competition laws would qualify as government involvement would be difficult to answer. In the case of implicit exemptions, these would clearly not meet the thresholds necessary to establish government involvement. However, in the case of explicit exemptions, such as those applied by the United States, it may be argued that by granting certificates of review to export cartels, the U.S. government is actively encouraging the formation of export cartels. On the other hand, it can also be argued that granting firms certificates of review in order to regulate export cartels operating in the country may not constitute sufficient government involvement either. It will be argued in Chapter Six that a harmonised competition law agreement under the WTO may help to resolve some of these issues.

Private International Cartels and Developing Countries

While jurisdictions such as the United States and the European Union may have the power to pursue international cartels affecting their own markets, countries without an effective competition or antitrust system, particularly developing countries, may not necessarily have the ability to do so. International cartels and export cartels can therefore often target developing countries to their own advantage.

<u>Public Enforcement</u>

The previous chapter has already covered the devastating effects these cartels have on developing countries. While it is evident that jurisdictions with established antitrust and competition law regimes often can and will impose their own sanctions extraterritorially, these penalties are often only applied in cases where the cartel has had a substantial negative effect within their domestic market. In instances where these jurisdictions cannot or will not interfere, developing countries need to find their own solution. Several

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[159] Van Den Bossche, Peter. *The Law and Policy of the World Trade Organization: Text, Cases and Materials.* (2009) 2nd ed. Cambridge University Press at 187.

developing countries such as South Korea, Mexico, and Brazil have specifically developed enforcement mechanisms in order to directly prosecute international cartels found targeting their economies. Others, such as Chile, have taken steps to develop an indigenous competition system but have yet to successfully pursue a private international cartel case.

China

While moving swiftly from developing country to global powerhouse, the People's Republic of China still retains many characteristics of a developing country, one of which, is the struggle to enact an effective competition law agreement. Instead of compiling its competition laws into a single comprehensive piece of legislation, until recently, China's competition laws, such as the prohibition on price-fixing agreements, were scattered between several national policy announcements issued by different government agencies and provincial governments.[160]

The Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy,[161] issued by the States Council 1980 was the first attempt at passing legislation in order to regulate monopolies, including government monopolies.[162] While the Interim Provisions acknowledged the importance of competition, they also emphasised that, 'competition between socialist enterprises is fundamentally different from that under capitalism. Competition under socialism is based on the common ownership of product resources and serves the socialist economy under the guidance of the state plan.'[163] These provisions were therefore more symbolic than practical; indeed many of the provisions were considered to be more slogans rather than substantive laws that could be used to address anticompetitive behaviour.[164]

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[160] Harris, Stephen, H., *Competition Laws Outside the United States*, (2001) American Bar Association at 18.

[161] Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy, published by the States Council on 17 October 1980, and abolished on 6 October 2001.

[162] Article 3 of the Interim Provisions states:

> [In] economic activities, apart from products, which are to be exclusively traded by departments or units designated by the State, no other products may be monopolized or traded in exclusively.

[163] Preamble of the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy.

[164] Jin, Chaowu; Luo, Wei, *Competition Law in China*, (2002) WS Hein at 6.

After the Interim Provisions, China subsequently passed a number of other competition law statutes. The most important of these were the Law Against Unfair Competition,[165] the Pricing Law,[166] the Provisional Regulation on Curbing of Pricing Monopolies,[167] and the Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors.[168] These, along with other basic laws, formed the starting point for a basic, though somewhat limited, competition law framework.

In 2008, China finally passed its Anti-Monopoly Law (AML), its first comprehensive competition law statute.[169] The AML prohibits agreements that fix prices, impose limits on production or sales, allocate markets, and set resale prices.[170] Three Chinese government agencies were tasked with implementing and enforcing the new law: the National Development and Reform Commission; the Ministry of Commerce; and the States Administration for Industry and Commerce (SAIC). The SAIC was also responsible for establishing an independent bureau in order to investigate and punish anticompetitive behaviour, commercial bribery, cases involving smuggling, and other activities that violated the provisions of the AML.[171]

In January 2013, China joined the ranks in the war against international cartels, when it successfully prosecuted manufacturers of liquid crystal display.[172] While the fines imposed (CNY 353, equivalent to $56 million USD at the time), were minimal when compared to its other developing country counterparts, not to mention those of the United States and the EU, competition law experts took it as a sign of China's potential to establish itself as a

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165 Law Against Unfair Competition, adopted at the 3rd Session of the Standing Committee of the 8th NPC on 2 September 1993.
166 Pricing Law, adopted at the 29th Session of the Standing Committee of the 8th NPC on 29 December, effected on 1 May 1998.
167 Provisional Regulations on Curbing of Pricing Monopolies, issued by the National Development and Reform Commission on 18 June 2003, effected on 1 November 2003.
168 Rules on Mergers and Acquisitions of Domestic Enterprises by Foreign Investors, issued on 8 August 2006, effected on 8 September 2006.
169 See China View, Anti-monopoly Law Takes effect, available at http://news.xinhuanet.com/english/2008-08/01/content_8901182.htm.
170 AML, Article 13-14, available at http://www.abanet.org/antitrust/at-source/07/10/Oct07-Bush10-18f.pdf (unofficial translation).
171 Organizational Chart of SAIC, available at http://www.saic.gov.cn/english/About%20Us/P020070529585714934 65.pdf
172 Bishop, Stewart, 'China Fines Major LCD Players $56M On Price-Fixing Claims,' 4 January 2014, available at http://www.law360.com/articles/404690.

future leader in global competition law.[173]

Mexico

Mexico introduced the Federal Law of Economic Competition as well as the Federal Competition Commission in 1993 as part of its conditions in order to enter into the North American Free Trade Agreement (NAFTA) free-trade zone in 1994. The Federal Law of Economic Competition (FLEC) made conduct such as hard-core cartel behaviour illegal *per se* with no defences for efficiency or small-businesses. There were initially no explicit guidelines when imposing fines, however section 30 of the FLEC stated that the Federal Competition Commission must account for the size of the market affected, the amount of damages, recidivism, and the ability of the cartel members to pay the imposed fine.[174] Since then, FLEC has undergone a number of amendments, such as increasing sanctions and the creation of leniency programme.[175] In 2011, Mexico introduced amendments criminalising cartels, increasing the fines imposed, and giving the Competition Commission the power to conduct 'dawn raids.'[176]

In June 2013, Mexico enacted the Comisión Federal de Competencia Económica (COFECE), an independent constitutional body, to replace the Federal Competition Commission. On July 15 2014, the new Federal Law on Economic Competition was subsequently passed, which granted the COFECE as well as the Instituto Federal de Telecomunicaciones the power to conduct market studies. The COFECE is responsible for enforcing the Federal Law on Economic Competition in all sectors except telecommunications and broadcasting, which is regulated by the Instituto Federal de Telecomunicaciones.

Following an investigation and the successful prosecution in Canada in 1997 of the lysine cartel, Mexico fined American company Archer Daniels Midland Co. (ADM) $125,000 USD in

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[173] See Hawk, Barry E. *International Antitrust Law and Policy: Fordham Competition Law 2014*, (2015) Juris Publishing Inc., at 530.
[174] OECD, *Competition Law and Policy in Mexico: A Peer Review*. Paris: Organization of Economic Co-Operation and Development (2004b) at 65.
[175] See Rodriguez, Omaar Guerrero; Ramirez, Alan C., 'Mexican Competition Law Aligned Incentives for Effective Cartel Enforcement,' (2012) available at https://www.competitionpolicyinternational.com/assets/Uploads/Cartel-Oct2012-Omar3.pdf.
[176] 'Mexico's Tough New Approach to Antitrust Enforcement,' 6 June 2011, LAW360, available at http://www.law360.com/articles/248607/mexico-s-tough-new-approach-to-antitrust-enforcement.

1999. It has been remarked upon that these fines are significantly low according to contemporary international standards.[177] Since then, it has also imposed fines or accepted plea agreements in cartels involving citric acid and vitamins.[178]

Brazil

Brazil has been praised as having the 'largest and most effective anti-cartel authority in Latin America.'[179] While competition law in Brazil can be traced as far back as 1962, Law 8884, the foundation of contemporary Brazilian competition law was passed in 1994.[180] Under Law 8884, Article 21 prohibited price fixing, market allocation, and other horizontal market restraints that have a substantial effect on the market. Two pieces of evidence must be produced in order to prove the existence of a hard-core cartel: first, confirmation of collective market power from a case-specific analysis; and second, there must be proof of an agreement to collude in that market.[181] Furthermore, unlike many other jurisdictions, Brazil's competition law system did not exempt export cartels, 'crisis' cartels, or agricultural cooperatives. Like Mexico, Brazil had also not established any specific guidelines regarding the issuance of fines in cartel cases. Law 8884 did however identify some general principles such as market overcharges or illegal gains to violators as aggravating factors that would increase level of the fine and cooperation with the authorities as well as the ability of defendants to pay as mitigating factors.[182]

On 30 November 2011, Brazil formally enacted Law 12,529/2011, which came into force in May 2012 and replaced law 8884. Along with extensive changes to the pre-merger review system, Law 12,529 also amended the previous law concerning the administrative

[177] Connor, John M. *Global Price Fixing*, (2007) Springer Science & Business Media at 379.
[178] Comisión Federal de Competencia, *Absolute Monopolistic Practices in the Market for Production, Marketing, Distribution and Sale of Citric Acid*, Resolution of the Federal Commission on Competition, available at http://www.cfc.gob.mx/EnIndex.asp; Working Group on the Interaction Between Trade and Competition Policy, World Trade Organization, *Hard Core Cartels: Contribution by Mexico*, WTO/WGTCP/W/196 (28 June 2002), available at http://www.economia-snci.gob.mx/portal/foros/omc/w196.doc at 9-10.
[179] Fox, Eleanor; Sokol, Daniel, *Competition Law and Policy in Latin America,* (2009) Bloomsbury Publishing at 315.
[180] Connor, John M. 'Latin America and the Control of International Cartels,' (2008) Paper for the Latin American Competition Policy Conference at 22.
[181] Pfeiffer, Roberto A.C. *Recent Aspects of Hard Core Prosecution in Brazil*, (2005) presented at the Third Latin American Competition Forum.
[182] Connor (2008) at 24.

proceedings regarding anticompetitive conduct such as cartels were administered. It introduced new rules related to Brazil's leniency programme and increased penalties imposed on cartels.[183] The new law allows the Administrative Council for Defense of the Economy (CADE) to focus its priorities on domestic issues such as local cartels and abuse of dominance claims.

Brazilian authorities have largely been concerned with domestic cases, indeed CADE who is responsible for initiating proceedings and administering penalties in cartel cases, has been criticised for choosing cases that are more likely to succeed and have lesser effects on the economy.[184] Brazil has, however, recently concluded its investigations and announced sanctions in the vitamin and lysine cartels as well as the graphite electrode cartel.[185]

Chile

Despite having one of the oldest competition law systems in Latin America, Chile's competition law, which was passed in 1973, remains largely ineffective when it comes to cartel enforcement. The Chilean antitrust authority, the National Economic Prosecutor's Office (*Fiscalía Nacional Económica, FNE*) has traditionally been more concerned with merger control than investigating and prosecuting cartels.[186]

The FNE averages around two decisions in relation to horizontal restraint cases a year. Before the maximum fine for cartels was raised in 2004, the average cartel fine that was imposed was an astonishingly low $50,000, which was largely ineffective in deterring the typically large-scale international cartels that targeted it. The FNE also lacks the sophistication and resources other jurisdictions with experience in cartel investigations have access to and therefore cannot investigate or even prosecute these cartels when they are

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[183] Kotona, Krisztian; Herrera Moraes, 'Reforms Achieved, but Challenges Ahead: Brazil's New Competition Law*,* (2011) International Antitrust Bulletin, available at http://www.americanbar.org/content/dam/aba/publications/antitrust_law/at311000_bulletin_2011_3.authcheckdam.pdf.

[184] Grinberg, Mauro. *Cartels: The Brazilian Experience*, (2006) Toronto, paper at the Global Competition Forum at 2.

[185] Levenstein, Margaret and Suslow, Valerie, 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy,' (2004) Antitrust Law Journal, Vol. 71, No. 3 at 844.

[186] OECD, *Competition Law and Policy in Chile: A peer review*, (2004) OECD Publishing at 63.

discovered. Chile has managed to successfully fine one international cartel in the *Medical Oxygen* case in 2004, where cartel members were fine approximately $300,000.[187] Apart from that, Chile has only ever investigated one other international cartel case, *Gasoline Distribution,* which was closed after many years of investigations.[188] Since then, Chile has never launched any other investigations or successfully prosecuted any international cartels.

Despite some of these promising examples of developing countries exercising their own legislation against international cartels, for many, a direct approach poses some serious problems. For instance, the difficulties faced by developing countries in export cartel cases can also be applied to hard-core international cartels. It must be reiterated that even in cases where there is an established enforcement mechanism with the power to conduct investigations and prosecute cartels, developing countries very often lack the necessary resources to obtain such evidence. More often than not, in many developing countries, the mere question of how to obtain evidence is never even asked because these countries rarely have the legal, political, or bureaucratic resources to even investigate or prosecute international cartels. The Consumer Unity and Trust Society (CUTS) report on competition policy in seven south Asian and African developing countries noted:[189]

> The competition authorities [in India, Kenya, Pakistan, South Africa, Sri Lanka, Tanzania and Zambia] find it very difficult to attract and retain competent and qualified staff … Adequacy of legal provisions is the most important aspect of a competition regime determining its effectiveness. The inadequacy or lack of legal clarity in dealing with cases, though prevalent in all countries, was most prominent in the case of India. The lack of research and investigative capacity in the seven countries makes it very difficult for the competition authorities to deal with cases judiciously.

[187] Ivaldi, Marc; Khimich, Aleksandra; Jenny, Frederic, 'Measuring the Economic Effects of Cartels in Developing Countries; Final report,' (2014) UNCTAD; see also Fox, Eleanor; Sokol, D. Daniel, *Competition Law and Policy in Latin America*, (2009) Bloomsbury Publishing at 317.

[188] OECD, 'Competition Law and Policy in Chiles: A Peer Review,' (2004) OECD at 38-40.

[189] Centre of Competition, Investment, and Economic Regulation, Consumer Unity of Trust Society, 'Pulling up Our Socks: A Study of Competition Regimes of Seven Developing Countries of Africa and Asia: the 7-Up Project.' (2003) available at http://cuts.org/pulling.pdf at ix.

South Korea

While South Korea can no longer be classified as a developing country, having earned its developed status in 2008,[190] it first established the Price Stablisation Act in 1973, as a developing country, in reaction to rising oil prices. This section will therefore analyse South Korea's competition laws prior to its establishment as a developed country.

The Price Stablisation Act served to promote fair trade by prohibiting the practice of refusal to sell, however, perhaps conversely, it also placed price ceilings on all goods and services. The Monopoly Regulation and Fair Trade Act (MRFTA) subsequently replaced it in 1980, however, prior to 2002, the Korean Fair Trade Commission did not exercise its powers to investigate anticompetitive behaviour from any international cartel.[191] Surprisingly, despite the fact that the MRFTA was enacted after a military coup in 1979 that put General Chun Doo Whan in power, it received overwhelming support from the public. By the time the coup took place, public perception of *chaebols* (large, family-owned businesses with deep connections with South Korean government agencies), was diminishing drastically.[192] Scholars, consumer interest groups and the media all promoted the view that these conglomerates were largely acting in order to exploit the weaknesses of the common South Korean worker.

In May 2002, South Korea became the first developing country to independently apply its competition law enforcement mechanisms extraterritorially and fine members of an international cartel when it imposed $5.7 billion won ($4.5 million USD) in fines against the members of the graphite electrodes cartel.[193] In April 2003, it then issued fines of $3.4 billion won ($2.7 million USD) against members of the vitamin cartel.[194] Since then, as a developed country, South Korea has levied fines against an Asian cartel accused of fixing

[190] Tucker, Sundeep, 'S Korea wins developed-country status,' *Financial Times*, 18 September 2008.
[191] South Korea Fair Trade Commission, *Competition Law and Policy in Korea,* (15 October 2002), available at http://ftc.go.kr/data/hwp/0210.doc.
[192] Chang, Seung Wha; Jung, Youngjin, 'Korea's Competition Law and Policies in Perspective Symposium on Competition Law and Policy in Developing Countries,' (2006) Northwestern Journal of International Law & Business, Vol. 26, No. 3 at 692.
[193] *Korea's FTC Imposes Fines on Graphite Electrode Cartel, Asia Pulse,* 21 March 2002.
[194] Korea Fair Trade Commission, *The KFTC Imposes Surcharges on the International Cartel of Vitamin Companies*, (23 April 2003), Press Release, available at http://ftc.go.kr/data/hwp/vitaminl.doc.

prices for copy paper in 2008[195] as well as more recently in April 2015, it set a combined $7.5 billion won ($6.85 million USD) fine on a German car bearing company and a Japanese auto parts manufacturer accused of illegal price rigging.[196]

Despite the clear benefits of having an established competition or antitrust legal system, many developing countries simply regard such an enterprise as too great a financial burden to bear. This is especially true in instances where the country is relatively small or lacks the economic and political power necessary to enforce potential fines or punishments. In these situations, there are very few routes aggrieved consumers may take in order to obtain a satisfactory outcome.

<u>Private Enforcement of Competition Law</u>

In cases where a developing country may lack the necessary legal system to successfully investigate and prosecute an international cartel, consumers in these countries may choose to bring a domestic private action case for damages. Private actions for damages in relation to competition law violations are allowed in over twenty countries, including Argentina, Brazil, Canada, Russia, Slovakia, and Venezuela.[197] However, private suits tend to be a rare occurrence due to a number of reasons. First, the damages that can be recovered in most countries are minimal, with the exception of the United States and Taiwan, which allow for punitive damages in addition to the actual damages suffered by the plaintiff.[198] Second, it can be more expensive and complicated to sue as an individual since many countries do not allow for class action suits either at all or solely for competition law violations. Finally, consumers are often intimidated by the legal and procedural difficulties attached to such cases.

The European Union has recognised the importance of allowing private citizens the right to enforce competition laws in cases where they have suffered harm as a direct result of a firm

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[195] International Financial Law Review, *South Korea: Tackling cartels*, (1 October 2009), available at http://www.iflr.com/Article/2324375/South-Korea-Tackling-cartels.html.

[196] The Korea Observer, *Schaeffler, JTEKT fined for price rigging in Korea,* (13 April 2015), available at http://www.koreaobserver.com/schaeffler-jtekt-fined-for-price-rigging-in-korea-27978/.

[197] Levenstein and Suslow (2004) at 845.

[198] See *Lowry v. Tile, Mantel & Grate Association*, 106 F. 38, 46 (U.S. Court of Appeals), and Article 31 of the Taiwan Fair Trade Act, (2011) Fair Trade Commission.

or firms' anticompetitive behaviour. In 1984, the Commission emphasised the importance of allowing for private damages for breaches of competition by stating that, 'Scant use has yet been made of the possibility of actions for damages for breaches of the Community competition rules. There is a need to make all concerned more aware of this possibility. The Commission believes it desirable that the judicial enforcement of Articles 85 and 86 should also include the award of damages to injured parties because *this would render Community law more effective*.'[199] [Emphasis added].

Therefore, in the Commission's opinion, allowing for private action damages would not only allow those who have suffered harm some compensation but also by informing the wider public of their rights regarding competition law enforcement, allow for more enforcement opportunities. There have been numerous cases where the European Commission has awarded damages in favour of consumers in relation to violations of competition law. For instance, in the *Manfredi* case, consumers filed for damages against a number of insurance companies formed an agreement that resulted in increased prices for insurance premiums.[200] The Italian national competition law authority had previously ruled the agreement as unlawful. In answer to the questions raised as to whether Article 101 TFEU allowed third parties to claim for damages for harm suffered as a result of anticompetitive behaviour, the ECJ held:[201]

> any individual can rely on the invalidity of an agreement or practice prohibited under that article and, where there is a causal relationship between the latter and the harm suffered, claim compensation for that harm.

Allowing for private action damages in international cartel cases may contribute to the objective of deterring the formation of other international cartels. However, outside the United States and the European Union, it is notoriously difficult for members of the public to

[199] Commission (EC), Thirteenth Report on Competition Policy (Brussels, Luxembourg 1984), available at http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublications-Start?PublicationKey=CB3883823.
[200] *Vincenzo Manfredi and Others v. Lloyd Adriatico Assicurazioni SpA and Others*, [2006] ECR I-6619.
[201] Ibid at paras 2, 20-21.

successfully bring an action for damages against an international cartel. For instance, the Japanese Anti-Monopoly Law contains limited provisions on private enforcement and effectively gives the Japanese Fair Trade Commission veto power over the institution of suit.[202] The Japanese Fair Trade Commission is seen as having a more involved and effective role in deterring the spread of cartels than its private citizens.[203]

Many governments, like Japan, are hesitant to allow for private enforcement of their competition laws.[204] The rationale behind this reluctance stems from the fear that in doing so they will relinquish control over enforcing their own laws in these cases.[205] For private citizens in developing countries that have suffered harm from an international cartel, this daunting hurdle is even larger owing to the fact that many developing countries often do not have competition law systems of their own to effectively prosecute that cartel. Consumers in these countries may therefore need to look elsewhere if they wish to claim any recourse for the losses they suffer.

Some jurisdictions, such as the United Kingdom and the United States, allow for consumers in developing countries to bring a private suit before their own courts, however, there are also problems associated with this approach. For instance, while the United States permits foreign antitrust plaintiffs under the Foreign Trade Antitrust Improvements Act (FTAIA)[206], historically, U.S. courts have not looked favourably upon foreign plaintiffs whose cases mostly pertain to conduct aimed at foreign markets. The courts have, until recently, agreed that the FTAIA requires foreign plaintiffs relying on the U.S. antitrust law system to show that: first, the alleged anticompetitive conduct had "a direct substantial and reasonably foreseeable effect" on the U.S. marketplace; and second, that the anticompetitive effect on the U.S. marketplace directly harmed the plaintiff's interests.[207] However, in the case of

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[202] First, H, 'Antitrust Enforcement in Japan,' (1995) Antitrust Law Journal, Vol. 64 at 147.
[203] Uesugi, Akinori, 'Can collective actions be a solution to improve access to justice in Japan? Examination of measures to enhance the private enforcement of competition law in Japan,' in Wrbka, Stefan; Van Uytsel, Steven; and Siems, Mathias, *Collective Actions: Enhancing Access to Justice and Reconciling Multilayer Interests?*, (2012) Cambridge University Press at 200.
[204] Ibid.
[205] Ibid.
[206] Foreign Trade Antitrust Improvements Act, 15 U.S. Code § 6a.
[207] Levenstein and Suslow (2004) at 847.

Kruman v Christie's International PLC[208], the Court of Appeals for the Second Circuit deviated from the traditional understanding and stated that foreign plaintiffs need only show the anticompetitive effects in the U.S. market violate the Sherman Act, and not that those effects formed the foundation of their harm in order to bring an action within the U.S.[209]

Nevertheless, despite this loosening of standards, developing country consumers still have little to no options in cases where an international cartel has no effect on the U.S. market.

Conclusion

The effects of international cartels and the law surrounding how these cartels are governed have now been covered extensively. Although, developed countries have sophisticated rules in place to pursue any international cartel found to be targeting their own jurisdiction, the exemptions for export cartels can have a serious detrimental impact on developing countries. It is clear from both this chapter and the previous one that, when it comes to international cartels, developing countries remain at a significant disadvantage. Many developing countries do not have their own competition law systems and those that do are not equipped with the necessary resources or expertise to effectively deal with international cartels. While efforts are being made to improve the situation by encouraging more cooperation between jurisdictions, there still much more that needs to be done.

While jurisdictions such as the United States and the European Union are quick to punish anti-competitive behaviour that is attributed to hard-core international cartels, at the same time, they ignore or even encourage the same behaviour if it is tied to an export cartel. Because export cartels tend to target weaker economies, indeed any export cartel that adopted behaviours that would affect either of these jurisdictions would be quickly punished, developing countries or countries that lack an effective cartel enforcement regime are left to bear the brunt of any negative effects that may arise.

Although jurisdictions such as the U.S and EU are often very effective in prosecuting

[208] 284 F.3d 384 (2nd Circuit 2002).
[209] 284 F.3d at 400.

international cartels, dependency on others to correct the situation is not a viable long-term solution. There are many problems associated with simply allowing developed countries to take the reins with regards to international cartels. In these cases, the authorities are normally only interested in the effects these cartels have on their own economies. For instance, even though U.S. and EU decisions often allude to a cartel having effects 'within the U.S. and abroad' or in 'specific third markets', the exact nature of these 'other effects' is never elaborated upon and they are never considered when calculating the final penalty. Furthermore, because this information is almost always confidential, the details of the effects of international cartels outside these markets are rarely released, undermining the effectiveness of cooperation between developed and developing countries in international cartel cases. Current competition laws and agreements between countries often do not contain provisions allowing for the free sharing of such information. In these situations, developing countries are therefore left in the dark, with little to no recourse to address any cartel affecting their economies.

Thus, developing countries often resort to establishing their own competition enforcement regimes, in an attempt to directly confront international cartels themselves. This chapter covered some examples where this approach has been successful namely in the cases of South Korea, Brazil and Mexico. However, many other developing countries face significant issues when trying to build a competition law system from the ground up. The following chapter will discuss the problems that arise when developing countries attempt to construct an effective competition law regime and the ways in which they may overcome them.

Chapter Four

Developing Countries and Competition Law: Challenges and Obstacles

Introduction

Developing countries typically lack effective competition law enforcement regimes, which makes them perfect targets for international cartels. Much of the analysis thus far has focused on how developed countries deal with international cartels affecting their economies. This is largely because developed countries are in a better position to prosecute such cartels, with better access to the necessary resources as well as the knowledge and experience in trying such cases. As a result, there is more documentation regarding developed countries' efforts in stopping international cartels.

The previous chapter discussed the possibility of positive comity as a way for developing countries to challenge any foreign international cartel negatively affecting their economies. Positive comity, while beneficial in that it allows for developing countries to gain access to resources and information they may otherwise lack, also has its drawbacks. With the exception of Brazil and Mexico, which pursued an action against the lysine cartel and is also in the process of investigating the vitamins cartel, few developing countries take any sort of independent action against international cartels found targeting their markets. This seeming reluctance can also be seen in the conduct of private individuals in developing countries, who, again with few exceptions, have evidently not pursued many civil remedies against cartel members to the same extent that their counterparts in more industrialised countries have. The underlying reason, at least from the individual's perspective, may be the lack of a cohesive competition law system. Without a cohesive competition regime, consumers are often unaware of their own rights and in any case can be largely suspicious of pursuing a case even when they have access to a competition authority. By establishing their own competition law regime, developing countries may be able to combat private international cartels on their own.

This chapter will discuss some of the challenges developing countries face when introducing and enforcing competition laws into their economy. It will begin with a discussion of their goals, both economic and political. Finally, it will examine the reasons behind why a developing country may wish to adopt a competition law system as well as some suggested ways they may overcome the associated problems.

Goals of Developing Countries and Competition Law

Given that developed and developing countries have markedly different economic structures, it is clear they would have different goals and priorities when implementing and enforcing a competition law regime. While some of these competition law goals may overlap, it is not necessarily the case that what is good for a developed country is good for a developing country. For instance, South Africa has included additional competition law goals beyond the more 'traditional' goals of western countries in order to account for their own specific economic and social needs. The goals of a particular country are therefore instrumental in shaping its competition laws.

The most common goals countries account for when introducing or interpreting competition law are economic efficiency (allocative, productive, and dynamic), consumer welfare (also including consumer choice), total welfare, and sometimes protecting the competitive market from the creation of private artificial barriers.[1] These concepts can be categorised under the larger goal of economic growth. Economic growth can mean different things depending on the country. For a developed country, economic growth may simply mean maintaining economic efficiency and competitiveness in the market.[2] For a developing country, economic growth often correlates with economic development, but the two are not always synonymous.[3] Economic growth may lead to an increase in Gross Domestic Product (GDP) per capita but simultaneously, the levels of poverty and the inequality in the distribution of wealth may also increase, which cannot be described as

[1] Irma, Adelman, *Theories of Economic Growth and Development,* (1961) Stanford University Press.
[2] Ibid.
[3] Zhong, Yangsheng; Wang, Xiaohui; He Guangmin, *The Economic Theory of Development Countries' Rise: Explaining the Myth of Rapid Economic Growth in China,* (2010) University Press of America at 25.

development.[4] For the purposes of this chapter, however, economic development will be defined as the method through which a country or region achieves sustainable economic growth along with positive structural changes to its economy. Economic development therefore describes the qualitative, structural, and institutional changes required to improve a country's abilities to allocate its available economic resources.[5]

Apart from economic priorities, developing countries also have different social goals, which may be taken into account when implementing new competition laws. The United Nations' Millennium Development Goals,[6] identify a number of such goals including: effective and inclusive education; adequate supplies of clean water and nourishing food; health care and medicines; infrastructures such as schools, housing, roads and transportation systems as well as improved governance to ensure all of these are effectively conveyed. The Millennium Development Goals also contain a section covering competition and markets.

The first part of this section concerns competition *policy* and aims to empower consumers to more easily participate in the community economy. Freeing the markets of artificial restraints and allowing buyers and consumers to obtain goods and services at a price near cost can liberate the people into becoming contributing members of the economy. The second part of the section deals with competition *law* and is concerned with encouraging the development of the markets and prohibiting anti-competitive practices, such as abuse of power, that create inequality amongst the people. These two sections, covering social goals and competition and markets, are often interdependent for developing countries, as competition is essential to lowering prices and thereby improving the quality of services such as health care.[7]

While the UN hoped to achieve all the goals outlined in the Millennium Development Goals, not all of them were met on a global level. In 2015, it introduced the Sustainable Development Goals, many of which overlap with the Millennium Development Goals, which

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[4] *Ibid.*
[5] *Ibid.*
[6] See http://www.un.org/millenniumgoals/. Last accessed 15 August 2015.
[7] Fox, Eleanor M. 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries,' (2012) Law & Economics Research Paper Series, Working Paper No. 11-04.

it hopes to achieve by 2030. These seventeen goals include: making improvements in countries' infrastructures; encouraging economic growth; and reducing poverty, among others.[8]

One of the biggest obstacles developing economies face is competition from imports. As most developing countries are predominately price takers on the global market, aside from natural resources in particular geographic locations, most firms in developing countries have little to no market power.[9] Any reforms would therefore have to account for the weak bargaining power many firms in developing countries possess.

Why Should Developing Countries Adopt Their Own Competition Policy?

Developing countries often have different motives for wanting to implement a competition law system. However, given the dearth of resources these countries typically have, it is prudent to ask whether they even ought to incur the expense of creating a competition law system of their own. The OECD has reiterated on numerous occasions that every country can benefit from an effective competition policy and legal system, so long as the law meets their specific needs.[10] Aside from the associated benefits, there are many reasons a developing country chooses to formulate their own competition laws, as will be discussed below.

Economic Development

Most developing countries list economic development amongst their many goals. The WTO Working Group has encouraged the development of competition policy in order to achieve this, stating:[11]

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[8] United Nations. 'Sustainable Development Goals: 17 Goals to Transform Our World,' http://www.un.org/sustainabledevelopment/sustainable-development-goals/ (last accessed 10 April 2017).
[9] Mbirimi, Ivan; Chilala, Bridget; Grynberg, Roman. *From Doha to Cancun: Delivering a Development Round*, (2003) Commonwealth Secretariat at 212.
[10] See Sengupta Rijit; and Dube Cornelius, 'Competition Policy Enforcement Experiences From Developing Countries and Implications for Investment,' OECD Global Forum on International Investment, 27-28 March 2008.
[11] World Trade Organisation, paper of 18 September 1998; WT/WGTCP/W/80.

> The specific benefits that have been attributed to such policy include promoting an efficient allocation of resources, preventing/addressing excessive concentration levels and resulting structural rigidities, addressing anti-competitive practices of enterprises … enhancing an economy's ability to attract foreign investment and to maximise the benefits of such investment, reinforcing the benefits of privatisation and regulatory reform initiating and establishing a focal point for the advocacy of pro-competitive reforms and competition culture.

This view has also been reiterated in a number of OECD publications, among those asserting that the evidence linking competition policy and economic development support the theory that more competition leads to an increase in 'economic growth, productivity, investment, and increased average living standards.'[12]

Proponents of adopting competition policy as a means to achieve economic development have argued that competition laws help maintain two of the main pillars of economic growth: a competitive market and a reliable legal system.[13] In an efficient, competitive market, firms are more likely to engage in practices that not only enhance their own efficiency but also take steps towards investment and research and development, both of which lead to economic growth. Competition policy also encourages other policies that lead to more openness in international trade, which also leads to more efficient markets. The World Bank has stated that competitive markets are the best way to organise production and distribute goods and services.[14]

However, it is important to consider that the above analysis deals with relationship between adopting competition policies and economic development. This is entirely different from analysing the effect that enforcing competition laws would have on development.

[12] Preston, John, 'Investment Climate Reform Competition Policy and Economic Development: Some Country Experiences,' (2003) DIFID Case Study for WDR at 2.
[13] Owen, Bruce M. 'Competition Policy in Emerging Economies,' (2005) 04-10 SIEPR Discussion Paper at 3.
[14] Uchida, Yuichiro; Cook, Paul. 'The Effects of Competition on Technological and Trade Competitiveness: A Preliminary Examination,' (2004) Centre on Regulation and Competition Working Paper Series, No. 72 at 2.

Developing countries frequently face challenges when it comes to enforcing their competition legislation, which may negatively affect their development.

Some scholars have criticised the view that adopting competition laws necessarily leads to economic development and that there are more effective methods of achieving this goal such as trade liberalisation. Supporters of the argument that trade liberalisation is a better alternative to competition law argue that trade liberalisation produces more prosperity than implementing laws that target restraints of trade.[15] The simple removal of trade obstacles such as tariffs and barriers to entry would encourage free trade, which would stimulate the creation of wealth and development, especially in smaller, less developed countries.[16] Bernard Hoekman and Petros Mavroidis have both supported this view, arguing that:[17]

> [The] implication of the empirical literature is that liberalisation … is likely to have a much greater direct impact on competition than antitrust enforcement, especially in smaller economies.

Importantly, trade and investment liberalisation and deregulation of entry barriers are not costly in administrative capacity and do not require the use of scarce technical expertise.'[18] In this way, trade liberalisation may be more effective than antitrust or competition law development for less developed countries.

Socio-Economic Welfare

Along with economic development, developing countries can also use competition as a tool for socio-economic development. For instance, in Mexico and Costa Rica, competition law is used to protect and promote access to basic needs.[19] Some policymakers in developing countries are afraid that, by adopting competition laws, they may be unduly restricting other

[15] Cooter, Robert D., 'Market Modernization of Law,' (1996) International Review of Law and Economics, Vol. 16 at 162.
[16] Godek, Paul, 'One U.S. Export Eastern Europe Does Not Need,' (1992) Regulation, Volume 15, No. 20. at 21.
[17] Hoekman and Mavroidis, 'Economic Development, Competition Policy and the World Trade Organization,' (2002) World Bank Policy Research Working Paper No. 2917 at 8
[18] *Ibid.*
[19] Stewart, Taimoon; Clarke Julian; and Joekes Susan, *Competition law in action: Experience from developing countries,* (2007) International Development Research Centre at V.

policy concerns. In order to alleviate these fears, many countries incorporate a number of non-economic factors in order to strike a balance between their competition law objectives and their industrial or public policy objectives.[20] Industrial policy goals are often comprised of a selection of economic and social policy goals, such as promoting employment, and correcting social injustices.[21]

The possibility of setting public policy considerations as a standard of welfare will be discussed in the following chapter.

<u>External Pressures</u>

In many situations, pressure from external forces such as international organisations and more powerful jurisdictions play a role in stimulating a developing country's motivation for adopting competition law legislation. This external pressure may take the form of conditions in order to gain membership into a particular body or organisation or during negotiations in order to better facilitate trade agreements. Regardless, this section will discuss the motives behind these sources of external pressure and whether this approach is effective in helping developing countries institute their own competition law system.

Members of The World Trade Organisation

While the World Trade Organisation (WTO) does not have a separate agreement governing competition law, much of the pressure on developing countries to adopt their own form of competition legislation comes from this organisation. The Working Group on the Interaction Between Trade and Competition Policy was established in April 1997. Since then, it has played an active role in encouraging developing countries to adopt their own competition policies. The WTO's interest in competition policy stems from the relationship between competition and the expansion of free trade. In order to facilitate free trade, not only must trade barriers such as tariffs be removed but also those emanating from private

[20] Lewis, David, Chairperson, Competition Tribunal of South Africa, 'Address at the Organisation for Economic Co-operation and Development Global Forum on Competition: The Objectives of Competition Law and Policy,' (2003).
[21] White, Lawrence J., 'The Role of Competition Policy in the Promotion of Economic Growth,' (2008) New York University for Law & Economics, Working Paper No. 08-23 at 9.

restraints such as abuse of dominance, monopolisation, import and export cartels, and horizontal and vertical restraints – all of which can be governed through competition policy.[22]

The influence the WTO has on developing countries has resulted in a few occasions where it has indirectly encouraged applicants to adopt their own competition law system prior to their accession. For instance, although the WTO Agreements themselves contain no requirements for prospective members to adopt an effective competition law policy applicants to the WTO must gain the approval of existing members before they are granted membership. Therefore, any existing member, such as the EU or the United States, can veto a developing country's accession if they don't already have a competition policy in place.

While the WTO has never explicitly pressured a country to adopt a competition law policy as part of its accession protocol, it is possible that some prospective applicants for membership feel indirect pressure to do so. For instance, the timing of China's decision to begin drafting the Anti-Monopoly Law in the 1990s was widely questioned, particularly given its subsequent accession in 2001.[23] These suspicions were substantiated during China's WTO Accession Working Group discussions, which were recorded in the Group's meeting minutes, wherein the issue of competition law was raised:[24]

> The representative of China noted that the Government of China encouraged fair competition and was against acts of unfair competition of all kinds. The Law of the People's Republic of China on Combating Unfair Competition, promulgated on 2 September 1993 and implemented on 1 December 1993, was the basic law to maintain the order of competition in the market. In addition, the Price Law, the Law on Tendering and Bidding, the Criminal Law and other relevant laws also contained provisions on anti-monopoly and unfair competition.

[22] Geradin, Damien, 'Competition Law and Regional Economic Integration: An Analysis of the Southern Mediterranean Countries,' (2004) World Bank Papers at 21.
[23] Wu, Qianlan, 'Harmonisation of competition law in multilateral trade framework: China's WTO membership and its Anti-monopoly Law,' (2011) in Andenas, Mads; Andersen, Camilla Baasch, *Theory and Practice of Harmonisation*, (2012) Edward Elgar Publishing at 512.
[24] Paragraph 65 of WTO Report of the Working Group on the Accession of China, WT/MIN(01)/3/Add.1.

> *China is now formulating the Law on Anti-Monopoly*. [Emphasis added].

While its previous statement in the Interim Provisions for the Promotion and Protection of Competition in the Socialist Economy remarked on the differences between competition law in a capitalist economy and competition law in a socialist economy, the Chinese government changed its position entirely and announced it would be adopting a competition policy based on fairness.[25] In doing so, it showed its willingness to promote trade liberalisation, in keeping with WTO's own norms, which may have placed the country in a stronger bargaining position during its pre-accession negotiations. Furthermore, the fact that it took thirteen years for the Anti-Monopoly law to be adopted is also evidence that the law itself likely faced resistance, either from the public or different industrial sectors. It is possible that the Chinese government used its obligations set out in its accession protocol into the WTO in order to push through political deadlocks and enact more domestic reforms.[26]

The emphasis WTO members place on developing countries to adopt policies similar to the U.S. and EU is likely to stem from their previous desire to develop a universal competition policy. It can be argued that a more universal approach to competition law among WTO members can only work in the Organisation's favour. For instance, if competition laws between developing and developed countries were fundamentally different from each other, parties involved in competition law disputes would have difficulty prosecuting perceived anti-competition practices. This disparity in interests can be seen in cases involving export cartels. Developing countries may view export cartels as directly harming their economies, however, under American antitrust law, export cartels are exempt from prosecution. As a result, there is very little recourse a developing country may have regarding an export cartel found affecting their domestic market.

[25] Qin, Julia Ya, 'WTO-Plus Obligations and Their Implications for the World Trade Organization Legal System – An Appraisal of the China Accession Protocol,' (2003) Journal of World Trade, Vol. 37 at 483-522
[26] Ibid.

The European Union

The WTO is not the only body that plays a part in encouraging developing countries to adopt a competition law system. The European Union has had a significant role in the development of many countries' competition laws. Treaties such as the Accession Agreements countries must sign in order to join the EU include conditions requiring signatories to implement a competition law system modelled on Articles 101 and 102 of the TFEU. The EU has also had extensive involvement in different forums regarding international cooperation, particularly in discussions on competition law such as the WTO, the OECD, the ICN, and UNCTAD. Aside from the Accession Agreements signed by EU Member States, the EU has also signed a number of agreements with other countries or regional jurisdictions that include competition law provisions, thereby compelling these countries into at least implementing national or regional competition law provisions if they do not have a competition law system of their own. However, some critics have pointed out that the EU typically only concludes agreements with nations it has an interest in partnering with and seems generally reluctant to widen the net to other jurisdictions.[27]

Nevertheless, despite these criticisms, the EU has entered into agreements with many countries, including developing countries. Most notably, the Cotonou Agreement, concluded between the EU, and African, Caribbean and Pacific countries, serves as the most comprehensive partnership agreement concluded between the EU and 78 developing countries.[28] Article 45, entitled *Competition Policy* obliges signatories to implement national or regional rules and policies in order to 'ensure the elimination of distortions to sound competition and [give] due consideration to the different levels of development and economic needs of each ACP country.'[29] Subsection 3 of the Article also asks parties to 'reinforce cooperation in this area with a view to formulating and supporting effective

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27 Gavin, Brigid. *The European Union and Globalisation: Towards Global Democratic Governance*. (2001) Edward Elgar Publishing at 107.

28 The Cotonou Agreement, signed 23 June 2000, available at http://www.europarl.europa.eu/intcoop/acp/03_01/pdf/mn3012634_en.pdf.

29 Ibid, Article 45.1.

competition policies with the appropriate national competition agencies' in order to strengthen enforcement of the competition law rules.[30] As a result, a number of signatories to the Cotonou Agreement, such as Nigeria, have since taken steps to adopt their own competition law agreements.[31]

The European Union was also the driving force behind the initiative to establish a universal competition law agreement within the WTO during the mid-1990s.[32] This venture however ultimately failed as the United States and several developing countries vehemently opposed the adoption of such an agreement and as a result, the negotiations in Cancun ultimately failed.[33]

Challenges Developing Countries Face When Establishing a Competition Law System

While some developing countries, such as Brazil and South Korea, have established competition or antitrust systems with relative success, many developing countries, for the most part, face almost insurmountable challenges when attempting to instigate an effective competition regime. Developing and least developed countries often lack the resources and advanced competition laws required to successfully prosecute international cartels exporting to their markets. As a result, they are often flooded with imports coming from such cartels. Some academics have argued that, given the other challenges developing countries face such as poverty, food shortages and rising food prices, lack of education, and, in some cases, poor governance, developing a successful competition law system should not be a great priority. Indeed, Paul Godek expounded this view when he stated, "exporting antitrust … is like giving a silk tie to a starving man. It is superfluous; a starving man has much more immediate needs.'[34] However, competition laws are vital in the development of weaker economies and can even occasionally help reduce some the concerns these countries may have. An effective competition policy can help reduce anti-competitive

[30] Ibid, Article 45.3.
[31] See Briggs, Mark, 'Nigeria edges closer to competition law,' Global Competition Review, 9 June, 2016, available at http://www.globalcompetitionreview.com/news/article//41227/nigeria-edges-closer-competition-law/.
[32] Brigid at 107.
[33] *Ibid.*
[34] Godek, Paul, 'One U.S. Export Eastern Europe Does Not Need,' (1992) Regulation, Volume 15, No. 20.

barriers and prevent exploitation. Competition laws can also contribute to a developing country's economic growth and can also reduce poverty.[35]

One of the biggest obstacles a developing country faces when attempting to establish a competition law system is its own government. In some developing countries, the government controls many different sectors of the economy, which can create problems when trying to develop an effective competition policy.[36] For instance, in some sectors where privatisation has been established, the government may initiate a price-fixing and market or customer-sharing mechanism.[37] These sectors may also be structured in a way so as to give the government complete control. In these situations, free market competition would be almost impossible to maintain as firms operating within the sector, whether public, political party-affiliated, or private would have little to no choice but to follow the measures adopted by the government.[38]

Governments can prevent the development of competition law policies in their own jurisdictions by erecting barriers preventing entrance or exit to the market; establishing or existing governmental monopolies and different forms of governmental subsidies granted to loss-making undertakings; and the politicisation of existing administrative authorities when applying and enforcing competition law rules.[39] With regards to governmental monopolies, many developing countries are state-run economies. As a result, in many of these economies, numerous industries are still comprised of state monopolies. These monopolies can result in highly concentrated markets, as described by the Herfindahl-Hirschman Index (HHI).[40] The bigger the market share a single entity has in a given market, the more highly concentrated that market is said to be. Developing countries tend to have more highly concentrated markets than developed countries. Besides government monopolies, high

[35] OECD, 'Implementing Competition Policy in Developing Countries,' (2007) in *Promoting Pro-Poor Growth: Policy Guidance for Donors,* OECD Publishing at 88.
[36] Dabbah, Maher, *International and Comparative Competition Law,* (2010) Cambridge University Press at 344.
[37] Ibid.
[38] Ibid.
[39] Waked, Dina I. 'Competition Law in the developing world: The why and how of adoption and its implications for international competition law,' (2008) Global Antitrust Law Review, Vol. 1 at 78.
[40] The HHI is a way of measuring industry concentration. The values in the index are calculated as the sum of the squared market shares of individual undertakings in the market. Higher index numbers indicate a greater degree of concentration in the market.

barriers to entry and exit in a market can also contribute to a developing country's highly concentrated market. Furthermore, developing countries characteristically also have low demand or purchasing powers, which can lead to a decrease in the number of firms that can operate profitably in the market.[41] Markets with low demand coupled with the requirement for undertakings to achieve minimum efficient scale of production in order to operate most efficiently (at the lowest cost), such markets are unable to sustain more than a few firms at a time.[42] A highly concentrated market can pose a challenge when considering the adoption and enforcement of more traditional competition policy models, especially in the context of laws regarding dominant positions and market power.[43] Another problem facing most developing countries is the lack of reliable administrative enforcement mechanisms along with qualified, unbiased judiciary systems capable of upholding any adopted competition law rule.[44]

As previously mentioned, corruption in the government can also hinder a developing country's quest for an effective competition law system. Many developing countries unfortunately have high levels of corruption throughout their administrations. Corruption often has a detrimental effect on competition within the market by raising the barriers some market players are faced with irrespective of any advantages they may have. There are three preconditions that can identify the presence of corruption: 1) arbitrarily conferring officials with discretionary powers; 2) the presence of economic rents, which may either be collected by officials or created by officials in exchange for a portion of those rents; and 3) institutional weakness with a lack of mechanisms in place to establish accountability and prevent officials from using their positions in public office for personal gain.[45]

These conditions can prevent the development of a successful competition policy. If government officials themselves are corrupt, decisions made by those officials to permit, prohibit or ignore anti-competitive behaviour can be linked with substantial rents for those

[41] Gal, Michal S. 'Size Does Matter: The Effect of Market Size on Optimal Competition Policy,' (2001) Southern California Law Review, Vol. 74 at 1445.
[42] Ibid.
[43] Ibid.
[44] Owen, Bruce M. 'Competition Policy in Emerging Economies,' (2005) Stanford Institute for Economic Policy Research; Discussion Paper at 1.
[45] Aidt, T.S., 'Economic Analysis of Corruption: A Survey,' (2003) 113 The Economic Journal F632

directly involved. There is therefore a strong incentive for market players to collude with officials and thus obtain a share in the gains. It has been suggested by some scholars such as Henry Ergas that enacting a competition policy in a country with high levels of corruption can do more harm than good.[46]

Changing the institutional features of law enforcement may reduce corruption by establishing new competition tribunals, staffed with newly appointed officials, rather than relying on existing, potentially corrupt, courts. However, this solution is in itself problematic. Not only must a developing country find the resources necessary to implement a new court, but also there may be little preventing already corrupt officials from appointing their own cronies into the newly established roles.

<u>Challenges in Enforcement</u>

Once a country has overcome the initial barriers to creating or introducing a competition law regime, it may face further challenges, particularly when it comes to enforcement. It has been previously mentioned that one of the defining characteristics of a developing country is its lack of resources. This can have a significant detrimental effect on competition law enforcement.

Enforcing already established competition law rules is, generally speaking, an expensive affair. Financial constraints can therefore severely limit competition enforcement, especially in *ex officio* cases.[47]

Financial resources are most commonly discussed when considering resource scarcity in relation to developing countries. However, developing countries can also suffer from a lack of human resources.[48] At the enforcement level, decision-makers must possess the relevant knowledge and expertise in order to understand, analyse and apply the laws to specific cases. Competition authorities therefore typically employ qualified lawyers, economists,

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[46] Ergas, Henry, 'Should Developed Countries Require Developing Countries to Adopt Competition Laws? Lessons from the Economic Literature,' (2009) European Competition Journal, Vol. 5, No 3 at 365.
[47] International Competition Network, *Lessons to be Learnt from the Experiences of Young Competition Agencies*, (2006) Competition Policy Implementation Working Group at 22.
[48] Gal, Michal; Fox, Eleanor. 'Drafting competition law for developing jurisdictions: learning from experience,' (2014) New York University Law and Economics Working Papers, No. 374 at 4.

and investigators with experience in applying competition law. Mistakes in the decision-making process can have grave consequences, extending well beyond the immediate effects on the conduct of the parties in a particular case.[49] Cases that have been decided wrongly could affect the incentives of other firms to act pro-competitively if the behaviour is erroneously labelled as anti-competitive.[50] On the other hand, if anti-competitive behaviour is mistakenly found to be legal, it may strengthen such behaviour from other firms. Moreover, these decisions can undermine the credibility and reputation of the national enforcement authority.

Lack of technical knowledge can also lead to limited or ineffective enforcement such as a limited capacity to identify anti-competitive practices and respond within a reasonable period of time. A study conducted by the Asia-Pacific Economic Cooperation (APEC) found that several developing countries were hesitant when it came to applying competition law due to a lack of experience in dealing with such cases.[51] This hesitation leads to a vicious circle where cases are never prosecuted and courts never gain the necessary experience.[52] Human resource deficiencies can also limit the creation of a competition culture within a developing economy. National competition authorities play a vital role in nurturing a competitive environment by directly influencing regulatory activities that discourage unnecessarily anti-competitive regulatory measures. It has been suggested that the role of advocating for the right provisions might be more important for the purposes of promoting competition than activities that repress anti-competitive conduct through enforcement.[53] However, if the competition authority is under-staffed, this role is often the first to be dropped.[54]

Another challenge a newly established national competition authority can face is not merely its lack of resources nor the control the government exerts over it but also the lack of a

[49] Dabbah, Maher M. 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime,' (2010) World Competition, Vol. 33, No. 3
[50] Gal (2014) at 19.
[51] Asia-Pacific Economic Cooperation (APEC), *Study on Competition Laws for Developing Economies,* (1999) at para. 2.9.4.
[52] APEC (1999) at para. 2.9.16.
[53] See Clark, John, 'Competition Advocacy: Challenges for Developing Countries,' (2005) OECD Journal: Competition Law and Policy, Vol. 6, No. 4.
[54] *Ibid.*

supportive environment. Market players in developing countries tend to be suspicious of what they see as competition policy interfering with their business practices.[55] Most domestic industries in these countries are usually highly concentrated and local business owners tend to be hostile towards the rules of free competition: they do not always accept that prices are set according to the invisible hands of the market rather than through their own collusion.[56] Finally, local politicians themselves often have misgivings on the benefits of competition law, particularly instances where the legal system was transplanted from elsewhere (see below section).

Scholars such as Douglas North regard competition culture as an informal institution. North argued that institutions are "the frameworks within which human interaction takes place. They are perfectly analogous to the rules of the game in a competitive team sport."[57] Institutional change is therefore, according to North, a "complicated process" due to the fact that "although formal rules may change overnight as the result of political or judicial decisions, informal constraints embodied in customs, traditions and codes of conduct are much more impervious to deliberate policies."[58] From this, it can be argued that for developing countries, the lack of competition law and competition cultures can be difficult to change. The absence of a competition culture can thus severely undermine the enforcement of competition law legislation in a developing economy.

Competition culture is often closely linked with a country's socio-economic ideology. Israel's attempts at developing an effective competition law enforcement regime is a good illustration of the challenges a country can face due to its lack of a competition culture. The Israeli Competition Act was established in 1959, only eleven years after the country itself was founded. It was implemented in response to public objections to hard-core cartels during the period when the country was attempting to create a working economic

[55] Bakhoum, Mor. 'Dual Language in Modern Competition Law: Efficiency Approach versus Development Approach and Implications for Developing Countries,' (2011) World Competition, Vol. 34, No. 3 at 495.
[56] *Ibid.*
[57] North, Douglas, *Institutions, Institutional Change and Economic Performance*, (1990) Cambridge University Press at 4.
[58] *Ibid* at 6.

infrastructure that could serve a small, developing, and immigrant country.[59] Israel at the time was also fighting severe financial problems. In order to address these issues, the government took on a highly interventionist and arguably paternalistic approach to industrial policy, regulating almost every aspect of the market. Israel's government had very little faith in the market's own natural operations and therefore exerted control over every its every facet by providing financial assistance to fund economic activity it perceived as beneficial, granting exclusivity rights to favoured suppliers and producers, and having direct control over prices and trade conditions of many goods and services.[60] Free competition was therefore virtually non-existent in the early years of the Israeli market and was actually discouraged on the basis that it would hinder the development of an efficient market.

During this period, the Israeli Antitrust Tribunal largely followed the government's controlling ideals and did not prioritise competition considerations in its decisions. Decisions in the 1960s and 1970s were mainly concerned with fulfilling the country's goals such as encouraging more exports and realising economies of scale, rather than an emphasis on individual consumer welfare and establishing effective competition conditions.[61] As a result, decisions such as the *Plywood* decision,[62] where the Tribunal allowed an agreement among plywood producers to fix prices and designate quotas on the basis that it would increase exports as well as productive efficiency, were allowed. This decision and many others often resulted in increased prices for consumers and increased dominance of already dominant firms in the Israeli market. Due to a lack of competition culture, both amongst the general public and the government itself, pro-competitive decisions were discouraged – as exemplified by the reception of the first Director of the Antitrust Authority, in which many of his pro-competitive recommendations were ultimately ignored.[63]

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[59] Gal, Michal, 'The Ecology of Antitrust: Preconditions for Competition Law Enforcement in Developing Countries,' (2004) Competition, Competitiveness and Development at 22.
[60] *Ibid.*
[61] *Ibid*.
[62] *Plywood Producers v Director of Israeli Competition Authority*, Antitrust file 202/240/5, 48 District Court Decisions at 158.
[63] Gal (2004) at 22.

In the 1980s, the socio-economic ideologies of Israel's government began to shift from an interventionist regime to a more pro-market ideal and the Competition Act began to have a significant, positive effect on the economy.[64] This change meant the government began to lower its own barriers to free operation of the market and instituted plans to privatise various sectors of the economy as well as liberalise trade in order to establish competition as the main power behind the functioning of the market.[65] In a more competition friendly environment, the Tribunal subsequently began to emphasise competition considerations more and started to apply long-term, dynamic economic analysis to its decisions.[66] In a short period of time, enforcement rates grew exponentially and free competition in the market was thoroughly embraced.

A national competition authority can improve the level of competition culture in its country through 'competition advocacy.' The ICN defines competition advocacy as,

> activities conducted by the competition authority related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other governmental entities and by increasing public awareness of the benefits of competition.[67]

John Clark identified three preconditions necessary for competition advocacy to be successful:[68]

1. First, the competition authority or agency must be wholly independent and free from political influence from both inside and outside of the government. Clark described two kinds of independence. Structural independence, which can have ambiguous effects on advocacy. If the competition authority is entirely separate from other sectors of the

[64] *Ibid.*
[65] Gal at 23.
[66] *Ibid.*
[67] International Competition Network, Advocacy Working Group, 'Advocacy and Competition Policy,' Report presented at the first ICN conference in 2002. Available at www.internationalcompetitionnetwork.org/media/library/conference_1st_naples_2002/advocacyfinal.pdf.
[68] Clark, John, 'Competition Advocacy: Challenges for Developing Countries,' (2005) OECD Journal: Competition Law and Policy, Vol. 6, No. 4 at 70-72.

government, it may not have sufficient access to knowledgeable decision makers in the executive legislative branches. On the other hand, operational independence gives the authority the freedom to take a stance and make opinions independent from those held by the public and private sectors.

2. Second, the agency should have sufficient financial and human resources in order to maintain both enforcement and advocacy activities. This is highly problematic for developing countries because, as detailed above, competition agencies in these countries almost always lack the necessary resources for both. These agencies therefore often find themselves having to make difficult decisions on how to balance available resources between law enforcement and advocacy concerns.

3. Finally, in order to be respected, the competition agency must gain credibility as an effective and impartial advocate for competition. This reputation must extend to all facets of society in both public and private sectors. Businesses, workers, and consumers must appreciate how competition benefits the economy and must also trust the competition authority or agency as an advocate for an effective competition policy. The agency's approach here must therefore cover multiple features such as education (crucial in dispensing information on how competitive markets operate and the associated benefits), and experience (consumers must be able to see the gains resulting from the agency's activities).

Developing countries often find themselves in a conundrum of having to allocate resources between enforcement and enriching the country's competition culture. Some scholars have argued that in the first few years of a national competition authority's establishment should allocate more of its resources towards projects supporting competition advocacy and only once a competition culture has been properly instituted should the focus turn to enforcement.[69] According to David Lewis, attempting to enforce competition legislation without a competition culture in place will only lead to a situation where almost every decision the competition authority makes will be challenged by the companies involved, often in front of national tribunals where the decision-makers are not equipped to handle competition law cases.[70] Simultaneously, local politicians will condemn the authority for undermining the country's industrial development by allowing local oligopolies to engage in anti-competitive conduct. Finally, the public will largely be reluctant to interfere due to a lack of general knowledge of its rights as consumers.

Proposals for Reform for Developing Countries

In addition to a lack of resources, another obstacle a developing country faces when building its own competition law system is confusion over which model to adopt. For developing countries, merely emulating the competition laws of developed countries may not be sufficient in meeting their own specific needs. On the other hand, policymakers in developing countries are likely to have little to no background expertise in competition law matters. Therefore, it is clear that the first step in establishing an effective competition law should be to develop a basic framework, which developing countries can refer to.

Eleanor Fox suggests six models in which developing countries may implement and enforce new competition laws:[71]

1. The U.S. model: this model begins with the presumption that antitrust law is to be used solely for efficiency purposes and that efficiency is produced by a predominately *laissez-faire* approach. This model therefore only contains minimal antitrust laws save for laws against cartels. A competition or antitrust system based wholly on the U.S. model has been criticised by some policy makers and scholars as less likely to create an open market. As a

[69] Clark, John, 'Competition Advocacy: Challenges for Developing Countries,' (2005) OECD Journal: Competition Law and Policy, Vol. 6, No. 4

[70] Lewis, David. 'Embedding a Competition Culture,' (2013) in Sokol, Daniel D et al. *Competition Law and Development*, Stanford University Press.

[71] Fox, Eleanor, 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries,' (2012) Law & Economics Research Paper Series, Working Paper No. 11-04 at 12-17.

result, developing countries are less likely to choose this model without first making a few changes.

It is argued here that a system based wholly on the United States would also not address the issue developing countries face with regards to international cartels. In addition to encouraging the development of an open market, any competition law system adopted by a developing country should have the necessary sanctions in place in order to adequately enforce its laws against any international cartel that targets it. While this model may be enough to address the issue of domestic cartels, it is questionable whether a system based on this model would be effective when dealing with international cartels.

2. The second model Fox describes also begins with the U.S. model but alters some of the laws and standards in order to accommodate the market situations of developing countries. This assessment may account for differences between developed and developing countries that a wholly U.S. model would not. For instance, a developing country may choose to emphasise a provision that deters dominant firms from exercising their competitive powers in a monopolised market over rules that allow dominant firms limitless freedom to engage in predatory prices. Conversely, they may also choose to maintain low prices for consumers, however temporary the situation. Fox notes that developing countries are also unlikely to base their competition policy on this model as, like in the first model, the idea that competition law be used only to prohibit inefficient practices is a fairly narrow outlook on competition law.

   The arguments against adopting this model are therefore very similar to the arguments against adopting the first model. It was discussed earlier in this chapter that developing countries often adopt competition policies for a number of reasons that go beyond protecting competition in the market, such as improving socio-economic welfare and encouraging economic development. Therefore, whichever model a developing country chooses to base its competition law system on should reflect these objectives.

3. The third model Fox discusses is based on EU competition law and those of its Member States. This model is based on rules allowing for more access to open markets and remains sceptical of state involvement that reduces or restricts competition. Unlike the previous two models, which were based on U.S. antitrust law, EU competition law considers whether the actions of the market players are 'sealing off the market' and preventing open access.

   Developing countries are more likely to adopt this model over the previous two. It has been argued that between the U.S. and the EU, the EU's competition law system is the more favoured of the two. This model would also address the issue many developing countries share regarding the high levels of state involvement in their markets.

4. The fourth model combines developing countries that have already established a working competition law system with the open market strategy of EU law. Fox places particular emphasis on South African case law, which serves as a good illustration of the challenges of balancing effective enforcement mechanisms with a lack of resources. It is important to note that South African competition law also contains special provisions designed to help disadvantaged classes and small and medium sized enterprises. These provisions will be elaborated upon in the next chapter.

   However, for developing countries that have not yet established their own competition law systems, this model would not be feasible. On the other hand, laws limiting abuses of the state and state-owned firms may encourage more privatisation of industries with a large governmental presence, thereby improving the competitiveness of the market as a whole.

5. The fifth model introduces the concept of fairness amongst domestic market players. It is especially suspicious of large multinational corporations and acknowledges the fact that many developing countries have been formed and influenced through colonialism, which may have led to exploitation and abuse. This model is best suited for developing jurisdictions that wish to best support the entrepreneurial enterprises of their local market players. This model is specifically designed to support local, independent firms, over the interests of larger firms. Fox highlights the example of the tourism industry in the Caribbean where larger hotel or travel chains obtain exclusive contracts, thereby shutting out local businesses. At face value, this may not appear to be a problem if competition between those chains ensures consumers are not subject to unfair prices. However, supporting local businesses is vitally important in the development of a developing country's economy.

   A competition law system based on this model may therefore address some of the problems associated with foreign direct investment (FDI), which will be discussed in Chapter Five. While FDI is an excellent way of encouraging more competition in the market, it may lead to an overabundance of foreign, dominant firms in the developing country's market. A competition law system based on this model would therefore be able to support domestic firms while limiting the spread of foreign firms.

6. Finally, rather than adopt any of the above models, developing countries may choose to devise their own system in accordance with their individual needs, with references to the methods of the previous five models, especially the third, fourth, and fifth. This model is however, particularly challenging as any model that deviates from the standard already set by developed jurisdictions is unlikely to be recognised as a valid choice.

   In order to successfully implement this model into an effective competition law system, developing countries must be certain their policymakers have the necessary background in competition law issues.

It is important to note that Fox does not consider any one of her six models to be mutually exclusive and that developing countries wishing to implement an effective competition regime can adopt any combination of the above models into their system.[72] In this way, developing countries can ensure that any competition law system it adopts will be specifically tailored to fit in with their economic and political structure.

Legal Transplantation

Rather than build a competition law system from the ground up, many developing countries find it easier and more economical to take an already established system from a more developed jurisdiction and transplant it into their own legislation. By modelling their competition laws on another jurisdiction's, developing countries can often spare themselves the expense and technical difficulties associated with forming an entirely new system. However, there can also be significant disadvantages in adopting a ready-made competition regime or even discrete aspects of it. It is therefore important that countries seeking to transplant existing competition laws conduct a thorough study weighing both the advantages and disadvantages to such an approach.

For the purposes of this chapter, legal transplantation is defined as the adoption into the national legal system by one country (the 'adopter') of laws established in a foreign country (the 'originator'). The process of legal transplantation has been the subject of much debate amongst legal scholars. Watson, who first coined the term 'legal transplant' considered law to be a collection of codified rules, easily copied and applied elsewhere since, "there is no simple correlation between society and its law."[73] This view has been roundly criticised as an overly simplistic stance on the relationship between society and its legal system. Legrand, one of Watson's most vocal critics stated that a wholly transplanted system is unlikely to succeed because the process of implementing it would involve transplanting an entire legal culture, including doctrines, procedures and institutions developed for the origin

[72] *Ibid.*
[73] Watson, Alan. *Legal Transplants: An Approach to Comparative Law.* (1974) Edinburgh: Scottish Academic Press at 108.

country's own specific needs.[74] Proponents of legal transplantation therefore recognise that transplanted laws will likely be interpreted in different ways in order to best serve the adopting country's own interests.

There are several advantages to legal transplantation, particularly for developing countries. Developing countries or countries with little experience in competition law matters often face difficulties in the early stages of development. It is often a challenge to determine how much emphasis should be placed on a particular provision or what content ought to be included. Furthermore, if the transplanted laws originate from a jurisdiction with a long history of successful implementation, interpretation and plenty of scope for academic discussion, they are more likely to succeed.[75] The size of the origin country is also an important factor to consider. In general, larger jurisdictions, such as the United States and the European Union, are more likely to have a greater turnover in the number of decisions interpreting and applying its laws, thus providing the transplanting country with more resources to consult when enforcing its own laws.[76] Of the two jurisdictions, the EU is the more commonly borrowed from, with more than 43 jurisdictions adopting the EU's prohibition on monopolisation.[77] Moreover, the more developed the competition law system, the greater the databank of guidelines and academic articles offering different interpretations developing countries may access. International forums such as OECD and the ICN have also published discussions focusing on the laws of developed jurisdictions.[78] Developing countries may also benefit from the direct guidance of the origin country itself. In doing so, both the transplanting country and the transplanted country can work to mutually benefit each other by creating joint solutions to cross-border problems.

It can also be argued that many competition law systems cover largely the same issues and that anticompetitive behaviour is the same no matter which jurisdiction one turns to. Professor Michal Gal put forth the argument that all competition laws are comprise of 'fit-all' formulas, that have been developed to address the specific competition law issue, be it

[74] Legrand, Pierre. 'What 'Legal Transplants',' (2001) in Nelken, David; Feest, Johannes (eds), *Adopting Legal Culture,* Hart Publishing (Oxford) at 55.
[75] Gal (2014) at 7.
[76] Gal (2014) at 7.
[77] Gal, Michal; Padilla, Jorge, 'The Follower Phenomenon: Implications for the Design of Monopolization Rules in a Global Economy,' (2010) Antitrust Law Journal, Vol. 76 at 903.
[78] *Ibid.*

merger regulation, cartels and antitrust, or abuse of dominant position, to which they apply in the best possible way.[79] It can therefore be stated that one should not expect developing countries to reinvent the wheel and concoct their own competition law concepts. Broken down, all competition law systems can be said to have the same goal: prevent anticompetitive behaviour and promote consumer welfare. The idea of common or universal competition law goals is strongly encouraged by the ICN.[80] Referred to as 'convergence,' the ICN has made it its ultimate goal and advocates the importance of striving to achieve convergence between its members. It has been lauded as the 'new universal church of modern competition law,'[81] and many have stressed it should be considered as the main objective of competition law in an increasingly globalised world. However, critics of the notion of convergence have pointed out that the theory essentially requires developing countries to adopt the standards and ideals of the western world, namely the U.S. and Europe.

An example of legal transplantation of one jurisdiction's competition laws into another can be seen in the Singaporean competition law system. Singapore's Competition Act was enacted in 2004 and revised in 2006.[82] It is almost a direct transplantation of the UK Competition Act 1998, which was itself modelled on Articles 101 and 102 of the TFEU. As such, it covers the standard prohibitions on anticompetitive agreements and abuse of dominant position. Furthermore, Singapore's broad definition of an undertaking, which covers activities of state-owned companies, is taken solely from EU case law.[83] Section 47 of the Competition Act in particular, which refers to the 'abuse of dominant position in any market in Singapore,' draws heavily on existing European jurisprudence.[84] The principles

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[79] Gal, Michal, 'Size does matter: the effects of market size on optimal competition policy,' (2001) University of Southern California Law Review, Vol. 74 at 1441.

[80] Fox, Eleanor, 'Linked-In: Antitrust and the Virtues of a Virtual Network,' (2009) The International Lawyer, Vol. 43 at 151.

[81] Drexl, Josef, 'Competition Policy in Developing Countries – What Does it Make Different from the Developed World?' presentation at the 3rd annual competition conference, South Africa, 3 September 2009, available at: http://www.compcom.co.za/presentations-third-annual-competition-conference/.

[82] Competition Act (Chapter 50b) (originally Act 46 of 2004; revised 2006), available at http://www.ccd.gov.sg/content/ccs/en/Legislation/Competition-Act.html.

[83] Dowdle, Michael W.; Gillespie, John; Maher, Imelda, *Asian Capitalism and the Regulation of Competition: Towards a Regulatory Geography of Global Competition Law*, (2013) Cambridge University Press at 239.

[84] Section 47 on Abuse of Dominant Position states:

1) Subject to section 48, any conduct on the part of one or more undertakings, which amounts to the abuse of a dominant position in any market in Singapore, is prohibited.

implemented by the General Court and the European Court of Justice can also be found in the Competition Commission of Singapore's Guidelines on the Section 47 Prohibition (the CCS Guidelines). For instance, in keeping with principles established in EU case law, the CCS Guidelines prohibits firms with a dominant position in the market from engaging in commercial conduct that would have a detrimental effect on competition. In addition, it also refers to dominant firms as taking part in exclusionary behaviour, such that other competitors are prevented from entering or competing in the relevant market.[85]

Regardless of these similarities, it cannot be said that Singapore's competition law system is wholly identical to that of the UK or EU. In recognition of its small and open economy and its dependence on imports as well as its vulnerability to cartel behaviour from foreign firms, Singapore has made a number of deviations from EU and UK law. For example, the definition of what constitutes a 'dominant position' is much wider under section 47 of the Competition Act than that of Article 102 TFEU.[86] In contrast to the EU's definition, which covers only undertakings that have a dominant position within the EU, or in one of its Member States, the Singaporean definition of a dominant position encompasses firms that hold a dominant position in another jurisdiction and firms that may belong to a transnational market in Singapore with a largely foreign customer base.[87] Rather than simply transplanting the entirety of the UK or EU competition law system, the Competition Commission of Singapore were careful to make the necessary changes in order to implement the European the competition law model in a way that best fit their own economic needs.

Despite the benefits associated with legal transplantation, many scholars remain highly critical of the practice. The most common criticism expressed in regards to transplanting an entire competition law system is the difference between the economies of developed and developing countries.[88] If a developing country fails to account for these differences, the transplanted laws are more likely to fail. The competition laws system of a developed

[85] 'CCS Guidelines on the Section 47 Prohibition,' (2007) Competition Commission of Singapore.
[86] Competition Act at Chapter 47.3.
[87] Whish, Richard; Townley, Christopher, *New Competition Jurisdictions: Shaping Policies and Building Institutions*, (2012) Edward Elgar Publishing at 55.
[88] Fox, Eleanor. 'Economic Development, Poverty and Antitrust: The Other Path,' (2007) Southwestern Journal of Law, Vol. 13 at 211.

country is likely to have very different goals and priorities than those of developing countries. Difficulties can arise when attempting to use a legal system designed to support an already functioning competitive market as the foundation of a competition law policy that is meant to stimulate a weak economy.

There is also a psychological element in legal transplantation. External pressure on domestic policy-makers may affect the likelihood a transplanted legal system will be followed effectively. Recognition that a particular set of laws is legitimate is an important factor in ensuring compliance, especially when the laws originate from a different country.[89] This perception stems not only from an assessment of a law's properties but also the source and the manner in which it was instituted. For instance, German and Japanese resentment over the compulsory implementation of a competition law system following the Second World War may have affected its success.

Furthermore, once a competition law has been transplanted, the adopter of the new system then faces the daunting task of applying the new laws. Successful implementation and enforcement of competition laws entails far more than simply 'cutting and pasting' one country's legislation into another's. Understanding how that law is meant to be applied and interpreting the provisions in a way that best serves the new system's objectives is just as important in the transplantation process. Even with guidance on competition law terms, developing countries may struggle with deciphering the complexities of the system they are transplanting, particularly if the laws need to be translated into their native language.

For instance Robert Bork notes, in relation to the United States' Sherman Act, '[the] bare language of the Sherman Act conveys little…'[90] the provisions in the Sherman Act are therefore continuously being interpreted and reinterpreted by the U.S. courts. If one only looks at section 2 of the Sherman Act[91], it provides little guidance on how these terms should be interpreted. Even in the EU, the most commonly transplanted system in developing countries, Article 102 of the TFEU provides few details on what constitutes a

[89] Gal (2014) at 10.
[90] Bork at 57.
[91] Section 2 of the Sherman Act states: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce…"

violation with regards to provisions prohibiting excessive pricing, predatory pricing, and duties to deal. The difficulties of applying the law solely based on the words of the statute with no guidance as to their application was acknowledged by then-Judge Breyer in the 1st Circuit decision in *Barry Wright Corp v. ITT Grinnell Corp*:

> [While] technical economic discussion helps to inform the antitrust laws; those laws cannot precisely replicate the economists' (sometimes conflicting) views. *For, unlike economics, law is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients.* Rules that seek to embody every economic complexity and qualification may well, through the vagaries of administration, prove counter-productive, undercutting the very economic ends they seek to serve.[92] [Emphasis added].

The same legislation applied in similar cases can sometimes lead to different methods of interpretation, even in the jurisdiction in which the legislation originated. For example, section 1 of the Sherman Act was applied in both the cases of *Dr Miles Medical Co v. John D Part & Sons Co*,[93] and *Leegin Creative Leather Prods v. PSKS Ltd*.[94] Both cases, which albeit were decided almost one hundred years between each other, involved the same conduct of vertical price fixing. *Dr Miles Medical Co* originally applied a *per se* prohibition on resale price maintenance. *Leegin* overturned this ruling and held that such conduct must be judged on the basis of the rule of reason. While this may seem like a drastic shift between the two cases, in the interim years between the *Dr Miles Medical Co* ruling and *Leegin*, the courts had already begun to move away from *per se* applications of antitrust laws. Indeed this can be seen almost immediately following the *Dr Miles* decision. Just a short month after the *Dr Miles* ruling, the case of *Standard Oil Co. of New Jersey v. United States* moved away from applying a *per se* prohibition on monopolising the petroleum industry and towards a rule of

[92] 724 F 2d 227 (1st Cir 1983) 234.
[93] 220 US 373 (1911).
[94] 551 US 877 (2011).

reason approach.[95] More specifically, the case of *United States v. Colgate & Co.,* which dealt with the issue of vertical price restraints in vertical agreements, also favoured a rule of reason approach over applying the rules *per se*.

It is questionable whether developing countries would be able to develop and evolve a transplanted competition law system in the same way as if they had designed one from the ground up to specifically target their needs. As William Twining notes, '[the] most important factors in a reception are the underlying values, principles, and political interests that motivate it rather than the details of the political rules or provisions.'[96] Therefore, it may be argued that without the background knowledge or political and economic motivations that were behind the establishment of the originator's laws, the adopting country may find itself struggling with applying the new laws effectively, rendering the transplanted system itself moot.

Developing countries wishing to adopt transplanted competition law systems would therefore do well to benefit from some receiving some technical assistance from the origin country. For instance, the European Commission has provided the Chinese government with extensive technical assistance after China based Article 45 AML regarding rules on investigation suspensions partly on Article 9 of Regulation 1/2003. Its definitions of what constitutes a 'relevant market' under Article 12 AML is also clearly taken from Western ideal of competition law. Thus, in November 2003, the Directorate General to the European Commission partnered with the Chinese Government to establish the EU-China 'Competition Policy Dialogue.'[97] This is a permanent instrument, which allows for continuous, transparent discourse between the two parties. In order to increase the EU's technical and capacity building assistance to China, a number of MOFCOM officials were invited to Brussels in 2004 for the purpose gaining practical experience in dealing with competition law cases.

[95] 221 US 1 (1911).
[96] Twining, William, 'Diffusion of Law: A Global Perspective,' (2004) Journal of Legal Pluralism, Vol. 1 at 27.
[97] EU-China 'Competition Policy Dialogue,' agreed on 6 May 2004, available at http://ec.europa.eu/comm/competition/international/bilateral/cn2b_en.pdf.

The ways in which developing countries can seek technical assistance and its effectiveness in helping developing countries achieve an effective competition law system will be discussed in more detail in the final chapter.

Regional Agreements and Competition Law

As discussed in the previous chapter, jurisdictions such as the EU commonly sign regional agreements with their partners in order to better combat the issue of international cartels as well as address any other issues common between them. Regional agreements can also be a useful tool for developing countries that may not have the resources to spare on a competition law system of their own. There are many different types of regional agreements, however, they can generally fall into one of two categories: loose integration such as cooperation agreements or tight integration such as customs unions that have a centralised competition policy. According to Fox, regional agreements can address six challenges developing and smaller economies face with regards to the effectiveness of their competition systems:[98]

1. Economies of scale in competition law enforcement: on their own, developing jurisdictions may lack the necessary resources to finance and staff their own competition authority. A regional agreement with a centralised system can help these countries pool their resources.

2. Leverage: developing countries acting alone may also lack the bargaining power needed to pursue, resist, or enforce laws challenging anticompetitive conduct abroad. By acting together through a regional agreement, they may be able to convince more powerful countries into obtaining and sharing crucial documents. They may also be able to prevent these countries from exploiting them, for example, by persuading them to prohibit their own firms' export cartels from targeting developing countries.

[98] Fox, Eleanor, 'Competition, Development and Regional Integration: In Search of a Competition Law Fit for Developing Countries,' (2012) NYU Law and Economics Research Paper No. 11-04 at 19.

3. Influence: alone, developing countries may lack the influence or voice required to maintain the rules and standards set for their specific needs for development.

4. Information and scope: a regional competition authority is likely in a better place to detect international conduct that places undue restraints on the market. This may also allow the authority to more effectively address regional trade barriers.

5. Combating parochialism: the European Union, for example, can combat parochialism in its member states by outlawing state measures that result in detrimental effects on their neighbours as well as preventing states from discriminating in favour of 'their own.'

6. Remedies: as can be seen in the European Union, in order to be effective, remedies addressing international cartels may need to encompass an entire region rather than simply one country or territory.

Regional agreements may be easier for developing countries to enter into rather than implementing a competition law system from the ground up, however, they can also present a few challenges, particularly if a country's priorities includes competition law issues such as addressing the problem of international cartels. For instance, regional agreements usually take the form of trade agreements, negotiated and enforced by the trade officials in territories that want to implement free trade by abolishing internal trade barriers. In these types of agreements, competition law is normally merely an afterthought and may not be effectively enforced even when they are included.[99] This can be seen in the example of the North American Free Trade Agreement (NAFTA). While NAFTA does contain a chapter on competition, the implementation of it, which was meant to be required as part of the negotiation process, never took place. NAFTA also authorised a report on the competition chapter; however, this report was also never submitted. The chapter on competition

[99] Gerber, David. *Global Competition: Law, Markets and Globalization*. (2012) Oxford University Press at 110.

therefore has largely been ineffective, despite the fact that the antitrust authorities of the three parties (Canada, the United States, and Mexico) have cooperated on other, less prioritised, issues.[100] This lack of a Canada-U.S.-Mexico regional competition law or policy has had significant effects on the relationships between these countries. When Mexican telecoms companies imposed anticompetitive measures that harmed the American company AT&T, rather than settle the dispute through NAFTA, the U.S. brought the case before the WTO under the WTO Telecommunications Annex in the General Agreement on Trade in Services (GATS), where it subsequently won.[101]

Signatories to a regional agreement must also contend with the potential for conflicts of jurisdiction between the regional authority and international organisations, such as the WTO. Conflict may also have been a factor in the United States decision to bring their dispute before the WTO rather than through NAFTA. Conflicts of jurisdictions can extend to cases where a regional trade agreement (RTA) shares similar provisions with the WTO. For instance, an export cartel formed by one RTA member that affects the other members could potentially violate the laws in both the RTA and the WTO. This could create the problem of identifying the most appropriate forum in which to bring the dispute. Again, many scholars remain divided over which one would take precedence in a conflict of jurisdictions.[102] At face value, the Dispute Settlement Understanding (DSU) can shed some light on this situation. The Appellate Body in *EC – Bananas III* highlighted Article 23 of the DSU, stating that the Dispute Settlement Body (DSB) had exclusive jurisdiction in any case regarding violations of WTO law.[103] Once a case has been brought before the WTO, no other forum has the authority to adjudicate on the matter.[104] Therefore, in cases where an export cartel violates both an RTA's provisions and the WTO, it may be simpler to merely bring the case before the DSB.

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[100] Lloyd, Peter John; Vautier, Kerrin M., *Promoting Competition in Global Markets: A Multi-national Approach.* (1999) Edward Elgar Publishing at 104.
[101] *Mexico – Measures Affecting Telecommunications Services*, WT/DS204/R, adopted 2 April 2004.
[102] See Yang, Songling, 'The Solution for Jurisdictional Conflicts Between the WTO and RTAs: The Forum Choice Clause,' (2014) Michigan State International Law Review, Vol. 23, No. 1.
[103] *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (III), WT/DS27/AB/R, adopted 9 September 1997 at para 136.
[104] *European Communities – Regime for the Importation, Sale and Distribution of Bananas* (III), WT/DS27/AB/R, adopted 9 September 1997 at para 136.

However, many RTAs contain their own dispute settlement procedures. In instances where a case violates both an RTA provision and the WTO, the outcome of the case would differ drastically in each forum.[105] A WTO panel would only discuss the issues relevant to the WTO while an RTA forum would do likewise with the issues under its own agreement, which would likely result in very different claims and remedies.[106] A member of an RTA may therefore prefer to have the RTA address its grievances regarding an export cartel conducted by another member states on the basis that the RTA's forum would be more suited to consider issues that are specific to that region. Nevertheless, regardless of any jurisdictional claims an RTA may have, the WTO remains reluctant to divest itself of its own claims to jurisdiction. In the *Mexico – Soft Drinks* case, the Panel declined to relinquish its jurisdiction in favour of NAFTA.[107] While both *Mexico – Soft Drinks* and *Argentina – Poultry*[108] briefly considered the possibility of WTO panels giving up their jurisdiction in cases where there is a 'legal impediment' preventing them from exercising that jurisdiction, the definition of what a 'legal impediment' would entail has never been addressed. Indeed, the Appellate Body in *Mexico – Soft Drinks* went so far as to refuse to elaborate on this concept by declining to consider the circumstances in which a legal impediment could exist.[109] The reluctance of both WTO panels and the Appellate Body have shown in defining the parameters in which their jurisdiction to decide cases could potentially be limited indicates that the WTO is unlikely to relinquish any jurisdiction they may have in a case in favour of an RTA.

While regional agreements can allow some countries to pool their resources, the problems associated with national competition law enforcement can also arise in regional agreements, even in cases where they have not relinquished jurisdiction to another international body. The nature of a regional agreement is a centralised system, with unified enforcement. Financial resources may still be inadequate. Signatories must be able to cover their share of the costs and in some situations, members may fail to pay or simply not

[105] Kwok, Tiffany. 'Conflicts of Jurisdiction between the WTO and various Regional Trade Agreements,' (2010) LLM Dissertation, King's College London.
[106] See the arguments made by the EC Court of Justice in European Economic Area, Opinion 1/91, [1991] ECR I-6084.
[107] *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, adopted 7 October 2005.
[108] *Argentina – Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, adopted 19 May 2003.
[109] *Mexico – Soft Drinks*, AB Report, para. 54.

consider it a priority. The same issues with the requirement for technical knowledge and expertise during the enforcement process such as advocacy, conducting investigations, prosecution, decision-making, and appeals are also present. Members of a regional agreement may be loath to share their already scarce resources, preferring instead to keep them for themselves.

If countries already have competition law enforcement mechanisms in place, they may need to relinquish these powers if they have signed a regional agreement, even for conduct that affects their own domestic market. For instance, the West African Economic and Monetary Union (WAEMU) requires members to defer domestic judgement until the regional authority has made a decision.[110] For countries whose competition law enforcement mechanisms are ill equipped or lack the experience to deal with trans-border competition law issues, deferring to a regional authority may be the ideal solution. On the other hand, this can be problematic as domestic issues may go unresolved for long periods of time. In cases where members are only obliged to give up the right to cross-border enforcement, gaps may still emerge if the regional authority is not capable or prepared to enforce the law. Studies have shown that competition law enforcement against transnational anti-competitive offences, such as international cartels, in regional agreements, particularly those involving developing countries, is rarely effective.[111] There is also the risk that developing countries will become utterly dependent on the possibility of regional enforcement, however effective enforcement on a regional level may not become a reality for many years.

Mercosur

Mercosur is comprised of six member states: Argentina; Brazil; Paraguay; Uruguay; Bolivia and Venezuela. Associate countries include Chile, Peru, Colombia, Ecuador, and Suriname with New Zealand and Mexico as observer countries. Although established in 1991 as a

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[110] Bakhoum, Mor; Molestina, Julia. 'Institutional Coherence and Effectivity of a Regional Competition Policy: The Case of the West African Economic and Monetary Union (WAEMU), (2011) Max Planck Institute for Intellectual Property and Competition Law, Research Paper No. 11-17 at 3.
[111] UNCTAD, 'Review of the experience gained so far in enforcement cooperation, including at the regional level,' (2011) TD/B/C.I/CLP/10 at 7.

trading bloc and therefore primarily concerned with promoting free trade and tearing down barriers to entry, Mercosur does contain some provisions governing competition law. The Fortaleza Protocol for the Defence of Competition, which was signed in December 1996, deals with competition related issues.[112] It borrows heavily from the EU model with regards to the substantive provisions. For instance, Article 4 of the Protocol prohibits 'agreements and concerted practices whose purpose or final effect is to restrict, limit, falsify or distort competition or access to the market, as well as abuse of dominance that affects intraregional trade.'[113] For member states such as Bolivia, which has been identified as one of the poorest countries in South America and has a very limited competition law system, the Fortaleza Protocol is the only recourse it has to address any competition law issues it may have.

At the moment, Mercosur's competition policy operates at primarily a national level. Member states are required to enact their own competition law systems in line with the provisions set out in the Protocol. Two intergovernmental bodies, the Mercosur Trade Commission, and the Committee for the Defence of Competition enforce the Protocol itself. The Mercosur Trade Commission carries out adjudicative duties while the Committee for the Defence of Competition, which is made up of representatives from member states' national competition authorities, investigates cases in conjunction with the national authorities of the defendant's domestic state. While Mercosur is an acceptable way to regulate competition law issues between member states, it may not be the most effective platform for addressing international cartel abuses. This is because Mercosur is predominately concerned with regulating competition law issues between its own member states. Under the Fortaleza Protocol, competition authorities of member states initiate proceedings either *ex officio* or after receiving a complaint from an interested party.[114] The national authorities must first determine whether the alleged anticompetitive behaviour has any implications under Mercosur. This determination must include evidence of the economic effects of the behaviour in question as well as a definition of the relevant market.

[112] Common Market of the Southern Cone (Mercosur), Protocol on the Defence of Competition, the 'Fortaleza Protocol,' available at www.ftaa-alca.org/Wgroups/WGCP/English/cpa/cpa3_e.asp (last visited 15 July 2016).
[113] See also article 6, which defines the types of practices (agreements and abuses of dominance) that violate the Protocol under article 4.
[114] Article 10, Fortaleza Protocol.

In this regard, Mercosur can address cartels domiciled in member state jurisdictions that target other member states, but it does not have the authority to protect its members from international cartels that are otherwise located.

ECOWAS

Another example of how competition law can be integrated in a regional agreement can be seen in the Economic Community of West African States (ECOWAS), which was established in 1975. Created in order to establish a single trading bloc, ECOWAS was founded in order to help its member states achieve 'collective self-sufficiency.' There are currently 15 member states: Benin; Burkina Faso; Cape Verde; Gambia; Ghana; Guinea; Guinea-Bissau; Ivory Coast; Liberia; Mali; Niger; Nigeria; Senegal; Sierra Leone; and Togo.

In spite of its main object to establish a common market, ECOWAS was not initially concerned with implementing a competition policy, which is generally necessary to ensure the common market's success. It wasn't until 2007 that a framework for a competition policy was published, which paved the way for the formation of a competitive market. As a regional competition law policy, the document, entitled 'ECOWAS: Regional Competition Policy Framework' stated, 'ongoing efforts to facilitate economic integration in the ECOWAS sub-region and to promote regional economic growth will be meaningfully enhanced by the adoption of a sound regional framework for competition law.'[115] This statement strongly implies that the objectives of ECOWAS' competition law policy were to promote regional integration and facilitate economic development.

However, despite publishing what looked like a promising competition law policy, ECOWAS has not yet formally enacted any substantive competition law provisions. In the 'Regional Competition Policy Framework,' it identified four measures that needed to be fulfilled in order to implement an effective competition law regime.[116] First, adoption detailed competition laws should take place as soon as possible. Second, regulations pertaining to

[115] ECOWAS, 'ECOWAS: Regional Competition Policy Framework,' (2007) available at http://www.ecowas.int/publications/en/actes_add_commerce/1.Regional_Competition_Policy_Framework-final-P.pdf.
[116] Ibid.

how the laws are to be implemented, including procedures for merger regulation, sanctions for violations of the competition law rules, and steps needed in order to file complaints or initiate investigations should be defined. Third, a regional competition law authority must be created in order to enforce the competition laws. Finally, an advisory board with dual competence empowered to assist in developing the internal procedures that the competition authority must follow and to assist the competition authority and any other regional institutions with the task of implementing the competition laws.

WAEMU

While ECOWAS as a whole was largely unsuccessful in implementing its lofty goals of a regional competition law system, the West African Economic and Monetary Union, a customs and currency union comprised of members of ECOWAS. In support of its objectives to promote greater economic competitiveness through open markets, WAEMU has also incorporated a set of competition law rules. Lauded as having one of the most comprehensive collection of competition laws contained in a regional agreement, it borrows heavily from the EU competition law framework, most notably the prohibitions on anticompetitive agreements and abuse of dominance that may affect intraregional trade.[117]

WAEMU's competition laws are contained in three Regulations and two Directives, which regulate and sanction anticompetitive agreements, abuses of dominant position, and state aid.[118] It also maintains transparency in the financial relationships between member states and public enterprises, as well as between public enterprises and international organisations in addition to facilitating cooperation between WAEMU's Commission and member states' national competition law authorities.[119] WAEMU's Commission has the sole responsibility of applying the regional competition law with assistance from the member states. In theory, under Directive 02/2002/CM/UEMOA, the national competition law authorities of the member states are required to cooperate with the Commission and assist

[117] Article 88 WAEMU
[118] Règlement 02/2002/CM/UEMOA; Règlement 03/2002/CM/UEMOA; Règlement 04/2002/CM/UEMOA; Directive 01/2002/CM/UEMOA; Directive 02/2002/CM/UEMOA.
[119] Ibid.

in the investigation of competition cases. In practice, member states often lack the human and financial resources necessary to equip their national competition law authorities with the tools needed to effectively collaborate and assist the Commission.

In spite of these difficulties, WAEMU is the only trading bloc (with the obvious exception of the European Union) to successfully apply its competition laws. In 2004 and 2005, the Commission settled two cases involving a dispute in the framework of the West African Gas Pipeline Project between Benin and Togo.[120] In 2005, it issued an injunction ordering Senegal to cease the sate aid it was providing to a firm.[121] While these instances of regional application of competition laws are promising, they remain limited to addressing the competition issues between member states only. With regards to investigating and prosecuting international cartels, WAEMU suffers from the same limitations that plague its member states. The Competition Commission also has insufficient resources when faced with the threat of an international cartel. It does not have the capacity to launch its own investigations; it lacks independence beyond the boundaries of WAEMU; and it is severely understaffed.[122]

While regional and preferential trade agreements may be ideal in addressing anticompetitive behaviour between member states, they do little when a jurisdiction is faced with an international cartel imposed by a non-member state. Members of a regional agreement, especially those of developing economies can find it difficult to apply their laws extraterritorially. The formation of such an agreement in order to combat international cartels is therefore a bandage solution at best and does little to address the overall problem faced by developing countries.

Conclusion

[120] UNCTAD, 'Voluntary Peer Review of Competition Policies of WAEMU, Benin and Senegal,' (2008), UNCTAD, at 62-3.

[121] Bakhoum, Mor, 'Delimitation and Exercise of Competence between the West African Economic and Monetary Union (WAEMU) and its Member States in Competition Policy,' (2006) World Competition, Vol. 29, No. 4 at 665.

[122] Drexl, Josef, *Competition Policy and Regional Integration in Developing Countries*, (2012) Edward Elgar Publishing at 106.

There are many reasons why a developing country may wish to adopt their own competition law regime, not least of which is the desire to combat international cartels on their own. However, the associated challenges with first implementing and then enforcing such a system may render the goal impossible. A country's competition laws' success is therefore dependent on its development as it is likely to have different goals and priorities. Developed economies can afford to expend its resources on priorities such as improving market efficiency and enhancing competition amongst market players. Developing countries may not have the resources to allocate to different sectors of their society and are likely to have social and economic goals that vastly differ from their more developed counterparts.

While solutions such as legal transplantation may curb some of the expense countries may incur, a legal system that has been transplanted may not always be the best fit. For instance, the U.S. antitrust law system is designed to support markets that can operate independently and do not have a history of excessive government involvement. While the United States has a reputation for its effective enforcement mechanisms against hard-core cartels, given that many developing countries' economies are or were until very recently, largely state owned, transplanting a wholly Americanised competition legal system may not be the most appropriate option. Alternatively, developing countries may choose to solve their competition law woes by entering into regional agreements, often with each other. Again, this recourse presents its own challenges. Developing countries without the resources to allocate to their own competition law systems may not wish to share those resources with their fellow members to a regional agreement, particularly if an effective competition law enforcement mechanism is not immediately forthcoming. Given these obstacles, it may be time to begin exploring other options. The following chapter will therefore discuss the case for reform in more detail.

Chapter Five

Establishing the Benchmark for Reform

Introduction

Chapter Two established that developing countries are more likely to suffer detrimental effects from international cartels, including export cartels. Chapter Three discussed the current legislation developed and developing countries have in place to combat international cartels. While developed jurisdictions often have sophisticated rules in place and the resources to enforce them against both domestic and foreign cartels, developing countries often have ineffective competition law systems and inadequate resources to support them. Chapter Four then moved on to consider the reasons why developing countries struggle with implementing effective competition law systems. Developing countries face unique challenges such as unstable governments and severe poverty, which can hinder the success of a competition law system or even disincentivise government officials from attempting such an endeavour altogether. However, a competition law system can do more than work towards combating the threat of international cartels; it can also be used as a tool to remedy some of these challenges, especially if the system has the appropriate welfare standard behind it.

Having established that developing countries are in a weaker position compared to developed countries when faced with the problem of international cartels, the next two chapters will discuss how we can remedy the current situation. A suitable welfare standard must first be established before determining the most appropriate method for reform. The outcome of any reform method that is adopted may not be the same depending on the welfare standard that is applied. Welfare standards serve as the benchmark for competition law and policy. Competition policy and laws are irrevocably linked to the goals and objectives of their jurisdiction's system. Therefore, the goals of that particular jurisdiction will have an impact on which welfare standard to apply. Furthermore, whichever welfare standard is adopted into a particular system will also have an impact on how competition laws are applied and how cases are decided in the courts.

There are several types of welfare standards that can be applied to a competition law policy or system and each have their own priorities that affect the end result. For instance, consumer welfare is generally concerned with protecting the interests of consumers in the relevant market. Therefore, competition law authorities in a system that has adopted a consumer welfare approach may not always balance the interests of producers against any losses the consumer has suffered. Alternatively, a competition law system that has established a total welfare standard may be more likely to weigh the interests of consumers and producers alike in making decisions. The total welfare standard does not necessarily consider transfers of wealth from the consumer to the producers to be completely unlawful so long as the producer is operating at maximum efficiency. When considering reform options in the case of international cartels, as seen in Chapter Two, where consumers are the ones who ultimately suffer as a result of cartel behaviour, balancing the interests of producers and consumers according to the total welfare may not be the most appropriate choice at face value. On the other hand, there are also inherent difficulties with applying a wholly consumer welfare standard when considering the different options for reform. For example, a total welfare standard may seem disadvantageous to consumers in the short term, might also protect local businesses from being forced out the market due to foreign, international cartel behaviour.

This chapter will outline the welfare standards that could be adopted when considering reform option and discuss the advantages and disadvantages of each from a developing country's perspective. It will also set out the goals for reform as well as outline the current regulatory framework regarding the status of international competition policy in order to set the stage for the final chapter, which will discuss the proposals available to rectify the current situation.

What is the Welfare Standard?

<u>The Importance of Goals</u>

The debate on which welfare standard is the most appropriate remains a highly contentious issue in competition law to this day.[1] Most of the debate centres on the seemingly inconsistent approach some jurisdictions apply when adopting a consumer welfare standard, which advocates for consumer interests and therefore forms the crux of competition law enforcement. Some of this inconsistency can be traced back to a lack of consensus amongst economists on what the goals of competition law ought to be.[2] Most economists generally assume that the main objectives of competition law should be to enhance economic efficiency and maximise consumer welfare, thereby lowering prices, increasing choice, and improving the quality of products in order to benefit the consumer. Other economic goals competition law could account for include promoting trade, improving economic liberalisation (including privatisation), and strengthening economic market development.[3] These goals are especially pertinent for countries whose economies are on the cusp of or directly transitioning from developing status to developed. Competition law is often adapted in these situations in order to support the liberalisation process occurring in separate sections of the economy and safeguard the competitive environment.

In addition to economic goals, some countries, particularly developing countries, may choose to incorporate social and political goals into their competition law regimes. These goals, which have been discussed at length in the previous chapter, may affect how the different welfare standards are applied. Thus, in order to successfully implement any type of reform, the goals of the particular countries involved as well as the appropriate welfare standard must first be established.

[1] See Blair, Roger D.; Sokol, Daniel, D., 'Welfare Standards in U.S. and E.U. Antitrust Enforcement,' (2013) Fordham Law Review, Vol. 81.
[2] See Blair, Roger D.; Sokol, Daniel D., 'The Rule of Reason and the Goals of Antitrust: An Economic Approach,' (2012) Antitrust Law Journal, Vol. 78, No. 2.
[3] Smejkal, Vaclav, 'Competition law and the social market economy goal of the EU,' (2015) International Comparative Jurisprudence, Vol. 1, No. 1; see also Fox, Eleanor; Sullivan, Lawrence A., 'Antitrust – Retrospective and Prospective: Where are We Coming From? Where are We Going?' (1987) New York University Law Review, Vol. 62 at 936.

When proposing reforms regarding the issue of international cartels and developing countries, the geographical nature of the reform itself will affect which welfare standard is more applicable. For instance, if the proposed reform were a globalised competition law agreement, applicable to many jurisdictions at once, a welfare standard that places more emphasis on domestic consumer interests would not be appropriate. The reasons for this will be explained later on in this chapter. On the other hand, if developing countries were to simply create strategies on how to establish or enforce an existing domestic competition law system, then a global welfare standard would be similarly inappropriate. This chapter will analyse the most common welfare standards that are typically discussed as well as how they relate to developing countries in the context of reform.

Types of Welfare Standards

It is important to consider there are two dimensions when analysing welfare standards: geographic welfare standards and more specific welfare standards such as consumer welfare, which can be considered under domestic or global welfare.[4] This chapter will consider welfare standards from both categories before discuss which is the most appropriate standard to adopt for the purposes of reform.

Geographic welfare standards can be divided into two sub-categories: domestic and global welfare. This distinction between domestic and global welfare is particularly significant given that different types of conduct can have different effects on either. For instance, export cartels may increase domestic welfare while simultaneously decreasing global welfare. Most competition law authorities however continue to base their decisions on a domestic welfare standard. National competition law authorities often only consider welfare standards such as consumer welfare and total welfare under a domestic welfare standard but they should also apply these standards in a global welfare context in circumstances that warrant it, such as in the case of international cartels.

[4] Jain, Jitendra, *Harmonization of International Competition Laws: Pros and Cons*, (2013) Anchor Academic Publishing at 33.

Consumer Welfare

There are many different standards and interpretations of the term 'consumer welfare'. While the phrase is sometimes used in conjunction with the theories of 'consumer protection' and price, service, quality and choice,[5] it can also be measured in economics. Here, consumer welfare can be defined as 'consumer surplus', which broadly speaking is the economic measure of consumer satisfaction by weighing the price consumers are willing to pay for a given product versus its market price.[6] Consumer welfare should be applied in order to improve economic efficiency, or maximise aggregate social wealth.[7]

Some have proposed that under the consumer welfare standard, competition and antitrust law must actively prevent "increases in consumer prices, restriction of output or deterioration of quality due to the exercise of market power by dominant firms."[8] Competition and antitrust policies can therefore strive for consumer welfare in one of two ways: 1) by placing their sole focus on immediate or short-term consumer interests; and 2) emphasising consumer welfare as a long-term goal and prioritising the overall economic welfare of society over short-term consumer interests.[9] In practice, only the second approach is economically feasible. This is because while the first approach may benefit consumers in the short term, for developing countries, the interests of both consumers and producers are closely tied with one another. As stated in the previous chapter, a given individual may play the role of consumer and producer in the market. Therefore, while protecting consumer interests at the expense of the overall economic welfare of the market may incur some benefits initially, in the long run, the market's overall welfare may suffer.

In the first approach, where only the short-term interests of consumers are dealt with, the dichotomy between consumer interests and producers' desires to preserve productive

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[5] Buttigieg, Eugène. *Competition Law: Safeguarding the Consumer Interest: A Comparative Analysis of US Antitrust Law and EC Competition Law.* (2009) Kluwer Law International.
[6] Brodley, Joseph F. 'The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technological Progress' (1987) New York University Law Review. Vol. 62 at 1033.
[7] Brodley at 1023.
[8] Cseres, Katalin Judit. 'The Controversies of the Consumer Welfare Standard' (2007) The Competition Law Review, Vol. 3, No. 2 at 124.
[9] Cseres, Katalin Judit. 'The Controversies of the Consumer Welfare Standard' (2007) The Competition Law Review, Vol. 3, No. 2 at 125.

efficiency and develop new innovations, which may in fact provide long-term benefits to consumers, is overlooked.[10] These shortcomings are corrected in the second approach where the welfare of society as a whole supersedes the more immediate goals of the first approach so long as consumers are given a fair proportion of the overall economic welfare.[11]

While it is accepted that occasionally short-term consumer interests must be sacrificed in order to maximise the overall welfare of society, competition policy based on this strategy often only permit such practices if they fulfil three conditions.[12] First, total welfare must increase as a direct result of considerable innovations in production and efficiency. Second, the practice must cause as little harm to consumers as possible and be 'necessary, reasonable and proportionate'.[13] Finally, the practice must not do any lasting damage to the competitive market in order to ensure a fair share of the efficiency gains is handed down to the consumers.[14]

Consumer welfare has long been the only priority of the American antitrust law system. Robert Bork, best known for his book *The Antitrust Paradox*, was a strong influence in the way courts interpreted the Sherman Act from 1978, the year in which it was published, to present day. His book has been cited in well over a hundred cases concerning antitrust violations. Bork argued that the maximisation of consumer welfare, in line with the Chicago School, should be antitrust law's sole objective and therefore the term should be considered synonymous with the economic wealth of a nation.[15] As a result, consumer welfare is at its most effective when society's resources are allocated with the greatest efficiency, thereby allowing consumers to satisfy their wants, as fully as current technologies will allow.[16] However, Bork also supported firms charging higher prices to consumers, so long as these

[10] Brodley at 1036.
[11] Cseres, Katalin Judit. 'The Controversies of the Consumer Welfare Standard' (2007) The Competition Law Review, Vol. 3, No. 2 at 126.
[12] Cseres, Katalin Judit. 'The Controversies of the Consumer Welfare Standard' (2007) The Competition Law Review, Vol. 3, No. 2 at 126.
[13] Ibid.
[14] Brodley at 1037-1039.
[15] Bork, Robert. *The Antitrust Paradox, A Policy at War with Itself* (1978) New York, Basic Books; see also Buttigieg, Eugène. *Competition Law: Safeguarding the Consumer Interest: A Comparative Analysis of US Antitrust Law and EC Competition Law.* (2009) Kluwer Law International at 6.
[16] Bork, Robert. *The Antitrust Paradox, A Policy at War with Itself* (1978) New York, Basic Books at 66.

firms operated at maximum efficiency.[17] By following this line of reasoning, one could argue that Bork sanctioned the behaviour of monopolists and cartel members as these parties would be the only ones to benefit from extorting wealth from consumers. Consumer welfare according to the Chicago School has since been heavily criticised. According to its principles, while they put forth that consumer welfare should be the only objective of antitrust law, they also contend that economic efficiency should be the only aim when interpreting and applying antitrust laws.[18] Thus, the Chicago School contends that resources should be distributed where they are the most needed and where they can be most efficiently used, regardless of the interest group whether consumer or producer.[19] It has therefore been suggested that the Chicago School is referring to total welfare when discussing the merits of consumer welfare.[20]

Competition laws that wish to follow a consumer welfare standard should therefore take care to distinguish between 'end consumers' and other consumers. Traditional competition laws are often not sufficient to cover all aspects of consumer interests. While consumer interests such as lower prices, and more choices and availability of products can be protected with a working competition law system, end consumer interests such as protecting health and safety should be dealt with through legislation specifically directed towards consumer protection.[21] Competition law systems that fail to distinguish between end consumers and other consumers risk falling into the 'Chicago trap.'[22] By blindly following a consumer welfare approach, without making such distinctions, policymakers may inadvertently support the interests of businesses over those of end consumers. Thus, the question that should be asked when considering any competition law provision is what impact will this provision have on final users in terms of price, choice, and availability? Because consumer welfare and consumer protection have overlapping concerns in this regard, it would also be helpful to include consumer interest groups in this narrative.

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[17] Ibid.
[18] Cseres, Katalin Judit. *Competition Law and Consumer Protection.* (2005) Kluwer Law International at 332.
[19] Hovenkamp, Herbert J. *Economics and Federal Antitrust Law*, (1985) St. Paul, MN: West Publishing Co. (Hornbook Series Lawyer's Edition), at 231-232.
[20] Cseres at 332.
[21] Ibid
[22] Ibid.

In contrast to the singular consumer welfare approach adopted by the U.S. antitrust system, European competition policy has incorporated both public policy considerations, such as social welfare goals, and the pursuit of consumer welfare in its enforcement strategies.[23] The importance of public policy considerations will be discussed further on in this chapter. As a result, 'consumer welfare' is less easily defined in EU competition law. While consumer welfare as defined by the United States can be read almost in conjunction with the total welfare standard (discussed below), consumer welfare in EU competition policy can be interpreted as referring only to the welfare of consumers.[24] Under this interpretation, benefits enjoyed only by producers, such as increased profits, are not accounted for in European competition law decisions. European competition law experts advocating for this approach often cite Article 101(3) TFEU, which allow for anti-competitive agreements that would, in other circumstances, trigger the application of Article 101(1), as long as they give consumers a fair share of any benefits resulting from the conduct.[25]

Economists are often highly critical of this approach, arguing that such a one-sided focus on consumer surplus, without the inclusion of producer surplus has 'no basis in welfare economics and can be justified on equity grounds only.'[26] Other commentators have responded with arguments that in practice, the application of either the total or consumer welfare standard would make little to no difference in the decisions of most cases.[27]

On the other hand, international organisations such as the International Competition Network have advocated for a more consumer-centric approach to competition law, with particular emphasis on the welfare of the 'end-consumer.'[28] The ICN argues a stronger focus on end-consumers would be more appropriate for developing countries:

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[23] Cseres, Katalin Judit. 'The Controversies of the Consumer Welfare Standard' (2007) The Competition Law Review, Vol. 3, No. 2 at 123.

[24] Van den Bergh, R and Camesasca, P. *European Competition Law and Economics: A Comparative Perspective.* (2006) London, Sweet & Maxwell at 41.

[25] Motta, M, *Competition Policy: Theory and Practice.* (2004) Cambridge, Cambridge University Press at 19.

[26] Van den Bergh and Camesasca at37.

[27] Kingston, Suzanne. *Greening EU Competition Law and Policy*. (2011) Cambridge, Cambridge University Press at 173.

[28] International Competition Network, Unilateral Conduct Working Group, 'Unilateral Conduct Workbook Chapter 1: The Objectives and Principles of Unilateral Conduct Laws,' (April 2012) paper presented at the 11th Annual ICN Conference, Rio de Janeiro, available at www.internationalcompetitionnetwork.org/uploads/library/doc827.pdf.

> End-consumers tend to be less well off than firms' owners. This argument is less relevant in modern economies with effective, broad based, capital markets in which ownership is becoming more and more dispersed via pension funds and other forms of collective investments.[29]

Nevertheless, others have argued that for developing countries, adopting a wholly consumer welfare standard as the sole goal of competition law may be problematic for a number of reasons.[30] Prioritising consumer interests over the interests of other market participants does not account for the economic status of the consumers. Consumers in developing countries typically make their living in the agricultural industry.[31] This is in contrast to developed countries, where most citizens are steadily employed with a stable income. Consumers in developed countries are therefore able to spend large amounts of their income on consuming goods and services.[32] Conversely, for consumers in developing countries, the consumption of goods and services purchased within the market forms a relatively small proportion of their daily life. The economic activity of citizens of developing countries is more likely to be dominated by their role as farmers, for instance, purchasing seeds or fertilisers as well as selling any surplus crops they do not consume themselves.[33] Therefore, citizens in developing countries often play the roles of both consumer and producer, sometimes simultaneously. Thus, when setting the welfare benchmark in such markets, it often makes little sense in distinguishing the welfare interests between producers or suppliers and direct consumers.

Protecting both consumers and suppliers may seem counterintuitive in the face of having consumer welfare as a goal of competition law as well as ensuring adequate safeguards

[29] Ibid. Para. 16(i).
[30] Rodriguez, Juan D. Gutierrez, 'Competition Law Goals in Agricultural Markets: A Latin American Perspective,' in Zimmer, Daniel (ed), *The Goals of Competition Law*, (2012) Edward Elgar Publishing at 450.
[31] Ibid.
[32] Deaton, A., Muellbauer J., *Economics and Consumer Behaviour*, (1986) Cambridge University Press.
[33] Drexl, Josef, 'Consumer Welfare and consumer harm: adjusting competition law and policies to the needs of developing jurisdictions,' in *The Economic Characteristics of Developing Jurisdictions,* (2015) Edward Elgar, edited by Gal, Michal S. et al at 289.

against anti-competitive behaviour.[34] However, in addition to accommodating the consumer interests, many jurisdictions with established competition or antitrust law regimes also include provisions preventing anti-competitive behaviour on the part of consumers, such as predatory buying and the formation of buyers' cartels.[35]

The *Weyerhaeuser* decision is particularly interesting when considering how consumer welfare can be applied to developing countries, especially since many of these countries are predominately exporters of raw materials and agricultural products while maintaining the need to import the majority of their manufactured consumer products. Limiting the welfare standard to consumer welfare would potentially create the problem that competition laws would apply to only benefit consumers in richer countries at the expense of domestic suppliers and small farmers. This would exacerbate the risk that the domestic producers in developing countries could be subject to exploitation through the creation of buyers' cartels and abuse of dominance by large traders in developed countries.

The United States Supreme Court provided some clarifications to Section 2 of the Sherman Act prohibiting 'predatory buying' in the *Weyerhaeuser* case.[36] In this case, the firms involved operated hardwood lumber sawmills and purchased alder logs, the native species in the regions, as inputs, which were then processed into hardwood finished lumber. By 2001, Weyerhaeuser established itself as the dominant purchaser of alder logs, obtaining approximately 65 percent of the region's available logs. Due to the fact that there was no separate market for processed alder lumber, with a three percent market share in the national hardwood lumber market, Weyerhaeuser had no market power in the output market. In 2001, Ross-Simons shut down its mill, citing the increasing prices of raw alder logs in contrast to the lower prices for hardwood finished lumber. Ross-Simons subsequently sued Weyerhaeuser under Section 2 of the Sherman Act, arguing that the firm had participated in predatory buying, in order to exclude alder logs from the market by increasing the prices.

[34] Drexl, Josef, 'Consumer Welfare and Consumer Harm: Adjusting Competition Law and Policies to the Needs of Developing Jurisdictions,' in Gal, Michal S. (et al, eds.), *The Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law*, (2015) Edward Elgar Publishing at 290.
[35] Ibid.
[36] *Weyerhaeuser Co. v Ross-Simmons Hardwoodlumber Co.,* 549 U.S. 312 (2007), available at www.supremecourt.gov/opinions/06pdf/05-381.pdf.

The Supreme Court abstained from analysing or discussing issues regarding consumer interests. Instead, it drew comparisons between predatory buying and predatory pricing, noting that both were analytically similar and involved the 'deliberate use of unilateral pricing measure for anti-competitive purposes,' which necessitated 'firms to incur short-term losses on the chance that they might reap supra-competitive profits in the future.'[37] The Supreme Court also focused its judgement on the competitive process, arguing, 'actions taken in a predatory bidding scheme are often 'the very essence of competition' … Just as sellers use output priced to compete for purchasers, buyers use bid prices to compete for scarce inputs.'[38]

Total Welfare

The American standard of consumer welfare has often been compared with the total welfare standard. Like consumer welfare, 'total welfare' can have a variety of definitions and the distinction between consumer welfare and total welfare remains controversial when considering the welfare standards of different jurisdictions. For the purposes of this thesis, total welfare will be defined as maximising welfare effects on the market as a whole, rather than focusing primarily on consumers or producers separately.[39]

Competition policies structured around maximising total welfare achieve this by distributing resources along the price system to those who value them most, without making a distinction as to whether they are consumers or producers.[40] The total welfare standard can therefore account for productive efficiency, where production is deemed to be at its most efficient if it is not possible to produce the same quality or quantity of output at a lower cost.[41] As a result, enforcement agencies operating under the total welfare standard do not require firms to transfer any efficiency benefits down to the consumers as social welfare has

[37] Ibid.
[38] Ibid, p. 10
[39] See Harker, Michael, 'Antitrust Law and Administrability: Consumer versus Total Welfare,' (2011) World Competition, Vol. 34, No. 3.
[40] Brodley at 1023.
[41] Van den Bergh and Camesacaat 65.

been increased by gaining those efficiencies elsewhere.[42] In practice, this means that an increase in consumer price may not necessarily result in a decision deeming the conduct to be anti-competitive, so long as the practice is justified by achieving productive efficiency.

Given the difficulties in applying a consumer welfare standard, some scholars have put forth the idea that a total welfare standard is more in keeping with the notion of dynamic competition, arguing that it provides a more sophisticated model of what competition law should be. A total welfare approach generally considers how competition can benefit the overall market, not just solely for consumers. In 2011, the ICN published a documents entitled, 'Competition Enforcement and Consumer Welfare,'[43] which detailed the responses to a survey it conducted in 2010. A number of respondents to the questionnaire acknowledged that while consumer welfare was an admirable goal, economic growth in general through the adoption of a total welfare standard should be the ultimate objective. Indeed, countries such as Australia, Norway, and Swaziland (a developing country), have already declared total welfare to be the goal of their competition laws over consumer welfare.[44]

Michal Gal lists several reasons why adopting a total welfare approach is the most appropriate standard for developing countries and smaller economies.[45] Developing countries' markets are unlikely to be able to support more than a few firms at a time. Gal therefore argues that in smaller economies, due to the high concentration of most of the markets, the adoption of a consumer welfare approach would likely result in diminished productive, and likely even dynamic, efficiencies. She also notes that the consumer welfare standard would potentially conflict with any goals the developing country may have of enhancing the international competitiveness of its domestic firms. A total welfare standard would therefore more adequately meet a developing country's goals of maximising its overall social welfare as well as entering the global market as a competitive force.

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[42] Roberts, GL and Salop, SC, 'Dynamic Analysis of Efficiency Benefits' (1996) World Competition, Vol 19, No. 5.
[43] International Competition Network, 'Competition Enforcement and Consumer Welfare: setting the Agenda,' 10th Annual ICN Conference, The Hague, 17-20 May 2011, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf.
[44] Jenny, Frederic; and Katsoulacos, Yannis. *Competition Law Enforcement in the BRICS and in Developing Countries: Legal and Economic Aspects*, (2016) Springer at 5.
[45] Gal, Michal, *Competition Policy for Small Market Economies*, (2003) Harvard University Press at 200-202.

While a highly concentrated market, with many monopolised industries, may be undesirable for developed economies, for smaller and less developed markets, they may be the only way to achieve productive efficiency. As such, a standard, such as the consumer welfare standard, that considers high concentration to be an unwelcome part of the economy and should thus be discouraged, would not be feasible. The ICN has previously suggested that a more highly concentrated market would allow developing countries to gain a stronger foothold in the international markets by making it easier for them to protect their 'national champions.'[46] These arguments often align with arguments that if domestic producers are to effectively compete in the global market, they should be given some freedoms in relation to the enforcement of competition laws. Competition laws in these economies should therefore contain provisions that allow for practices such as export cartels or discriminatory enforcement, both of which clash with ideals associated with the consumer welfare standard. On the other hand, a highly concentrated market can also lead to instances where domestic firms may increase their prices to far beyond costs, which would result in a decrease in allocative efficiency. The welfare standard any competition law policy or type of reform relies on should therefore balance structural efficiency with that of the competitive process, so firms may operate at the highest efficiency while at the same time passing some of the benefits of greater efficiency onto their consumers.[47]

As stated above, several countries, including Swaziland, have already adopted a total welfare standard for their competition law systems. In its response to the 2010 ICN survey, it justified its decision by stating, 'besides consumers, there are other equally important stakeholders, such as competing businesses, and that this can lead to the importance of ensuring welfare of groups other than consumers.'[48] The Competition Authority of Swaziland therefore strives to promote competition for the general public's benefit. Swaziland's preference for total welfare over consumer welfare was emulated in Kenya, who stated, 'competition law sometimes seeks to maximise producer and consumer

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[46] ICN, 'Report on the Objectives of Unilateral Conduct Laws, Assessment of Dominance/Substantial Market Power, and State Created Monopolies,' available at http://www.internationalcompetitionnetwork.org/uploads/library/doc353.pdf; last accessed 1 June 2016, at 20

[47] Waked, Dina I at 89.

[48] ICN, 'Competition Enforcement and Consumer Welfare: setting the Agenda,' 10th Annual ICN Conference, The Hague, 17-20 May, 2011 available at http://www.internationalcompetitionnetwork.org/uploads/library/doc857.pdf.

surplus, not just consumer surplus alone.'[49] In this vein, Kenyan competition law, enshrined in chapter 504 of its 1989 Restrictive Trade Practices, Monopolies and Price Control Act, strives to promote competition within the country's economy by prohibiting practices that restrict trade, regulating the spread of monopolies and preventing firms from achieving an unjustified dominant position in the market, as well as ensuring prices remain competitive for goods and services.

It should be noted however that a pure total welfare concerns itself with the reasons why consumers choose not to purchase a product that has experienced an increase in price (overcharges) rather than the reasons behind the overcharges themselves.[50] A system focused on a pure total welfare standard may not question the fact that prices have increased and may in fact justify it as the producers' right to increase prices due to external factors such as increases in production costs. The distinction between the reasons why consumers choose not to purchase a product versus the reasons behind the increases in price is especially important when comparing the overcharges between domestic and international cartels. In general, international cartels generate higher overcharges than their domestic counterparts. Overcharges also tend to increase the longer a cartel remains active. Therefore, a competition law system based on a total welfare standard may not question why prices for a particular product have suddenly increased if the producers are operating at maximum efficiency. As such, a total welfare standard may not necessarily be sufficient to address all the problems developing countries may have with international cartels.

Global Welfare

Advocates in favour of adopting an international competition law policy often adopt 'global welfare', when considering competition law decisions. National competition and antitrust policies are often argued as having a detrimental effect on global welfare. The UK's former Office of Fair Trading has described the current system regarding competition enforcement

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[49] ICN, 'Competition Enforcement and Consumer Welfare: Setting the Agenda,' (2011) International Competition Network, 10th Annual Conference, 17-20 May.
[50] Neumann et al at 317.

as a 'patchwork', with each national policy focused on a different priority.[51] As a result, it identified key problems consumers in the globalised market, particularly those of developing countries, may suffer, resulting in a failure to address the following:[52]

1. Private anti-competitive behaviour, including cartels, abuse of unilateral market power and anticompetitive mergers;
2. Public restrictions on competition, such as state restrictions on entry and protectionism;
3. Different or inconsistent substantive standards and policies that give rise to a risk of 'chilling' conduct that could be pro-competitive and;
4. Duplicative and inconsistent procedures across national competition regimes that create additional burdens for businesses, which are ultimately passed on to consumers.

It has been put forward that the domestic effects of international anticompetitive behaviour and domestic welfare are inescapably tied to the foreign effects of such behaviour and global welfare.[53] Mirroring the consumer welfare priority in many domestic competition law policies, some commentators have put forward the idea that global welfare ought to incorporate increasing consumer welfare as one of its goals. The rationale behind this view is that any increase in consumer welfare on the global market will benefit consumers across the globe, regardless of jurisdictional boundaries.[54]

An emphasis on global welfare would also reduce the tendency towards self-interest that is commonly demonstrated in domestic competition laws. In a world market that is increasingly more open to international trade and investment, some countries may be more tempted to enact protectionist or 'beggar-thy-neighbour' competition policies. An example of such policies can be seen in the attitude towards export cartel exemptions. A shift

[51] Fingleton, John. Former Chief Executive, Office of Fair Trading, 'Competition Agencies and Global Markets: The Challenges Ahead,' (2009) at 4.
[52] Fingleton, John. Former Chief Executive, Office of Fair Trading, 'Competition Agencies and Global Markets: The Challenges Ahead,' (2009) at 4.
[53] Klevorick, Alvin A. and Sykes, Alan O, 'United States Courts and the Optimal Deterrence of International Cartels: A Welfarist Perspective on *Empagran*' in Fox, Eleanor M and Crane, Daniel A. (eds), *Antitrust Stories*, (2007) Foundation Press at 371.
[54] Gerber, David. *Global Competition: Law, Markets and Globalization*. (2010) Oxford University Press at 307.

towards a global welfare standard may curb such provisions in the future. National competition laws are inevitably concerned solely with the welfare of the country's residents to the exclusion of the welfare of all non-residents. In some respects, this single-mindedness can be mitigated through comity with other nations. Some specialists in competition law have also called for national competition law authorities to adopt a global welfare perspective alongside their own national welfare standard.[55] In doing so, governments may be more willing to move away from the tendency to act in their own self-interests, to the detriment of both national and global welfare.

The struggle national competition authorities face when trying to balance global welfare with their domestic welfare concerns was expounded on by Bacchetta, Horn, and Mavroidis.[56] It is clear that cooperation between national competition authorities results in higher global welfare rather than if each national competition authority refused to cooperated or acted independently of one another without any sort of coordination. Bacchetta, Horn, and Mavroidis use the example of two countries, a domestic country and a foreign country where the national competition law authority in the domestic country must choose between two different outcomes regarding welfare in a competition law case. One outcome (A) will have the effect of maximising the welfare of residents in the domestic country's market and the other (B) will have the effect of maximising welfare of the global market. This illustration, where national competition authorities must weigh these two choices and make a decision, is quite common in cases involving international cartels, where one country serves as the manufacturer of a good while the consumers are located in another.

One of the most successful examples of an international organisation that has adopted and applied the global welfare standard while at the same time balancing the interests of individual member states is the WTO. The WTO focuses on both national and global welfare in order to benefit all its members. One of its key principles, the Most Favoured Nation

[55] See Fox, Eleanor; and Ordover, Janus, 'The Harmonization of Competition and Trade Law,' (1995) World Competition, Vol. 15 at 5-34.
[56] Mavroidis, P.; Bacchetta, M.; Horn, H. 'Do Negative Spill-Overs From Nationally Pursued Competition Policies Provide a Case for Multilateral Competition Rules?' (1998) in Ehlermann, Claus-Dieter; and Laudati, Laraine (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy*, (1998) Hart Publishing at 271.

(MFN) treatment, which is contained in the first article of the General Agreement on Tariffs and Trade (GATT), has been praised as one of the 'most efficient engines for creating global welfare.'[57] According to the MFN principle, member states are generally forbidden from discriminating between their trading partners. Therefore, any benefits granted to one country, such as lowering customs duty rates for a particular product, must be granted to all other WTO members. It does allow for some limited exceptions, such as the establishment of free trade agreements, or giving preferential treatment with regards to special access to a market to developing countries. By requiring member states to treat every country equally, the MFN can reduce corruption and protect more vulnerable economies from being unfairly discriminated against.

The WTO has identified two effects that can result, depending on the decisions of a national competition law authority: negative spillover effects, and distortions.[58] Negative spillover effects occur when a national competition authority's decision culminates in the lowering of welfare of the foreign country's residents. These are common in situations in the global market, such as those involving international cartels, where those that benefit from such conduct reside in one country while those that suffer losses reside in another. On the other hand, distortions transpire when the national authority makes a decision that while maximises domestic welfare, does so at the expense of global welfare.[59] In this context, for example, it may be the decision to allow an export cartel to continue targeting another country or countries. It is important to note that a national authority's decision may have negative spillover effects but not create a distortion. In order to eliminate distortions in the market, national authorities should therefore act in the best interests of the global market rather than in their own best interests. While this may have the short-term effect of decreasing domestic welfare, countries would eventually start to benefit from decisions taken by other countries in the long term. In summary, the positive spillover effects from

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[57] Matsushita, Mitsuo; Schoenbaum, Thomas; Mavroidis, Petros; Hahn, Michael, *The World Trade Organization: Law, Practice, and Policy,* (2015) Oxford University Press at 158.
[58] Mavroidis, P.; Bacchetta, M.; Horn, H. 'Do Negative Spill-Overs From Nationally Pursued Competition Policies Provide a Case for Multilateral Competition Rules?' (1998) in Ehlermann, Claus-Dieter; and Laudati, Laraine (eds.), *European Competition Law Annual 1997: Objectives of Competition Policy*, (1998) Hart Publishing at 271.
[59] Lloyd, Peter John; Vautier, Kerrin M., *Promoting Competition in Global Markets: A Multi-national Approach.* (1999) Edward Elgar Publishing at 22.

more countries adopting a global welfare standard over a domestic welfare standard would soon outweigh any negative spillover effects.

There are some cases, such as those involving hard-core international cartels, where the interests of a domestic competition law authority and those of a foreign authority will coincide. In such cases, any decision taken by a national competition law authority will benefit residents in both countries. Other cases, such as those involving export cartels, the interests of the domestic country and the foreign country can conflict with one another.

There are several problems that may arise when adopting a global welfare standard. The first and most difficult one is persuading countries to give more weight to global welfare over domestic welfare. Governments are usually very reluctant to adopt any sort of policy that would result in decreases in their own residents' welfare, even if those effects would only be felt for a short time. This can be seen for instance in the United States' continuous, vehement defence of its export cartel exemptions.

Another problem is determining how much weight a national competition law authority should give to the objective of maximising global welfare at the expense of its country's domestic welfare. When faced with a case that bisects international borders, competition authorities must conduct studies regarding global and domestic market conditions as well as the potential consequences of their decisions on those markets become increasingly more complex. This is especially difficult for developing countries, which may not have as many options due to a lack of resources. In term of enforcement, identifying which option would be the most effective in terms of promoting competition on a global scale is particularly difficult. These options often encompass bilateral, regional, plurilateral, or multilateral enforcement mechanisms. The competition law authority must therefore assess and choose whether or not coordinate its actions with other national competition law authorities or if it will choose to defer to a supranational authority.[60] Factors that should be considered during this decision making process involves calculating the costs of unilateral conduct, as well as the benefits of coordinating with other national competition law

[60] Lloyd, Peter John; Vautier, Kerrin M., *Promoting Competition in Global Markets: A Multi-national Approach.* (1999) Edward Elgar Publishing at 24.

authorities. Benefits such as more opportunities and resources to gather evidence as well as investigate alleged violations must be weighed against concerns such as relinquishing control over a particular case, if a country chooses to defer to a supranational authority, as well as any credibility concerns that may be associated when coordinating with a particular country's competition law authority.

Public Policy Considerations

Some scholars have argued for the inclusion of public policy goals in the interpretation of competition law, particularly in EU competition law.[61] These arguments stem from the view that, unlike the independent antitrust laws in the United States, EU competition laws are part of a larger set of inter-connected provisions. Under this model, there are seven policy-linking clauses contained in the Treaty for the European Union: environmental protection, employment, culture, public health, consumer protection, economic and social cohesion and development policy.[62] As competition policy is a European policy in the TFEU, it may be argued that each of these policies must be taken into account when competition policy decisions are made, even where those policy objectives conflict with competition law objectives.[63] Article 7 of the Treaty expands on policy-linking causes by adding a new, all-inclusive, clause: 'The Union shall ensure consistency between its policies and activities, taking all of its objectives into account.' It also includes additional clauses for employment, social protection, social exclusion, education, training, the protection of human health, environmental protection, consumer protection and the welfare of animals.[64]

In the event of conflict between competition and the other public policy goals, resolution is achieved in the form of balancing them in accordance with Article 26(1) of the Treaty, which states that:

[61] Townley, Christopher, 'Is Anything more Important than Consumer Welfare (in Article 81 EC)?: Reflections of a Community Lawyer' (2008) The Cambridge Yearbook of European Legal Studies, Vol. 10 at 352.
[62] Articles 11, 9, 167, 168, 169, 174 and 212 TFEU respectively.
[63] Townley at 352.
[64] TFEU Treaty Arts 9-13.

> The Union shall adopt measures with the aim of establishing or ensuring the functioning of the internal market [which includes competition], in accordance with the relevant provisions of the Treaties.[65]

By enacting such a provision, the Treaty emphasises that all the provisions outlined in it, including those on competition law, are to be read in conjunction with one another.[66] Therefore, public policy considerations covered in the Treaty can conceivably be taken into account when deciding on competition law issues.

The inclusion of public policy considerations into competition law remains a controversial topic, particularly with those who feel the emphasis should be placed on efficiency rather than social concerns. While this approach may work for more advanced jurisdictions such as the EU and the United States, it can be argued that competition law can and should be used as more than simply an economic tool to regulate markets. The reasons why a developing country should include competition law as one of its priorities in legislation have been discussed in the previous chapter.

Public policy considerations are also particularly pertinent for developing countries when defining the welfare standard. For instance, developing countries such as Kenya and Algeria have embraced a broader set of considerations, albeit mainly in their merger regulation laws. These considerations include, among others, 'financial stability, the protection of national champions, industrial policies, the promotion of employment, and increasing the ownership status of historically disadvantaged persons.'[67] While some of these considerations may not be directly related to international cartel regulation, for developing countries, in order to optimise competition in the market, governments must take into account a wider range of factors based on their other socio-economic needs.

[65] Townley at 356.
[66] Ibid. at 352.
[67] See Gal, Michal; Fox, Eleanor, 'Drafting competition law for developing jurisdictions: learning from experience,' in *The Economic Characteristics of Developing Jurisdictions,* (2015) Edward Elgar, edited by Gal, Michal S. et al at 345.

South Africa has also employed a broader range of goals beyond merely economic goals into its competition policy. The non-economic goals that have been incorporated into the system are mainly geared towards rectifying the social iniquities the country has experienced throughout its history, particularly during the period of apartheid. To that end, along with promoting efficiency and consumer welfare, South African competition law also seeks to encourage employment, advance social and economic welfare, grant small and medium sized firms more opportunities to access their relevant markets, and give more economic opportunities to individuals that have been historically disadvantaged.[68] In practice, this may entail the Competition Tribunal granting an exemption for anticompetitive behaviour if it contributes to the 'promotion of the ability of small businesses or firms controlled or owned by historically disadvantaged persons, to become competitive.'[69]

An excellent example of the ways in which a competition law agency can employ public policy considerations in its decisions is South African Competition Tribunal's approval of the acquisition of domestic retailer Massmart by Wal-Mart. In response to the concerns raised with regards to the acquisition of a local business by a retailer giant, the Competition Tribunal imposed several conditions on the merged entity, mainly that it was required to carry out a study specifically designed to determine how domestic suppliers, including small and medium sized firms, could benefit from the merger. It was also asked to rehire 503 distribution workers that Massmart had laid off in the months preceding the merger and prohibited from cutting jobs for another two years.[70]

Public policy considerations can be considered in cases such as the Canadian potash cartel, where increases in price could have resulted in food shortages, as farmers in developing countries such as India were unable to pay such exorbitant prices for fertiliser. In other instances, proponents of export cartels often state that export cartel exemptions are usually enacted for public policy reasons. These arguments are supported by the notion that

[68] See chapter 1(2) of the South African Competition Act, available at http://www.compcom.co.za/assets/Files/pocket-book-2005-R.pdf, last accessed 16 July 2016.
[69] Ibid, at chapter 2, part C, pt. 10.
[70] Maylie, Devon, 'Wal-Mart, Massmart Merger Approved in South Africa,' The Wall Street Journal, 9 March 2012.

increased trade between trading partners and increases in production efficiency of domestic producers can offset any detriments or efficiency losses suffered by domestic markets.[71] However, these arguments often disregard or ignore the negative spill over effects inflicted on foreign markets or the wider implications export cartels can have on international competition.[72]

Despite the reasoning put forth from developing countries that have supported the inclusion of public policy considerations in competition law, there remains an equally vehement camp who argue that such considerations have no place in competition law.[73] For instance, Professor Donald Turner argued, 'it is questionable whether populist goals are appropriate factors to consider when formulating antitrust rules.'[74] By granting special privileges such as protecting small and medium sized firms and giving dispensations in merger applications that promote certain goals, these actions ultimately undermine the main function of competition law. Supporters of this view often argue that competition law's predominant objective is to protect and facilitate the competitive process, and therefore competition agencies should not prioritise the interests of individual competitors over this goal.[75] Others argue that small businesses should not have to be given special treatment given that in theory, an effective competition law system's enforcement agency should be able to protect them from any unfair or anticompetitive schemes not directly related to superior skills or efficiencies, used by larger companies in order to gain an advantage in the market.[76]

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[71] Larson, David A., 'An Economic Analysis of the Webb-Pomerene Act' (1970) Journal of International & Economic Law, Vol. 6 at 497.

[72] Taylor, Martyn D. *International Competition Law: A New Dimension for the WTO?* (2006) Cambridge, Cambridge University Press at 235.

[73] See Blair, Roger D. & Sokol, Daniel D., 'Welfare Standards in U.S. and EU Antitrust Enforcement,' (2013) Fordham Law Review, Vol. 81; and Gal, Michal, 'Size Does Matter: The Effects of Market Size on Optimal Competition Policy,' (2001) Southern California Law Review, Vol. 74.

[74] Turner, Donald F., 'The Durability, Relevance, and Future of American Antitrust Policy,' (1987) California Law Review, Vol. 75 at 798.

[75] Campbell, Neil A., & Rowley, William J., 'The Internationalization of Unilateral Conduct Laws – Conflict, Comity, Cooperation and/or Convergence?' (2008) Antitrust Law Journal, Vol. 75 at 7.

[76] Kovacic, William E., 'Competition Policy, Consumer Protection, and Economic Disadvantage,' (2007) Washington University Journal of Law & Policy, Vol. 25 at 105.

Other scholars have responded to the argument that competition law can and should be used in furtherance of other socio-economic goals with the opinion that competition law is not the most appropriate area in which to do so:

> There is widespread (albeit not universal) acceptance that competition laws should focus on the maximization of economic welfare, that they are not well suited for achieving employment or other economic or social policy objectives, and that attempts to infuse amorphous 'public interest' considerations into competition law standards create serious uncertainty, which may chill investment and pro-competitive initiatives.[77]

In addition to these arguments, critics of the public policy debate also stress that that these wider goals can be better achieved by pursuing other avenues such as sector regulation.[78] Sector regulation has the capacity to include a wider range of goals and is thus in a better position to reconcile the potential conflicts between law and policy. In this regard, a more suitable approach may be to address each concern in separate pieces of legislation instead of one where none of them are adequately dealt with.

Developing countries may still argue that incorporating public policy considerations as a standard of welfare in their competition law systems is more efficient than spreading out their economic and socio-economic concerns over multiple platforms, at least in the short term. Many countries that defend such inclusion have also rejected traditional Western competition or antitrust law goals; especially those that promote aggregate welfare or efficiency goals.[79] They argue that such goals do not meet their specific needs and fail to address issues such as the distribution of power and opportunity. By designing and implementing their own competition laws based on their own standards of welfare, developing countries can have a competition law system that is tailor made to suit their individual economic and socio-economic conditions.

[77] Campbell & Rowley (2008) at 44.
[78] Blair & Sokol (2013) at 2505.
[79] Fox, Eleanor, 'Economic Development, Poverty, and Antitrust: The Other Path,' (2006) Southwestern Journal of Law & Trade in the Americas, Vol. 13 at 219-20.

Which Welfare Standard to Adopt Then?

The next chapter will discuss proposals for reforming the current situation regarding developing countries and international cartels along with their pros and cons, however it is necessary to note that there is no one all encompassing welfare standard that will be applicable. Depending on the type (or types as multiple forms of reform can take place simultaneously) of reform that is to be implemented, the welfare standard will need to shift accordingly.

For instance, proposals that concern reform on a global scale, such as the possibility of establishing a harmonised competition law agreement designed to combat international cartels and other such anti-competitive behaviours globally, should be developed with a global welfare standard in place.

Much of this thesis has also been focused on developing countries and the effects international cartels have on them. Chapter Six will have a similar focus, in which one of the options proposed is to develop strategies in order to aid them in implementing and enforcing their own competition law systems. For such methods of reform that are applied on a domestic level a domestic welfare standard would be more suitable. This is because it is the position of this thesis that developing countries should first focus on improving their own domestic situation first before concentrating on wider global reforms. Therefore, they should first apply a domestic welfare standard, at least initially, in order to bolster or implement their own competition law systems, before they can consider the application of a global welfare standard to other methods of reform, such as the development of a global, harmonised competition law agreement.

Should reform strategies include an element of helping developing countries create and enforce their own competition law regimes, public policy considerations along with other welfare standards such as consumer or total welfare would be useful in establishing a baseline. Some developing countries have already begun to take wider considerations into account when deciding on other competition law issues, such as merger control. For instance, some countries, such as Swaziland, allow for mergers based on other public policies such as advancing employment opportunities.

It may be argued that countries should adopt a global welfare perspective regardless of the scope of reform that is considered, be it on a domestic or a global scale. Because of the very nature of international cartels, even reform on a domestic level could have international implications. Furthermore, while domestic reform options such as implementing strategies to help developing countries establish their own effective competition law systems would go a long way in helping them fight these cartels on their own, they would still benefit from some intervention from more developed countries. As Eleanor Fox stated in her testimony to the Antitrust Modernization Commission:[80]

> We must contemplate maximizing world welfare … The national law governing jurisdiction and remedies should be broadened so that, for example, national authorities in a jurisdiction with the greatest contacts or the largest consumer market can provide a forum in which smaller affected nations can be heard, can take account of outside harms, and can afford relief that covers those harms.

While this does not mean developed countries with the most sophisticated competition law systems, such as the United States and the European Union, should be obligated to adopt the role of 'global competition law enforcers.' To do so would not only be a massive burden on the courts, but would also serve as a deterrence and disincentivise developing countries from working towards their own competition law enforcement mechanisms. Having said that, perhaps national competition law authorities would do well to consider the impact their decisions have on the international community, as was suggested by the Munich Group.[81] In this regard, choosing not to act can often have more devastating consequences than if the national authority had made the decision to enforce their domestic competition

[80] Fox, Eleanor, 'Antitrust and Regulatory Federalism: Races Up, Down, and Sideways,' (2000) New York University Law Review, Vol. 75 at 8.
[81] Petersmann, E.U., 'International Competition Rules for Governments and for Private Business: The Case for Linking Future WTO Negotiations on Investment, Competition and Environmental Rules to Reforms of Anti-Dumping Laws,' (1996) Journal of World Trade, Vol. 30, No. 5.

laws. For instance, given that many competition law systems operate on the basis of the effects doctrine, or something similar, they often decide not to prosecute cartels such as export cartels if they do not have a substantially negative effect on their domestic markets, ignoring the fact that these cartels can often detrimentally affect the markets of other countries. By choosing not to enforce domestic cartel laws, a country can create a 'safe haven' for international cartels, thereby creating a toxic environment for that country's trading partners.[82] So long as that international cartel ensures their behaviour does not directly affect the market in which they are domiciled, they can effectively cartelise the market of a foreign nation with very few consequences.

In addition to global welfare and other considerations such as public policy, it is important that developing countries do not outright dismiss the value of adopting a consumer welfare standard. In addition to the questions covered above regarding the 2010 ICN survey, the ICN also asked respondents whether they referred, either directly or indirectly, to consumer welfare in any of their competition law mission statements or legislation of authorities. This was in order to determine whether or not authorities that claimed consumer welfare was not a primary goal of their competition law systems, regardless still promoted it. The ICN noted that out of the 57 authorities that answered the survey, only seven responded that neither their mission statements nor legislation contain any direct or indirect references to consumer welfare.[83] Of these seven respondents, the ICN pointed out that four of these in fact had identified consumer welfare as one of several goals of their competition law authority. Two of these stated consumer welfare was a primary goal of their authority, despite not including it in either their legislation or mission statement. Indeed, the ICN pointed out that out of all 57 respondents surveyed, only one country did not make any references to consumer welfare in its mission statement, legislation, or goal of its competition law authority. Therefore, it cannot be emphasised enough that while consumer welfare can be difficult to define and subsequently apply, it would be almost impossible to consider enacting any of the options for reform that will be discussed in the next chapter without it. Consequently, while some developing countries may choose other welfare

[82] Evenett, Simon J., 'Five Hypotheses Concerning the Fate of the Singapore Issues in the Doha Round,' (2007) Oxford Review of Economic Policy, Vol. 23 at 392.

[83] ICN, 'Competition Enforcement and Consumer Welfare: Setting the Agenda,' (2011) International Competition Network, 10th Annual Conference, 17-20 May.

standards such as total welfare, in order to best suit their own individual needs, consumer welfare should also be applied.

The Current Regulatory Framework

There is yet no global regulatory framework solely devoted to governing competition law. Therefore, in most cases involving international cartels, unless a developing country has partnerships in bilateral or regional trade agreements, they are arguably left on their own. The previous chapter detailed the difficulties developing countries face when attempting to not only establish but also effectively implement and enforce a competition law regime.

This is not to say that there have been no attempts or efforts made by international organisations to curb international cartels. Previous chapters discussed efforts made by the ICN, OECD and UNCTAD; however, none of them are binding on a global scale.

<u>Calls for Reform</u>

One of the most important elements required in order to implement any method of reform is consistent and confident political support – most notably, at the highest level. Reform of the current system, depending on the form it may take, will require active involvement from both the public and private sectors. Any reform activity must also begin with a clear and discernible objective, whether it is to establish a global, harmonised agreement with a focus on international cartels or develop a strategy in order to support developing countries in forming their own competition law systems.

In 1998, the Council of OECD adopted the "Recommendation of the Council concerning the Effective Action Against Hard Core Cartels."[84] In it, it asked for member states to fulfil two requirements in order to combat the scourge of international cartels: 1) member states must enact anti-cartel legislation in order to punish and deter cartelisation; 2) they must also outline common principles in order to provide guidance and establish cooperation between other antitrust and competition authorities. The Recommendation makes it clear

[84] OECD. 'Recommendation of the Council concerning Effective Action against Hard Core Cartels,' (1998) OECD Publishing.

that such cooperation would be in the members' best interests. Following this Recommendation, the OECD issued a report in 2000 that gave an account of what steps had been taken in the time since the report was adopted. It noted that while a few member states had eliminated or restricted some of their exemptions to their cartel laws, very few developments had been made on encouraging bilateral cooperation in international cartel investigations. Despite the lack of progress, these two publications contributed to the growing consensus that international cartels could not be solely regulated through domestic legislation and that greater reforms must take place.

If reform is to take the form of establishing a new competition law system, special attention must be paid to its structure. According to the OECD in its *Council Recommendation Concerning Structural Separation in Regulated Industries*[85], any reform that takes place must ensure that competitive and non-competitive activities are separated. This separation is essential in order to avoid discrimination and abuse between the competitive and non-competitive activities. For instance, regulated firms (i.e. those bound by regulations restraining the firm's exercise of its market power), particularly those in network industries, often engage in complementary competitive and non-competitive activities. As a result, regulated firms may be tempted to restrict competition in the non-competitive activity. Establishing independent subsidiaries specifically designed to operate these activities as well as enacting complementary provisions can ensure structural separation.[86]

Another way to ensure any reform measures that are adopted are successful is to ensure that any rules established can adequately meet the established goal or objective. Some scholars argue that the first step to successful reform, for developing countries, is to first establish their own competition law systems. According to Bernard Phillips, developing countries benefit little from waiting until they are sufficiently economically developed before creating or implementing a new competition law system.[87] By delaying this process, Phillips argues, previously established state monopolies and private firms with dominant

[85] OECD. 'Recommendation of the Council concerning Structural Separation in Regulated Industries,' (2001), C(2001)135 – C(2011)135/Corr1.
[86] Philips, Bernard, 'A Competition Framework for Developing Economies and Technical Assistance,' in Huang, Zongle. *The Future Development of Competition Framework*, (2004) Kluwer Law International at 245.
[87] Ibid at 249.

positions in the market have more time to continue practising anti-competitive behaviours that would severely dampen the development process.[88] He therefore advocates for countries to implement domestic competition laws as soon as possible in order to better facilitate the market opening process. However, developing countries must also ensure they are not only in a position to establish an entirely new competition law system but also that they have the necessary resources to enforce it as well.

As cross-border transactions become increasingly more common due to strengthened efforts in trade liberalisation and the removal of trade barriers, more countries are acknowledging the need to solidify their own competition law enforcement systems. For developing and least-developed countries, this translates to a need to implement an entirely new system, particularly as their economies develop more market-based reforms, such as deregulating certain market areas, privatising select public sectors, and liberalising trade. For example, Zambia established its own competition law authority after selling 241 of its 281 state owned enterprises to the private sector.[89] Conversely, Ghana has faced numerous difficulties after privatising its telecoms sector – without an effective independent regulator or competition law in place, the sector has been subjected to practises akin to commercial bullying and political interference.[90]

For many countries, such as Zambia, the underlying motivation for developing and instituting a new competition law system is to create merger controls in order to prevent dominant firms from gaining too strong a foothold in the market.[91] Privatisation leads to more players in the market, and developing countries are subsequently realising the need for competition laws and policy in order to better facilitate healthy competition and restrict unfair business practices. However, international cartels can also serve as the main motivation for implementing a competition law system. While Chapter Three discussed the cases where developed and developing countries alike addressed the problem of international cartels, by and large, these cartels are still a serious problem for developing

[88] Ibid.
[89] Hatchard, John; Perry-Kessaris, Amanda, *Law and Development: Facing Complexity in the 21st Century*, (2012) Routledge.
[90] Ibid.
[91] Ibid.

countries. In some instances, when cartels, such as the vitamins cartel, have been successfully prosecuted by the United States and the European Union, they simply shift to countries where they may practice their behaviours without fear of punishment. As a result, it is more important than ever that developing countries implement an enforceable competition law system as soon as they can.

On the other hand, special attention must also be given to the size of a country's economy as well as its capabilities. For example, Tanzania, like many African nations, has a relatively small market that is incapable of supporting more than a few firms at a time.[92] It also does not have a history of competition advocacy, a trait shared by many other developing countries.

Goals for Reform

Before any discussion of possible methods of reform can take place, an exploration of the goals any proposed type of reform should address must be made. As stated before, it is not necessary to adopt merely one of the proposed reform solutions; reform can take place on multiple platforms and in multiple ways. Therefore, this section will give a broad overview of the general goals any method that is adopted should strive to achieve.

While total eradication of international cartels and other such anti-competitive behaviours is the most desirable outcome, it is also wildly ambitious and clearly impractical. It has been reiterated in this thesis that international cartels are notoriously difficult to detect and the temptation to cartelise the market is sometimes too great to resist. As such, in order to gain some insight into suitable, achievable goals, it would be helpful to first discuss some general goals of competition law for developing countries.

One of the main reasons developing countries implement a competition law system of their own is in order to gain economic freedom. Economic freedom rests on the principle that free participation in the market forms the basis of a free market economy.[93] While

[92] Ibid.
[93] Zimmer, Daniel, *Goals of Competition Law*, (2012) Edward Elgar Publishing at 423.

economic freedom and free competition are wholly intertwined as goals in every competition law system, for developing countries in particular, achieving economic freedom is of the utmost importance. Because of the institutional challenges faced by developing countries, which have been previously discussed in Chapter Three, developing countries often face difficulties when incorporating economic freedom into their goals for competition law. Economic freedom, if it is constitutionally protected, gives individuals the right to freely participate in the economy. These individual interests can often conflict with one another, especially if one accounts for the fact that economic market power is normally unequal between participants, which can lead to imbalance. For instance, individual freedoms can come into conflict in situations where dominant firms attempt to push smaller firms out of the market. Firms with monopoly power in the market can also prevent new entrants from gaining access. It can therefore be difficult to balance out the interests of different participants, particularly for developing countries.

Other scholars argue for a more economics based approach when it comes to setting competition law goals for developing countries, which can be difficult to implement when combined with a free-competition approach. For instance, Professor Michal Gal, who has done extensive research into competition policy issues for small market economies, advocates for a system centred more on efficiency concerns rather than individual freedoms. Gal writes, 'in a small economy, it is vital that the goals of competition policy be clearly, consciously, and unambiguously defined, and that economic efficiency be given primacy over other goals.'[94] While it is true that small market economies can also come from developed countries, developing countries are more likely to fall under this category.

Gal identifies three main economic characteristics every small market economy shares: 1) high industrial concentration levels, 2) high entry barriers, and 3) below minimum efficient scales (MES) levels of production.[95] According to the argument that 'competition policy is designed to protect, promote, and encourage the competitive process,' inefficient firms, or firms that are not operating at maximum efficiency, should be pushed out of the market. Countries with smaller markets should not be overly burdened with more companies than it

[94] Gal, Michal, *Competition Policy for Small Market Economics,* (2003) Harvard University Press at 47.
[95] Ibid.

needs in order to obtain economies of scale. Social goals would also not be protected under this system of competition law. Because developing countries are often concerned with issues that are beyond those that are purely economics based, this approach to competition law can be particularly difficult to implement.

However, according to Gal, employing a strict efficiency approach to the exclusion of promoting economic freedom appears to challenge Professor Josef Drexl's theory that, 'there is no inherent conflict between the more economic approach and the freedom paradigm.'[96] Once again, though, this argument is unworkable in light of developing countries. Because developing countries' markets tend to be highly concentrated, a rigorous application of economic efficiency principles may result in more concentrated economic power, thereby conflicting with the freedom paradigm.[97] Free competition also decreases, particularly in instances where concentrated industries are held by political or well-connected individuals or are subsidiaries of foreign companies. Drexl's theory is therefore only applicable to developed countries, where the entry barriers are relatively low.

Economic freedom at the expense of economic efficiency may be a feasible goal for developing countries, however if reform methods are to be universally applicable, developed countries may chafe at the idea of sacrificing efficiency for a goal they have more or less already achieved. This is the fear many countries, both developed and developing, have when discussing universally applicable reform methods for competition law issues such as merger regulation and international cartels. The general fear is that some goals, particularly those advanced by countries with more political power, are more likely to be adopted than other goals.[98] For example, in developed countries, the goals of competition law are heavily based on traditional economic theories, namely to improve the efficient allocation of resources and maximise consumer welfare. On the other hand, as previously established, developing countries focus on broader objectives when considering

[96] Drexl, Josef, 'Competition Law as Part of the European Constitution' in Bogdandy, A von and Bast, J., *Principles of European Constitutional Law*, (2009) Hart Publishing at 695.
[97] Gal (2003) at 47.
[98] Guzman, Andrew, 'Is International Antitrust Possible?' (1998) New York University Law Review, Vol. 73 at 1501.

competition law goals such as building up their market economies as well as ensuring any changes or provisions that are implemented are done so with the approval of the public.

As over 120 countries have already adopted some form of competition policy, each with provisions specially tailored to fit their own economies and market structures; it would therefore be unrealistic to expect any single goal to satisfy both developed and developing countries.

Conclusion

Regardless of the method of reform that is ultimately adopted, its outcome and impact on developing countries and the global market as a whole will be dependant on which welfare standard is chosen to serve as its benchmark. While there have been some discrepancies in how various standards of welfare are defined, such as the confusion in the precise difference between consumer and total welfare, different jurisdictions choose different welfare standards as the foundation to their competition law systems according to their individual needs. Competition law goals of individual countries can range from maximising economic and social welfare in the domestic market to achieving economic freedom. Therefore, it may be argued that adopting a welfare standard for all developing countries may not be entirely appropriate as it would be difficult to presume one welfare standard would suit the needs of all countries.

When considering which welfare standard should be adopted when implementing the proposed reform measures that will be discussed in the next chapter, due consideration must be paid to the intended beneficiaries of that reform measure. For instance, a domestic welfare standard with a focus on consumer or total welfare would be appropriate for reform measures designed to specifically help developing countries, such as helping them establish their own competition law systems. This is because while it has been argued that national competition law authorities should consider how their decisions would affect global welfare, developing countries are still in a position where they must tend to their own needs first before worrying about global problems. On the other hand, reform strategies that are designed to address the issue of international cartels on a global scale, such as establishing a global harmonised competition law agreement, a global welfare standard would be required in order to address the worldwide issues regarding international cartels.

Developing countries wishing to implement their own competition law systems may be tempted to emulate the systems of more developed jurisdictions, even going so far as to copy their welfare standards, for instance by adopting the same approach to consumer welfare as the United States or the EU. However, doing so would not address the specific challenges that are unique to developing countries. Therefore, developing countries that choose to base their competition law systems on a specific model, they should bear in mind how that system would meet their own individual needs and make the necessary changes.

The following chapter will discuss some proposals for reform, both on a domestic level and on a global level, specifically designed for developing countries.

Chapter Six

Proposals for Reform

Introduction

As established in the previous chapter, before a global solution can be sought, the difficulties facing developing countries must first be corrected. The best way to do this is to enact strategies designed to help them establish and enforce their own competition law systems. These strategies can include fostering better relationships between developed and developing countries as well as establishing guidelines that can help developing countries implement a competition law system designed to address their own specific needs.

Developing countries rarely prioritise forming any kind of competition law policy or enforcement mechanism when they are battling more pressing issues such as poverty, social instability, and political upheaval. However, as was discussed in the previous chapter, an effective competition law system can go a long way towards resolving these issues.

This chapter will discuss the next steps in reforming the current situation regarding international cartels and developing countries. It was proposed in the previous chapter that the most appropriate solution would be to execute reform strategies on a domestic level first before moving onto global reform strategies. This will solve two issues: first, by helping developing countries implement and enforce their own competition law systems, it will ensure these countries are in a position to better defend themselves against both domestic and international cartels; second, with a competition law system of their own, developing countries will be in a much stronger position when entering into negotiations with other nations.

Because developing countries often lack the resources or the knowledge to enact or enforce a competition law system on their own, many strategies designed to help them do so are predicated on seeking support from outside sources. Much of this support can be obtained from international organisations such as the OECD, UNCTAD, and the ICN. The OECD and UNCTAD in particular have developed specific policies and programmes designed to educate policymakers in developing countries on the importance of effective competition laws and ways they can develop or amend their own. Developing countries can also seek support from other developing countries as well as developed countries, through the signing of bilateral or regional cooperation agreements. Nevertheless, while many of these strategies may give developing countries the aid and encouragement they need to enact their own competition law policies, they are not without their own difficulties and consequences. It is therefore still up to them to tread carefully and choose the right strategy that will best fit their needs.

However, in order to fully address the issue of international cartels, it is not enough to simply help developing countries implement and enforce their own competition law systems. In order to attack this problem from all sides, both domestic and global reform strategies must be put forth. Even with their own competition law systems, developing countries will still be at a severe disadvantage in comparison with developed countries and will likely still be targeted by international cartels. In a world where cartel members and cartel behaviours are no longer limited to one or two jurisdictions, it is more important than ever to revisit the idea of global reform in the area of competition law. While some attempts have been made in the past to adopt more globalised competition law policies, it is this thesis' proposal that the world may be ready for another.

Domestic Reform

Helping Developing Countries Implement an Effective Competition Law Regime

Chapter Four discussed the ways in which developing countries themselves can help build an effective competition law regime as well as the factors, such as competition advocacy, necessary to enforce it. This section will therefore detail the ways in which foreign nations, notably developed countries, may better support developing countries.

Free Riding

There are number of ways developing countries may obtain support from developed countries in cases involving international cartels. The simplest of these is by free riding on cases already tried by competition authorities in developed countries. An example of free riding was discussed in Chapter Two regarding Mexico's successful case against the American company Archer Daniels Midland Co. following the successful prosecution of the company by Canada. Free riding is an attractive option for competition law enforcement agencies in developing countries for two reasons: first, developing countries are often fearful of making decisions that would conflict with or simply differ from decisions a foreign, more powerful competition law authority, especially one from a developed country would make; and second, developing countries, especially those with weak enforcement mechanisms, would rather 'assist' or 'support' a more developed or advanced authority by taking on less intense duties such as conducting specific investigatory activities or passing on information it may already possess to the foreign competition authority rather than face the pressure of prosecuting the case itself.[1] Free riding would also alleviate some of the difficulties developing countries when attempting to gain access to evidence on their own.

It is not just developing countries that can benefit from free riding on previous international cartel investigations. Chapter Three alluded to Mexico's successful prosecution of the lysine cartel following Canada's decision regarding the international cartel. Canada's case was previously built upon the United States'. According to John Connor, the Lysine Cartel case represents one of the most significant cases involving an international cartel in history for several reasons: first, it 'represented the U.S. government's first completely successful conviction of a global cartel in more than four decades';[2] second, it 'was the first public manifestation of a sea change in enforcement priorities';[3] third, it 'demonstrated the government's intention to employ tough 'blue-collar' criminal investigative techniques to what had formerly been treated as gentle 'white-collar' misdemeanours';[4]; and finally, although it proved that fines had 'escalated enormously' in the years leading up to the case,

[1] Dabbah, Maher, *International and Comparative Competition Law*, (2010) Cambridge University Press.
[2] Connor, John M., 'Global Cartels Redux: The Lysine Antitrust Litigation,' (1996) in Kwoka, John E.; White, Lawrence J., *The Antitrust Revolution: Economics, Competition, and Policy,* (2014) Oxford University Press at 301.
[3] Ibid at 302.
[4] Ibid.

‘they may still be inadequate to suppress recidivism.’[5] The lysine cartel case was the first case in which the United States went beyond the Sherman Act’s stated maximum penalty of $10 million. By applying the penalty provisions allowing for the recovery of up to twice the cartels profits, or twice the value of consumers’ losses, as laid out in 18 U.S.C. §3571, in 1997, the Department of Justice was able to charge a fine of $70 million on Archer Daniels Midland for its participation in the lysine cartel and a further $30 million for its participation in the citric acid cartel.

Working closely with U.S. antitrust investigators, Canada launched its own investigation into the lysine cartel in 1995. In 1998, Canada successfully imposed a fine of about Canadian $11.4 million (approximately $7.9 million USD at the time) on Archer Daniels Midland, six times more than the previous Canadian recorded fine in competition law.[6] Following on from the U.S. and Canada’s investigations and successful prosecution, Mexico began its investigation into the lysine cartel in February 1997. Two years later, Mexico’s Competition Commission successfully fined Archer Daniels Midland approximately $125,000.[7]

While free riding can alleviate some of the pressure felt by developing countries when confronted with the prospect of bringing an action against an international cartel on their own, it is not without its difficulties, particularly in abuse of dominance cases.[8] In instances where the foreign authority has taken over an abuse of dominance case, whether the final result be eradicate the anticompetitive behaviour or cause it to become ineffective in the global market, the foreign competition law authority may neglect to address the specific harms felt by the developing country that directly affected its domestic market. Furthermore, there are some who argue that allowing developing countries to free ride on foreign international cartel cases is a poor use of the already limited resources these

[5] Ibid at 303.
[6] Reuters. ‘Canada Fines Archer Daniels in Price Fixing,’ *The New York Times*, 28 May 1998.
[7] OECD, ‘Promoting Compliance with Competition Law,’ (2012) OECD Directorate for Financial and Enterprise Affairs, Competition Committee, DAF/COMP(2011)20.
[8] Dabbah.

countries have access to and would only result in a minimal gain with regards to deterring future cartel activity.[9]

Increasing the number of domestic competition law authorities that initiate investigations and enforcement procedures against the same international cartel can also carry the danger of undermining existing leniency programmes. Multiple jurisdictions prosecuting the same cartel also means having to deal with multiple leniency programmes associated with each individual competition law system. Juggling numerous leniency applications is no easy feat and cartel members can suddenly find themselves dropping a ball or two. A company may successfully apply to one leniency programme, granting it immunity in one jurisdiction, while at the same time finding that another cartel member has beaten them to the punch in another. These difficulties can be seen in the EU, where there is no 'one-stop shop' for leniency applications. Firms must therefore apply to multiple jurisdictions at the national level in order to be granted immunity. Even then, their case may still not be heard by the European Commission.[10]

Peer Review

OECD established a Competition Committee responsible for conducting peer reviews of countries' competition law systems. Participation in the programme is entirely voluntary, however once the review is conducted, the country under review has no right of veto over the final report.

The OECD describes several stages that occur during the peer review process.[11] The first stage is the investigation where one or more of the members of the peer review groups collect information relevant to the activity or policy that is under review. The investigators then compile a report based on the acquired information and according to the review criteria that has been previously established. The second stage is the examination stage where the committee discusses the contents of the report with the party being reviewed.

[9] Sokol, Daniel D.; and Stephan, Andreas, 'Prioritizing Cartel Enforcement in Developing World Competition Agencies,' in Sokol Daniel; Cheng, Thomas; and Lianos, Ioannis (eds), *Competition Law and Development*, (2013) Stanford University Press at 140.
[10] Ibid.
[11] Ibid.

The third stage involves the preparation of the final report, which is then submitted to the party under review. The party will then be allowed to submit its own comments and corrections and the modified final report is then published.

Peer reviews are especially helpful when conducted in a public policy context, most importantly the role they play in developing and improving policy making. Peer reviews often culminate in a final report containing specific conclusions and recommendations for improvement, which can serve as a catalyst for internal reform. Peer reviews can also instruct the party under review as well as the country's general population on the best practices in the international field. For developing countries, peer review can be an especially useful tool for obtaining technical assistance and building a proper foundation for an effective competition law regime.

The final report is divided into six sections:[12]

1. Competition policy foundations: this section details the history of the competition policy of the country in question and includes any policy goals that have been implemented into its competition laws.
2. Substantive issues, including the content of the competition law: this section describes the competition law enforcement mechanisms already in place in the country's competition law system and usually also includes summaries of actual cases investigated by the competition law authorities.
3. Institutional issues, enforcement structures and practices: this section outlines the structure and practices of the competition law agency and includes descriptions of its investigative and enforcement powers, its average case load, and any practices that have an international scope.
4. Limits of competition policy, exemptions and special regulatory regimes: this section outlines any exemptions or provisions that give special or differential treatment under the country's competition laws.

[12] OECD. *Trade and Competition from Doha to Cancun: From Doha to Cancun*, (2003) OECD Publishing.

5. Competition advocacy and policy studies: this section describes any activities related to competition advocacy conducted by the competition agency.
6. Assessment and policy options: the final section summarises the conclusions of the committee based on the information contained in the previous sections. It also lists seven to ten recommendations for improvement.

Countries that have agreed to submit themselves for review reported to the OECD that they found the reports to be valuable resources in identifying the areas that needed to be reformed.[13]

Several countries have already taken advantage of the peer review system offered by the OECD, many of whom come from Latin America. For instance, between 2003 and 2006, the OECD, in collaboration with the Inter-American Development Bank, reviewed the competition policies of five countries: Chile (2003); Peru (2004); Mexico (2004); Brazil (2005); and Argentina (2006). It subsequently followed up with these countries in 2007 during the Latin American Forum in order to ascertain the impact the peer review recommendations had on each country's competition policies and the effectiveness of their competition law authorities.[14]

The OECD noted that in general, all five respondents to the follow-up commended the peer review process and the reports they generated, which were then used in a number of ways: as a reference to best practice for internal competition agencies; as evidence for advocating for much needed reforms that required measures outside the agencies, for instance expanding budgets or enacting new legislation; and finally as a tool for competition advocacy through its inclusion in communications with the press or reports on agencies' websites.[15] The recommendations of the reports were separated into two categories: those that necessitated the enactment of new legislation; and those that national competition

[13] Ibid.
[14] OECD, 'Peer Reviews of Competition Law and Policy in Latin America, a Follow-up: Argentina, Brazil, Mexico, and Peru,' (2008) OECD, Inter-American Development Bank.
[15] Ibid.

agencies could put into effect on their own. For the most part, the OECD reported that the latter were more easily carried out.[16]

Each respondent country to the peer review scheme was asked to fill out a generic questionnaire, which only differed slightly from participant to participant depending on their specific recommendations. Each questionnaire asked the respondents to comment on whether and the extent to which the recommendations in their peer reviews had been implemented, and to also detail if further implementations were planned, what steps those would entail. Recommendations in the peer reviews, particularly those that required new legislation, were met with mixed results. While Argentina and Brazil struggled with pushing through the new legislation, Mexico and Chile found the peer reviews to be a highly useful instrument, with Mexico making broad amendments to their competition laws two years after their review and Chile using the report as an aide to applying existing legislation that had been passed almost at the same time as the peer review itself. Peru's attempts to follow through the providing for merger control as recommended by its peer review report failed at the time. The debate has since been revitalised and new legislation is now being discussed.[17]

Along with budget concerns, which every respondent had difficulties with, the topic of cartels and cartel regulation was raised in all five peer review reports. The OECD has been emphasising the importance of prosecuting hard-core cartels and how competition agencies should be making this their highest priority for several years.

While the OECD recognised the difficulties in enacting and enforcing an anti-cartel mechanism, the OECD reviewers found each respondents' efforts to be lacking in some way. In general, all the peer review reports pointed out the dearth of cartel investigations that had been conducted in each respondent country and even fewer cases that had been successfully prosecuted.[18] Other criticisms included a lack of leniency programmes, or

[16] Ibid.
[17] Egge, Michael; Motta, Rita, 'Merger Control 2016 – Introduction,' (2016) Latin Lawyer, available at http://www.latinlawyer.com/reference/article/49103/introduction/.
[18] OECD, 'Peer Reviews of Competition Law and Policy in Latin America, a Follow-up: Argentina, Brazil, Mexico, and Peru,' (2008) OECD, Inter-American Development Bank

ineffective leniency programmes; and that fines and sanctions imposed in successful cases were not high enough to have any impact on deterring future cartel activity.

The reports all contained the same general and specific recommendations. General recommendations given to respondents included prioritising the prosecution of cartels, and imposing stricter penalties in successful cases. Specific recommendations included incorporating more investigative tools, setting or specifying the legal standard for cartels (preferably by establishing a *per se* rule or its equivalent), and suggesting amendments to leniency programmes in order to improve their effectiveness.[19]

In general, the OECD reported that most of the recommendations, particularly those designed to combat cartels, made to the respondents were carried out.[20] More difficult recommendations, such as those requiring new legislation, such as setting new standards for cartels, had yet to be implemented at the time of the follow-up report but had been proposed. Although the OECD noted that at the time of its report, it was still too soon to see whether any of the changes made had any positive effects on combating cartels, several respondents recorded an increase in the number of cartel investigations they had begun.[21]

Not only are the recommendations in the peer review reports a useful instrument to the country that is being reviews, but they can also act as a helpful reference point for other countries. For instance, Chile and Mexico both reported using the recommendations in the peer review reports for Argentina and Brazil during the implementation process of their own recommendations.[22] It is clear from reports such as this, that the OECD's peer review scheme is one of the most indispensable tools when identifying and fixing the problems in the competition law systems of developing countries. While success with implementing the recommendations made in peer reviews can be mixed, they serve as a good stepping-stone for developing countries wishing to improve the infrastructure of their competition laws.

[19] Ibid.
[20] Ibid.
[21] Ibid.
[22] Ibid.

There are, however, a few disadvantages associated with peer reviews.[23] For instance, peer review recommendations are not binding, nor are there any enforcement or compliance mechanisms attached to the final outcome. There is no requirement for the party under review to follow or accept the final review or to implement any of the recommendations. In some respects, however, a more voluntary implementation system may produce more favourable results than if the final recommendations were compulsory. Parties under review are more likely to cooperate with the review committee and the process as a whole is likely to be confrontational if the process is more informal.[24] On the other hand, peer reviews require a great deal of investment. The process itself is lengthy and requires a great deal of time to complete. Therefore, peer review committees are restricted to how many reviews they may be able to undertake and as a result, individual countries likely are not reviewed very often, giving very little opportunities for follow-up checks.[25]

Technical Cooperation

In addition to the peer review system established by the OECD, the UNCTAD has also developed a programme that offers assistance to developing countries in relation to capacity building and technical cooperation.[26] There are five elements to the programme: legislation, where UNCTAD helps developing countries adopt or amend their domestic competition laws in order to best meet their particular needs; the peer review process, which has been previously discussed; institutional, which provides support to developing countries creating or improving domestic institutions; capacity building, which helps developing countries come up with effective enforcement strategies; and finally, advocacy, which promotes competition culture in developing countries.[27] According to UNCTAD, in 2015, they ran almost thirty programmes, which comprised of 229 projects in 145 countries. One of the programmes it designed is COMPAL, which is supported by the Swiss government and is concerned with helping Latin American countries with regards to

[23] Ibid
[24] Ibid
[25] Ibid
[26] UNCTAD, 'A Guide to UNCTAD Technical Cooperation,' (2012) UNCTAD, UNCTAD/DOM/2009/2/Rev.1.
[27] Ibid.

competition law and consumer protection matters. The programme currently involves twelve countries and aims to help them implement competition law and policies in a way that will result in lower prices, higher quality and variety of products.[28]

In response to the Accra Accord, which was adopted by the 12th Ministerial Conference of UNCTAD, the Africa Competition Programme (AFRICOMP) was launched in 2008. AFRICOMP works to advance competition law in developing countries on a national as well as a regional level.[29] The programme is funded by Norway, Sweden, Switzerland, France, the EU, and the UN Development Programme. It is also run by UNCTAD alongside the national coordinators of the beneficiary countries as well as the secretariats of WAEMU and CEMAC. By May of 2010, 21 countries and six regions put in requests to be included in the programme.[30] Beneficiaries to the programme include countries such as Ghana, Lesotho, Malawi, Swaziland, and Zambia along with the regional groups, WAEMU (West African Economic and Monetary Union) and CEMAC (Economic Community of Central African States). WAEMU has eight member states and CEMAC has eleven.[31] The programme is intended to help African states to 'develop appropriate administrative, institutional and legal structures for effective enforcement of competition and consumer laws and policies.'[32]

UNCTAD is also the depository of the Model Law on Competition, which is used as guidance for developing countries when drafting and amending their competition laws.[33] The Model Law is comprised of two parts: the first part, which contains thirteen chapters, sets out potential substantive provisions for a basic competition law system; the second part

[28] Maher, Imelda, and Papadopoulos, Anestis, 'Competition Agency Networks around the World,' in Ezrachi, Ariel (ed.), *Research Handbook on International Competition Law,* (2012) Edward Elgar Publishing at 71.
[29] UNCTAD, 'Accra Accord and the Accra Declration,' UNCTAD/IAOS/2008/2 at para. 104.
[30] Qaqaya, H. (Head of Competition and Consumer Policies Branch of UNCTAD), 'The AFRICOMP Programme,' (High Level Meeting on Trade Capacity Building and Competition Policy from African LDCs, Zambia, May 2010), available at http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb_AFRICOMP_en.pdf, last accessed 18 July 2016.
[31] WAEMU member states: Benin, Burkina Faso, Ivory Coast, Guinea-Bissau, Mali, Niger, Senegal, and Togo; CEMAC member states: Angola, Burundi, Cameroon, Central African Republic, Chad, Republic of the Congo, Democratic Republic of the Congo, Equatorial Guinea, Gabon, São Tomé and Príncipe, and Rwanda.
[32] UNCTAD, 'The Africa Competition Programme (AFRICOMP),' May 2009 Briefing, available at http://www.unctad.org/sections/ditc_ccpb/docsditc_ccpb0027_en.pdf.
[33] UNCTAD, Model Law on Competition, TD/RBP/CONF.7/8, available at http://unctad.org/en/Docs/tdrbpconf7d8_en.pdf, last accessed 17 July 2016.

contains commentaries and explanation of the chapters discussed in the previous part and describes alternative to existing legislation.[34]

In addition to developing technical assistance programmes and guidelines on competition law, UNCTAD also carries out training activities to different audiences in developing countries.[35] These training activities are mostly geared towards judges, policymakers, competition and consumer officials and those in private sector with competition law experience. Training activities are held either in UNCTAD's offices in Geneva, or in the relevant country itself. Many of these activities are conducted in a way that is reminiscent of university style 'teaching' or 'seminars.'[36] Because many audience members are unfamiliar with competition law issues, these sessions tend to focus on the foundations on competition policy.[37] However, others are much more advanced and are designed to help policymakers with the skills they need to implement legislative reform or enact a working competition law system. In addition to these training sessions, UNCTAD also offers judges from developing countries the opportunity to meet with competition law specialists in order to discuss pending cases.

Unlike other international organisations such as the ICN and the OECD, the UNCTAD has retained a strong focus on providing support to developing countries. Through the running of technical assistance programmes, which all draw heavily on the Model Law, it has established itself as an invaluable aide to other competition law networks and regional institutions.

Foreign Direct Investment

Another way developed countries can support developing countries in their attempts to strengthen their competition law systems is through foreign direct investment (FDI).[38] As

[34] Lee, Cassey, 'Model Competition Laws,' in Cook, Paul; Fabella, Raul; and Lee, Cassey (eds), *Competitive Advantage and Competition Policy in Developing Countries* (2007) Edward Elgar Publishing at 29-53.
[35] Dabbah (2010) at 147.
[36] Ibid.
[37] Ibid.
[38] Hawk, Barry E., *International Antitrust Law & Policy: Fordham Competition Law* (2010) at 316.

stated above, FDI can be an excellent way to encourage competition in the market. Furthermore, it has been put forward that the development of investment policies that encourage foreign investment can also support the development of stronger competition policies.[39] Indeed, more countries are recognising the need to maintain strong competition laws and policies in order to encourage and facilitate FDI into their economies. Because of this view, developing countries that are reluctant to adopt their own competition law systems can be persuaded to do so on the basis that it may encourage more foreign investment.

Many developing countries acknowledge that FDI is crucial in the development of their economies as well as technological advances, which can not only increase the competitive conditions of their domestic economies but also benefit local consumers.[40] However, as with the issue of free riding, FDI also comes with some inherent risks. If the developing country relies too heavily on FDI, it may find themselves subject to the whims of foreign nations and multinational firms. This loss of control may then translate to the loss of control the domestic government can exert in its ability to make independent decisions with regards to economic, political, and social issues.[41] Developing countries are also in danger of being manipulated if it lobbies too hard for FDI. In some countries, governments may institute well-meaning measures in order to attract more FDI. In doing so, governments may be so singularly focused on attracting FDI and accommodate the interests of foreign investors that they may forget or neglect their own interests in relation to competition and competition policy.[42] This oversight may result in situations where the domestic competition law system may develop into a regime it may otherwise not have, thus undermining the potential for effective and impartial enforcement.[43] In order to avoid these circumstances, domestic governments should adopt a more circumspect approach to FDI by recognising that allowing foreign investors free rein in their local markets is not in their country's best interests nor in the interests of its local consumers. Governments from

[39] World Trade Organisation, 'The relation between investment and competition policy,' (1998) Communication from the European Community and its Member States, Working Group on the Relationship between Trade and Investment, WT/WGTI/W/63.
[40] Dabbah, M, 'Competition Law and Policy in Developing Countries: A Critical Assessment of the Challenges to Establishing an Effective Competition Law Regime,' (2010)
[41] Hawk at 317.
[42] Ibid.
[43] Ibid.

developing countries should therefore be instructed to clarify to foreign governments that participating in their markets would be granted on the condition that such investment will not unduly infringe on the domestic firms' rights to participate in the market.

China is the largest recipient of FDI among developing countries and plays a massive role in promoting trade, investment, and tax revenue generation. It relies heavily on FDI to sustain its economy and therefore the government extensively regulates it. FDI is regulated by several pieces of legislation in China. The 'Regulations on Guiding the Direction of Foreign Investment,' (FDI Regulations) first enacted by the State Council in 1995 and subsequently amended in 2002, outlines the regulatory framework for FDIs.[44] The FDI Regulations separates foreign investment projects into four headings: encouraged, permitted, restricted, and prohibited.[45] Foreign investments that introduce new technologies can fulfil the demands of the market, develop the market, increase China's competitiveness internationally, or contribute to the development of the middle and western regions of the countries are encouraged.[46] On the contrary, projects that endanger state security, damage public interest, pollute the environment, hinder the protection and development of natural resources, or utilise techniques or technologies that are exclusive to China are prohibited.[47] Any industry not specifically mentioned in any of these four categories is permitted. The 'Foreign Investment Industrial Guidance Catalogue,' issued by the National Development and Reform Commission (NDRC) in 1995 and later revised by the NDRC and the Ministry of Commerce (MOFCOM) in 2011, defines and catalogues the industries in which foreigners may invest. FDI transactions in China can take several forms: first, through the creation of a foreign investment enterprise (FIE) in China; or second, by way of an M&A operation, specifically designed to acquire existing local businesses. The latter of these options is the most important method of obtaining FDI in China and the acquisition of a number of well-known Chinese firms has had a notable impact on the development of competition in China.

Following its accession to the WTO, China has had to relax some its policies and restrictions on foreign investment in order to stay true its commitments. As a result, more industries

[44] State Council.'Regulations on Guiding the Direction of Foreign Investment,' (1995, amended in 2002).
[45] See Article 4.
[46] See Article 5.
[47] See Article 7.

have been added to the permitted or encouraged categories and the restrictions such as capping foreign ownership and the mandatory export requirements placed on joint ventures have been removed. These changes have allowed China to develop and refine it competition policies, industrial policies, as well as its intellectual property rights protections.[48] By creating a more competitive environment for foreign investors, China has created a more open market and allowed both foreign and domestic firms to trade freely with regards to imports.

Nevertheless, while some scholars have lauded the expansion of FDI in China, there are others who have cautioned an overly dependent approach to foreign investment. Professor Ping Lin has discussed two ways in which FDI can negatively affect industries in China.[49] First, while FDI firms can open up competition in the market, they can also place undue burdens on local enterprises.[50] Foreign firms often have access to greater resources and more advanced technology and management. Unable to compete, domestic firms are driven out of the market, leading to a higher concentration of foreign enterprises. Second, the most desirable local enterprises for FDI are often the dominant ones in the market, making them more attractive to foreign firms who wish to merge or acquire them.[51] Many of these transactions involve either state-owned enterprises or other top companies. As a result, foreign enterprises can quickly gain a dominant position in the market. Indeed, industries such as automobile production, mobile phone production, and soft drinks, are all largely dominated by foreign enterprises in China.

Fearful of relinquishing all its markets to foreign influences, China's competition law authority, MOFCOM, has begun to push back against foreign investments. On 3 September 2008, industry giant Coca Cola announced its plans to acquire China Huiyuan Juice Group Ltd, the largest domestic juice manufacturer in the country.[52] This acquisition would increase Coca Cola's market share in China's juice industry from 12.7 percent (calculated in

[48] Song, Ligang, *Rising China: Global Challenges and Opportunites*, (2011) Australian National University Press at 85.
[49] Lin, Ping; Zhao, J., 'Merger Control Policy under China's Anti-Monopoly Law,' (2012) Review of Industrial Organization, Vol. 41.
[50] Ibid.
[51] Ibid.
[52] Madden, Normandy, 'Coca-Cola Bids $2.4 Billion for Huiyuan Juice Group,' AdvertisingAge, 3 September 2008.

2008) to 20.2 percent. It would also give it an advantage over its rival PepsiCo in relation to accessing the beverage market in China. The reaction to this announcement was almost immediate. Local juice manufacturers claimed they would not be able to compete with Coca Cola's increased market power.[53] Citizens protested the acquisition of a beloved, home-grown, Chinese brand. Due to the overwhelmingly negative response, on 18 March 2009, MOFCOM subsequently released Notice [2009] No. 22, prohibiting the acquisition.

Notice No. 22 outlined three potentially negative consequences of the acquisition on competition.[54] First, following its acquisition, Coca Cola would have had the power to transfer its dominant position in the carbonated soft drink market to the fruit juice market, driving out local fruit juice manufacturers and therefore injuring consumer interests. Second, by obtaining control over two of the largest fruit juice brands in China, Huiyuan and Coca Cola's existing subsidiary Meizhiyuan, the dominant position it would gain would have raised barriers to entry, preventing new competitors from entering the market. Third, the acquisition would have forced small and medium-sized local fruit juice manufacturers out of the market and hinder their ability to innovate and develop new products.

MOFCOM's decision was roundly criticised as motivated by protectionist values, with many believing it was 'fuelled by popular resentment against a foreign company acquiring a popular Chinese brand.'[55] Conversely, or perhaps in response to the criticisms it received regarding its previous decision, in August 2012, MOFCOM issued a conditional approval to Wal-Mart regarding its plans to acquire Niuhai Holdings Ltd, an indirect parent company of Niuhai Information Technology (Shanghai) Ltd, which controlled Yihaodian.[56] Wal-Mart specifically targeted Yihaodian, which translates to Store No. 1 in Chinese, in its transaction. Yihaodian is one of the largest and fastest growing online retailers in China. The decision was once again met with criticism, however MOFCOM imposed a number of limitations on Wal-Mart, which confined its business to the Yihaodian website alone.

[53] Fairclough, Gordon; Tejada, Carlos; and Bauerlein, Valerie, 'Beijing rejects Coke takeover,' *Wall Street Journal Asia,* 19 March 2009.
[54] Notice of the Ministry of Commerce of the People's Republic of China, Notice 22 (2009), available at http://fldj.mofcom.gov.cn/aarticle/ztxx/200903/20090306108494.html, last accessed 15 July 2016.
[55] Fairclough, Gordon; Tejada, Carlos; and Bauerlein, Valerie, 'Beijing rejects Coke takeover,' *Wall Street Journal Asia,* 19 March 2009.
[56] 'Wal-Mart gets restricted approval to raise stake in China e-commerce firm,' 14 August 2012, Reuters.

As can be seen from these examples, while FDI can be a useful way to persuade developing countries to implement their own competition law systems on the condition that it may encourage more foreign investment, the use of FDI must be exercised with extreme caution. Many countries are loath to relinquish control of well-established domestic enterprises, however, these enterprises are usually the most likely targets of foreign investors. A balance must therefore be maintained, between allowing more foreign influences to enter the market and ensuring the relevant market is not completely dominated by outside investors.

Global Reform

Establishing a Global Harmonised Competition Law Agreement

Reasons for Supporting a Globalised Competition Agreement

For developing countries struggling to establish their own competition law systems, a global, harmonised competition law agreement, specifically designed to combat international cartels, can ease the burdens they experience when faced with prosecuting these cartels on their own. There are many reasons why a harmonised, global competition law agreement may be the most ideal way to address international cartels.

A global harmonised competition law agreement could help alleviate the conflict regarding export cartels. As previously discussed in Chapter Two, developing countries are more likely to suffer negative effects due to the exemptions granted to export cartels by other, mainly developed, countries. As a result, many attempts have been made in curbing or abolishing these exemptions entirely, as was discussed in Chapter Three.

Apart from resolving the controversy regarding export cartel exemptions, a harmonised agreement can also be an effective tool in the fight against hard-core international cartels, and not solely for the benefit of developing countries. Given that the large majority of international cartels are formed of producers from a multitude of predominately industrialised states, investigating, let alone prosecuting, an international cartel as an individual competition authority, especially from a developing country, is particularly difficult. Scholars who argue that there is little to no need for governments to curb cartel behaviour often rely on the argument that cartels in themselves are inherently unstable due to the propensity for cartel members to 'cheat.'[57] These arguments often go hand in hand with others that argue that governments may potentially do more harm than good if they wrongfully condemn a welfare-enhancing cartel.[58]

Given that all developing countries suffer from a dearth of resources, many are unwilling or unable to allocate the funds necessary to effectively maintain a competition law regime. A global, harmonised competition law agreement can help to ease this burden. Chapter Four discussed the difficulties developing countries face when attempting to confront an international cartel operating in their economy alone. Many of these problems stem from the lack of resources developing countries are able to expend on investigating such cartels, made especially more difficult given that many international cartels these days are increasingly more adept at structuring their cartels in order to make domestic enforcement nearly impossible. A globalised competition law agreement can not only alleviate some of the expenses in such cases as well as facilitating the transfer of information between countries on a global scale, thereby making the task of gathering sufficient evidence easier, particularly for countries who may not have convenient access to such information across their borders.

In addition to alleviating some of the burdens competition law authorities from developing countries face when prosecuting international cartels, a global harmonised agreement can also be a driving force in increasing, or even maximising, global welfare (see the previous chapter for a discussion on the definition of global welfare and how it can be applied). This can be seen most clearly in cases involving cross border mergers of large, dominant firms from various parts of the world. While domestic welfare may increase as a result of such a merger, due to an increase in productive efficiency and an increase in the market power of the merged entity, at the same time, foreign welfare and subsequently global welfare may

[57] Stigler, George J., 'A Theory of Oligopoly,' (1964) Journal of Political Economy, Vol. 72, No. 1.

[58] See Levenstein, Margaret C.; Suslow, Valerie Y., 'Contemporary International Cartels and Developing Countries: Economic Effects and Implications for Competition Policy.' (2003) Antitrust Law Journal, Vol. 71, No. 3.

decrease.[59] It is a well-known fact that national or domestic competition law authorities only account for national or domestic welfare, and seldom even consider the implications their choices may have on the global economy.[60] An international competition law agreement, if negotiated effectively, may thus ensure that global welfare is accounted for in every decision-making process.

Proposed Content of a Global Harmonised Competition Law Agreement

For the purposes of this thesis, only provisions dealing specifically with international cartels will be discussed with regards to potential inclusion in a global harmonised competition law agreement. Should such an agreement ever be successfully negotiated, it will of course cover a wider spectrum of competition law issues; however, an analysis of the content of these rules would go beyond the scope of this thesis. It is also important to note that any international competition law agreement should not override already established domestic competition laws. It is highly unlikely that countries would agree to an agreement in which they would lose control of their own competition law regimes.

The specific provisions governing a global harmonised competition law agreement would of course depend on the forum in which such an agreement would take place. It is argued that it would be much less complicated if the agreement were to be concluded in an established international organisation, such as the WTO. In this regard, not only would negotiations be more readily initiated but also the agreement would be able to draw on some of the already established principles of the organisation itself.

With regards to prohibiting hard-core international cartels, it is proposed that the provisions adopted under an international competition law agreement can be drawn from domestic competition laws with a few modifications. However, in addition to prohibiting the formation of international cartels, the international agreement must also provide mechanisms for detecting and punishing any cartel that is formed. Provisions on detecting

[59] Jain, Jitendra, *Harmonization of International Competition Laws: Pros and Cons* at 33
[60] Ibid.

and punishing international cartels can be separated into three categories: investigations, leniency programmes, and fines.

One of the biggest problems with research into international cartels is the issue of detection. While this thesis deals with the question of how developing countries can effectively combat these cartels, either on their own or in conjunction with the international community, these strategies can only be employed in cases where an international cartel has been successfully identified. As stated earlier in this thesis, the rate of detection for cartels operating in the United States and Europe is about ten to twenty percent. Without the resources to prosecute or even investigate suspected cartels, it would fair to surmise that detecting a cartel that is either operating in a developing country's jurisdiction or targeting it is nigh impossible.

National competition law authorities should therefore be encouraged to cooperate with one another as much as feasibly possible during the investigation process. Cooperation agreements related to the sharing of evidence in cases involving international competition law issues will be discussed later in this chapter; however, it is proposed here that a similar approach may be adopted in an international agreement.

The second aspect that should be included in a provision dealing with hard-core international cartels is the issue of leniency programmes. An effective leniency programme can facilitate the detection of international cartels by encouraging cartel members to report on their fellow cartel participants in exchange for immunity or other benefits. As previously stated, at the moment, there is no global leniency programme in place to address the issue of international cartels. However, the EU's Directive 2014/104/EU, more commonly known as the Damages Directive, serves as a good example. The Damages Directive, which is to be implemented by all member states by 17 December 2016 at the very latest, coordinates many aspects of national competition laws related to private enforcement of Articles 101 and 102 TFEU.[61]

[61] Directive 2014/104/EU of the European Parliament and of the Council of 26 November 2014 on certain rules governing actions for damages under national law for infringements of the competition law provisions of the Member States and of the European Union, OJ 2014, L349/1.

The European Commission's leniency programme has traditionally been operated on the basis of combating and deterring the formation of cartels. The Commission will often grant immunity or reduce imposed fines to cartel members who inform their fellow members or cooperate with their investigation. The Damages Directive subsequently grants absolute protection to statements made for leniency or in the course of settlement applications.[62] Parties wishing to bring follow-on actions for damages would therefore no longer have access to this information. Because the Damages Directive has not yet been implemented across all EU member states, it is still too early to determine what effect this rule will have with regard to cartel informants or private enforcement cases. It may be that cartel members may be more likely to report on their fellow cartel participants if they can be assured that any information they provide in the course of that reporting will not be used against them at a later time. On the other hand, the Directive may have a deterring effect on those who wish to bring private actions for damages. If claimants no longer have access to the necessary documents in order successfully bring a claim in the EU, they may turn elsewhere to another jurisdiction in order to seek proper compensation.

The final issue a global harmonised agreement must address is optimal deterrence. As was discussed in Chapter Three, deterring the formation of cartels, both domestic and international, is usually achieved through the imposition of fines or criminalising such behaviours. With regards to the issue of fines and other sanctions, there are a number of approaches that can be taken here. National competition law authorities should of course be able to retain their independence and be free to apply their own domestic laws in cases involving international competition issues. However, an international competition law agreement can serve to establish a standard according to which all countries should maintain. At the moment, sanctions for international cartels vary widely between different competition law systems. For instance, on one side of the spectrum sits the United States, whose treble damages actions, criminal charges and imprisonment of cartel members has rendered it one of the most severe systems in the world. On the other side of the spectrum sits developing countries that may or may not have a competition law system of their own.

[62] Ibid, Recital 46.

Those that do are usually ineffectively enforced and may be missing significant competition law elements. Those that do not are clearly in no position to combat international cartels.

It is doubtful that many nations would wish to apply the strict penalties adopted by the United States. However, if left to their own devices, it is doubtful that an international competition law agreement designed to punish international cartels would be able to effectively do so. Therefore, it may be necessary to impose a minimum standard for sanctions regarding international cartels in order to establish a middle ground between the harsh punishments on the United States and the weaker ones of other countries.

The idea of setting minimum standards in relation to cartel enforcement in international competition law was raised in the Munich Code. The Munich Code was drafted as part of a study conducted by the Max Planck Institute for Foreign and Patent Copyright and Competition Law of Munich, which seriously considered the development of an international competition law agreement.[63] As part of its initiative to consolidate different domestic competition laws into a single international competition law agreement, the Munich Code proposed setting a minimum standard of enforcement procedures for all ratifying countries. These minimum standards were based on the three main ideals of contemporary competition law: regulation of concerted conduct, prohibition of abuses of dominant position, and regulation of business concentration.[64]

However, while setting minimum standards in a competition law agreement may help developing countries form a foundation, concerns have been raised regarding their effectiveness and desirability. When minimum standards were suggested in the Munich Code, it was met with resistance from a number of countries. By requiring all potential ratifying countries to harmonise their competition laws and adopt a minimum standard, many competition law authorities voiced the concern that the requirement would undermine their political preferences and economic policies on which their own laws were

[63] International Antitrust Working Group, 'Draft International Antitrust Code as a GATT-MTO Plurilateral Trade Agreement,' (1993) Max Planck Institute; see also Hauser, H; Petersmann, E. U, 'Draft International Antitrust Code,' (1994) Swiss Review of International Economic Relations, Special Issue No. 310.
[64] See Taylor at 304.

based.[65] In addition, they argued that harmonising all competition laws could prevent the natural progression of their domestic competition laws and also prevent them from designing and applying them in a way that suited their individual needs.[66] Furthermore, while introducing a minimum standard of competition law may be useful for developing countries who either lack a competition law system of their own or have a weak or ineffective system, stronger economies with already established competition laws may balk at the notion of being prevailed upon to amend or abolish their existing laws.

In keeping with the concerns raised by China and Thailand, any international competition agreement should also contain provisions to more effectively regulate the exemptions granted to export cartels. It is tempting to argue for a complete blanket prohibition on export cartel exemptions; however, this approach ignores the associated benefits export cartels can have in some situations. Therefore, any provisions in an international competition law agreement dealing with export cartels should continue to allow for these exemptions, albeit on a much more limited scale.

In addition to simply examining the effects an export cartel may have on their domestic market, governments could also be required to consider any ramifications the cartel may have on international competition and foreign markets. Governments seeking to apply any kind of exemption to an export cartel should be required to assess the effects of that cartel on the overall global market. In the event that an export cartel has a negative impact on international competitive market, the exemption should be refused. Exemptions granted to export cartels should also contain strict limitations such as the restricting the size of the cartel that is allowed and the types of conduct the cartel is allowed to engage in. Furthermore, export cartels that are granted an exemption should be subjected to regular reviews in order to monitor any potential anticompetitive effects.

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[65] Chum, Yun-Peng, 'Towards the Establishment of an Order of Competition for the International Economy: With References to the Draft International Antitrust Code, the Parallel Imports Problem, and the Experience of Taiwan,' in Cheng, Jiarui; Cheng Chia-Jui; Liu, Lawrence; Wang, Chih-Kang, *International Harmonization of Competition Laws*, (1995) Martinus Nijhoff Publishers at 453.

[66] Melamed, A. Douglas, 'International Antitrust in an Age of International Deregulation,' (1998) George Mason Law Review, Vol. 6 at 444.

While some of these provisions may go a long way in helping developing countries combat international cartels, negotiating a new international law agreement is never a simple endeavour. There are many challenges that can arise when attempting to implement such an agreement. These will be discussed in the following section of this chapter.

Challenges in Implementing and Enforcing a Global Harmonised Competition Law Agreement

Despite the many benefits associated with supporting a harmonised competition law agreement, there are also many challenges. For instance, while many academics agree that the WTO would be the best possible forum for such an agreement, the WTO has unilaterally declared there are no plans to implement a separate competition law agreement.

One of the major challenges associated with implementing a global harmonised competition law agreement is the level of difficulty associated with negotiating such an agreement. The previous chapter highlighted some of the problems developing countries can face when entering into negotiations in bilateral or regional trade agreements. On a global scale, these challenges are likely to be magnified to an extent where successfully concluding the terms of such an agreement is a near impossible dream. For instance, the issue of export cartels is a particularly contentious issue in the political economy. Countries that continue to maintain exemptions for export cartels have been extremely vocal in their support for them, the United States being amongst the most vehement. Therefore, a global competition law agreement that would allow foreign states to regulate export or import cartels located beyond their own borders is likely to face a great deal of opposition.

Countries are also likely to disagree on the exact definition of what an 'ideal' global competition law regime should be.[67] Each jurisdiction will have its own specific economic, cultural, and societal needs that may conflict with those of others. There are some who argue that competition laws, when put into practice, should not be wholly uniform – that

[67] Sweeney, Brendan, 'Globalisation of Competition Law and Policy: Some Aspects of the Interface Between Trade and Competition,' (2004)

depending on their individual economic structures and levels of development, states are likely to have different policy needs and therefore have developed their own laws to reflect that.[68] In order to properly establish a harmonised agreement, countries would need to agree on a number of provisions governing a range of competition law issues. Countries are less likely to make allowances or compromise on such issues, particularly in cases where the differences between the signing parties is significant.[69] Given that an international competition law agreement would be most effective if the signatories included developed and developing countries, it is unlikely that harmonisation would be successful.

The idea of a WTO agreement on competition law has been rejected by several developing countries based on the argument that it would need to encompass more than simply competition law issues and should therefore include broader industrial policy exceptions. During the discussions in the working group on trade and competition, India submitted a communication stating that:[70]

> Developing countries do not yet have the kind of well-developed safety nets that exist in industrial countries to provide for those displaced by import competition. There is thus a greater need to cushion its impact by suitable industrial restructuring measures … which would also enable developing countries to embrace greater trade liberalization.

This concern is also reflected in the ways several developing countries have already included other social and political objectives in their competition law systems rather than focusing wholly on competition issues. To that end, it is clear that some developing countries still have not reconciled themselves to the idea of a pure competition law system. During the Cancun Ministerial Conference, Kenya provided an explanation for this reticence:[71]

[68] Ibid.
[69] Taylor, Martyn D. at 343.
[70] Communication from India of 26 September 2002, WT/WGTCP/W/216.
[71] Comments by Kenya on Second Revision of the Draft Cancun Ministerial Text of 14 September 2003, WT/Min(03)/W/21.

> [We] believe that this Ministerial Conference should … focus on how to expand the space of understanding of the Singapore Issues and launch a process of improving that understanding. Kenya cannot accept the launching of negotiations on issues that we do not clearly understand and whose implications for our economies have not been assessed. Moreover, although Kenya attaches a lot of importance to technical assistance and capacity building, we are fully convinced this should be provided to enhance understanding of issues involved before negotiations are launched.

This statement from the Kenyan representative is indicative of the worry a number of developing countries share regarding the costs that are involved with developing a new WTO agreement. The issue of costs has been raised with regards to a number of agreements that were adopted in the course of the Uruguay, such as the agreements on customs valuation,[72] technical regulations,[73] sanitary and phytosanitary measures,[74] and intellectual property rights.[75] In order to implement the norms in each of these agreements, developing countries were required to purchase new equipment, hire and train enforcers, and establish a system of checks and balances.[76]

Kenya's concerns about technical assistance in the event of WTO competition law agreement are also well founded. Each of the above agreements mentioned have technical assistance provisions, requesting that industrialised countries should provide guidance to developing countries related to the necessary procedures in order to implement and apply the rules set out in the agreements.[77] However, none of these provisions are binding on the members, an issue that is the source of great contention among developing countries who

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[72] Agreement on the Implementation of Article VII (Customs Valuation)
[73] Agreement on Technical Barriers to Trade.
[74] Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement).
[75] Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement).
[76] Finger, Joseph, Schuler Philip, 'Implementation of Uruguay Round Commitments: The Development Challenge,' (1999) Policy Research Working Paper Series 1264, The World Bank.
[77] See Article 9 of the SPS Agreement; Article 67 of the TRIPS Agreement; and Article 20(3) of the Customs Valuation.

claim that industrialised countries have done little to help them.[78] Indeed, in the area of competition law, developing countries have already reported receiving inadequate technical assistance from developed countries, with the result that many of them are unable to establish the institutions and agencies necessary to efficiently enforce competition rules.[79] It is therefore understandable that developing countries are reluctant to expend their already scarce resource on a venture that would bind them to more obligations without first obtaining assurances that they would receive the necessary help in order to do so.

Attempts to Establish a Global Competition Law Agreement

There have been several attempts throughout history to establish an international competition law agreement. Unsurprisingly, these attempts have all failed at the negotiation stage. The first attempt came following the First World War when the League of Nations called for a global conference in 1925 in order to determine and abolish the obstacles to the development of international trade. This led to the World Economic Conference in 1927, whose primary objective was develop policies in order to reduce barriers to international trade as well as government barriers such as tariffs.[80] Additionally, many of the participants also discussed the issue of private barriers, such as domestic and international cartels, as they considered these to be of equal importance. It was during this conference that the idea of using a universal law to govern and protect global competition was first deemed a potential international issue.[81]

The official objective of the 1927 Conference was to convince governments of the necessity of cooperation with foreign governments in order to avoid economic collapse and the subsequent political consequences.[82] 194 participants from fifty nations were in attendance, including the members of the League of Nations, the United States, the Soviet Union, and Turkey.[83] Conference organisers hoped that government participants would

[78] Finger, M.; Winters A., 'Reciprocity in the WTO,' (2002) in Hoekman, Bernard; Mattoo, Aasitya; English, Edward Philip, *Development, Trade and the WTO: A Handbook*, (2002) World Bank at 51-2.
[79] Papadopoulos, Anestis S. *The International Dimension of EU Competition and Policy*, (2010) Cambridge University Press at 268.
[80] Gerber, David. *Global Competition: Law, Market, and Globalization* at 24.
[81] Ibid.
[82] Gerber at 25.
[83] Ibid.

realise the importance of fostering relationships with one another on their own. As such, the agenda did not contain plans to create any sort of binding agreement and the participants were not required to represent their government in an official capacity. Instead, conference leaders intended on developing a set of internationally accepted responses to various global economic problems, which would then convince the public as well as world leaders of the need to implement further cooperative economic policies.[84] Through the conference's initiative, a number of studies were conducted on the effects of international cartels, which would go on to have a major impact on the way the issue was subsequently discussed.[85] Ultimately however, its final recommendations did not warrant the establishment of a binding international competition law system nor did it call for any sort of enforcement agency or office to oversee international cartels, much to the disappointment of some participants.[86] Instead, the Conference recommendations included instructions for League members to document information related to international cartel behaviour, monitor their activities, and investigate and publish information regarding any negative effects they produced. Despite these hopeful first steps in implementing an international competition law agreement, the start of the Great Depression followed by the Second World War forestalled any attempts states might have made to follow the recommendations set by the Conference.

The Havana Charter project began in 1948 and from the beginning, it included plans to create an international institution in order to stabilise and improve commercial relationships. While competition law was only one small part of the Havana Charter, it was considered by many to be an integral part of the entire project. The Havana Charter's main objective was therefore the creation of the International Trade Organisation (ITO), which would contain restrictive practices codes governing global competition.[87]

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[84] Ibid.

[85] League of Nations, 'Report and Proceedings of the World Economic Conference,' (paper presented at the World Economic Conference held in Geneva 4-23 May 1927) 146-8; CEL 46 II; League of Nations Publication at 49.

[86] The Official Report stated, "So far as regards international [cartel] agreements, it is generally recognised that the establishment of an international juridical regime is impossible in view of the divergences between the measure which various countries have considered it necessary to take in the matter, and on account of the objections of principle which a number of states would feel on national and constitutional grounds to any such system."

[87] Brown, William A. *The United States and the Restoration of World Trade: an analysis and appraisal of the ITO charter and the General agreement on tariffs and trade,* (1950) Brookings Institution at 47.

The negotiations were predominately led by the United States, whose proposal contained two elements. One of these was a set of substantive principles that would apply to all states. These principles embodied a code of conduct that mainly governed trade, focusing on four main areas: government interference with trade (tariffs and quotas); private party restrictive agreements (cartels); commodity agreements among governments; and national treatment of foreign investment. The hope was to create a set of principles that would be 'fair' and impartial for all parties and could therefore be used as the foundation for international economic relations. The second element of the United States' proposal called for the creation of an international organisation – the International Trade Organization - that would enforce these principles.

The Charter also built on the idea of a global competition law agreement as discussed in the 1927 Conference. Early on in the discussions with officials from the United Kingdom and Canada, the United States argued for strong competition laws that would include prohibitions on anti-competitive conduct, such as cartels, and enforcement mechanisms to police these provisions.[88] The UK officials considered these proposals too onerous and convinced the U.S. State Department to relax these provisions, as at the time, UK competition law did not contain any prohibitions on cartels or other forms of anti-competitive behaviour.[89] The United States' final proposal therefore did not contain any prohibitions on anti-competitive conduct. Instead, it determined which conduct was unlawful and asked for states to action against it.

The response from the 57 countries was largely underwhelming. Negotiations for the final agreement were fraught with tension – the most vehement came from less developed countries, mainly participants from Latin American countries. In order to facilitate the agreement, the U.S. made a number of concessions to developing countries, such as giving special treatment to such countries and assisting them in developing their own economies.[90]

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[88] U.S. Department of State, *Proposal for consideration by an international conference on trade and employment*. (1945) 1-2.
[89] Gerber at 49.
[90] Toye, Richard, 'Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization,' (2003) International History Review at 282-305.

53 countries thus signed the agreement in March of 1948. The Charter ultimately failed to come into force, due in large part to the United States refusal to present the agreement to the Senate for ratification.[91]

As mentioned above, the Munich Code was one of the most serious undertakings as well as the most comprehensive to date that endeavoured to establish an international competition law agreement. It was drafted between 1991 and 1993 in the final stages of the WTO Uruguay Round by a private group of twelve leading competition and trade law academics and practitioners who called themselves the International Antitrust Code Working Group (Munich Group). The Group consisted of nine German, one Japanese, and two American academics, who were additionally all qualified lawyers in their respective countries. Recognising that many GATT members were considering incorporating competition law into the proposed World Trade Organisation, the Munich Group sought to provide guidance on how to reconcile the inconsistencies between international trade and competition law.[92] They proposed that the Munich Code could be enacted as a new plurilateral trade agreement under Annexe 4 of the WTO Agreement.

As a reflection of the difficulties political powers are often faced with when negotiating international law agreements, the Munich Group itself could not agree on the substantive content of the Munich Code. The majority of the Group proposed adopting an elaborate, interventionist code comprised of twenty articles separated into eight parts governing different aspects of competition law. These included provisions regulating horizontal and vertical restraints, market concentration, abuses of dominant position, and a regime for public undertakings and state authorisation.[93] On the other hand, the minority advocated for a less detailed intrusive model, which encouraged the adoption of fifteen fundamental principles designed to provide support in the development of international competition law policies. The different approaches proposed by the majority and the minority will now be discussed in more detail.

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[91] Gerber at 45.

[92] Petersmann, E.U., 'International Competition Rules for Governments and for Private Business: The Case for Linking Future WTO Negotiations on Investment, Competition and Environmental Rules to Reforms of Anti-Dumping Laws,' (1996) Journal of World Trade, Vol. 30, No. 5.

[93] 'The Draft International Antitrust Code,' (1993) Antitrust & Trade Regulation Report, Vol. 64, No. 1628.

Along with setting minimum domestic standards of competition law, which has been discussed earlier in this chapter, the majority of the Munich Group's draft of the Munich Code set out five core principles:[94]

1. Domestic minimum standards of competition law (outlined above)
2. A principle of national treatment: all signatories were to abide by the principles of equality and non-discrimination according to the tenets of the WTO.
3. Substantive international standards: all signatories were to apply and enforce the suggested international standards in relation to trans-border anticompetitive behaviour when applying their domestic competition laws
4. A principle of international procedural initiatives: all signatories were to establish appropriate institutions and mechanisms in order to effectively enforce the domestic and international standards of competition law.
5. A principle of exclusivity: The Munich Code would only apply to international anticompetitive behaviour rather than anticompetitive behaviour confined solely within one jurisdiction.

In order to enforce the principles and provisions detailed above, the Munich Group proposed the establishment of an International Antitrust Authority (IAA) under the WTO, which would be led by a president, appointed for terms lasting no more than six years, and supported by an International Antitrust Council of twenty members. The IAA would be granted extensive powers, similar to existing international enforcement institutions, such as the WTO Dispute Settlement Body. It was here that the lofty ambitions of the majority of the Munich Group hit a snag. Most of the representatives at the Uruguay round were concerned by the idea of a supra-national enforcement agency and panel with the power to override their national courts.[95]

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[94] 'The Draft International Antitrust Code,' (1993) Antitrust & Trade Regulation Report, Vol. 64, No. 1628; see also Cheng, Jiarui; Cheng, Chia-Jui; Liu, Lawrence S.' Wang, Chih-Kang, *International Harmonization of Competition Laws,* (1995) Martinus Nijhoff Publishers at 121-22.
[95] Phillips, Bernard J., 'Comments on the Draft International Antitrust Code,' (1994) Swiss Review of International Economic Relations (Aussenwirtschaft), Vol. 49, No. 327.

Recognising the value of the differences between national competition laws, the minority proposed adopting a more minimalist system of international competition law, which was comprised of a general statement of fifteen principles. These fifteen principles would serve as guidance for national competition law authorities rather than setting out a framework of binding provisions. The only substantive provisions the minority felt should be harmonised were for the worst competition law offences, such hard-core cartel behaviour. While the minority still advocated for the establishment of the IAA, it was suggested that its powers should be limited to providing advice and assistance and acting as an arbiter of international jurisdictional disputes.

While imposing very few actually binding provisions on ratifying countries, the minority of the Munich Group did suggest that countries should be required to consider the effects its enforcement decisions would have on the international community. They also recommended limiting the exemptions granted under domestic competition laws and reducing the number of defences.

In addition to the concerns related to the IAA, some countries were also critical of the Munich Code's approach to international treaty obligations. Rather than wait for international obligations to become binding when they ratified into domestic law, the majority of the Munich Group proposed compelling all potential signatories to adopt domestic laws that complied with at least the same standard and content as the Munich Code, thereby establishing it as the benchmark for all domestic competition laws. Some of the provisions that potential signatories would have been asked to amend include:[96]

1. How horizontal restraints, such as cartel behaviour and market division, and vertical restraints were to be governed in each jurisdiction: these were classified as per se illegal in the Munich Code, however, many jurisdictions do not identify them as such;[97]
2. The thresholds that applied in certain provisions: the Munich Code imposed far

[96] Taylor at 312.
[97] Comanor, William S.; Rey, Patrick, 'Competition Policy Toward Vertical Restraints in Europe and the United States,' (1996) Paper Presented at Conference 'Global Issues on Competition Policy,' Vienna, 20 June 1996.

higher thresholds than those of a number of jurisdictions, notably with regards to assessing business concentration;

3. The level of importance that is associated with violations of certain competition laws: for instance, the United States has a more moderate approach to vertical restraints that those contained in the Munich Code;
4. Some exemptions, such as those for export cartels and those granted to specific industries, like exemptions the U.S. grants to defence related industries, that are contained in many jurisdictions' competition laws would not be consistent with the provisions outlined in the Munich Code;
5. A number of national competition law authorities, such as Kenya, are required to account for non-competition considerations, such as national interest, when deciding on a case. These considerations would not necessarily align with the interests of those contained in the Munich Code; and
6. Many jurisdictions completely exempt certain acts of state from their competition laws. These exemptions would be wholly inconsistent with the Munich Code.

Given these concerns and the fact that the suggested minimum standards, which were drafted by mostly EU academics and practitioners and thus were perceived to be excessively influenced by the EU, it is not surprising the Munich Code was widely rejected during the Uruguay round, with the delegation from the U.S. being its strongest critic.[98] Sir Leon Brittan, then the EU Commissioner even recognised that it would be unreasonable to expect countries to agree on an international harmonisation principle based solely on EU competition policies.[99] Developing countries in particular, who lack the economic stability and integration necessary to effectively incorporate these principles into their competition law system would have an especially difficult time conforming to these standards.

The main criticisms of both the majority and the minority's proposals, voiced by the United States delegates and the international community at large, can be classified into two

[98] See Klein, J., 'Anticipating the Millennium: International Antitrust Enforcement at the End of the Twentieth Century,' Address Before the Fordham Corporate Law Institution, 16 October 1997.; see also Klein, J, 'A Note of Caution with Respect to a WTO Agenda on Competition Policy,' Address Presented at the Royal Institute of International Affairs, 18 November 1996.

[99] See UNCTAD, 'United Nations Conference on Trade and Development: Competition and Trade,' 16 September 1994, UNCTAD/ITD/9.

categories, institutional concerns and substantive concerns.[100] The institutional concerns were related to the fact that IAA and its associated supra-national procedures placed unnecessary restrictions on national sovereignty.[101] Secondly, the substantive concerns dealt with the overly detailed provisions of the Munich Code itself, which did not address the legitimate differences between different nations' domestic competition laws.

In addition to the concerns raised that the IAA's authority would supersede the authority of a national competition law authority, countries were also troubled with the notion that the IAA would also have the power to investigate alleged instances of anticompetitive behaviour and initiate enforcement actions before domestic authorities and courts. Furthermore, these powers extended to the ability to bring actions against any national competition law authority, in their own national courts, if they refused to take enforcement actions of their own.

While the Munich Code strengthened the United States opposition to the idea of incorporating binding international competition law policies into international trade law, it also gave the EU the fuel it needed to lobby for inclusion of these principles into the WTO. The concerns that arose during the Munich Code's discussions highlighted the need for compromise and flexibility when considering the adoption of a harmonised international competition law agreement.

As previously reiterated, the WTO has ultimately rejected the notion of implementing a harmonised competition law agreement, however, it did toy with the idea at various times. The WTO first commissioned a group headed by Karel van Miert, the then European Commissioner for competition law, to draft recommendations on the relationship between competition law and the WTO.[102] The report, which was issued in 1995, emphasised that the WTO's 'new' free trade institution required the further development of competition

[100] Waller, Spencer Weber, 'An International Common Law of Antitrust,' (1999) New England Law Review, Vol. 34, No. 1.
[101] Gifford, Daniel, J., 'Antitrust and Trade Issues: Similarities, Differences and Relationships,' (1995) Depaul Law Review, Vol. 44, No. 1049.
[102] European Commission, Directorate-General IV, 'Competition Policy in the New Trade Order: Strengthening International Cooperation and Roles: Report of the Group of Experts,' [COM (95) 359 final] (July 1995).

law.[103] Interestingly, it should be noted that two of the academics of the Munich Group, Professors Petersmann and Immenga, were also part of the group of experts appointed to draft the report by Commissioner van Miert.

Building on the principles and methods proposed by the Munich Group two years previous, the report also advocated for the adoption of a plurilateral competition law agreement under Annex IV of the WTO that would include signatories from all the member states of the OECD, along with the Central and Eastern European countries, as well as Hong Kong, Korea, Singapore, and Taiwan.[104] Rather than foist the principles of competition law onto all ratifying countries, as was the approach suggested by the Munich Code, the report suggested that should such an agreement be adopted, it would initially only be implemented by countries that already had established competition law systems.[105] It drew on provisions already established in bilateral enforcement cooperation agreements such as notification procedures, cooperation, positive and negative comity obligations, as well as a few minimum standards for cross-border competition transgressions, for instance prohibiting international cartels, including export cartels, vertical restraints (for which a rule of reason test was proposed), abuse of market power, including national monopolies.[106] In addition, the report dialled back the Munich Group's proposals demanding countries adopt the same standards and provisions contained in the Code and suggested that while the principles in the new agreement would have to be implemented into the national laws of the member countries, that requirement would share similarities with the way EU Directives themselves are incorporated.[107] Member countries with competition law systems that already contained the same principles or similar interpretations of those principles would not be required to amend them.

Again, departing from the Munich Code's suggestion of establishing a separate body to enforce the provisions of the new agreement, the EU report proposed using the WTO's

[103] Van Miert stated, "[Regarding] competition policy, how can we imagine that this new 'trade order' could produce its full, positive effects when, throughout the world, companies are subject to different rules on competition and, of even more concern, certain national authorities (or regional authorities in the case of the EU) rigorously apply their antitrust legislation while others have a more lax approach?"
[104] Report of EU Experts at 16-17.
[105] Ibid.
[106] Ibid at 17.
[107] Ibid.

existing dispute settlement system, which would have the power to review disputes involving competition issues. There are four types of disputes the report foresaw that could come before the WTO dispute settlement body: disputes over international procedural obligations; disputes related to per se violations of competition law; disputes related to rule of reason violations of competition law; and disputes involving restrictions to market access.[108] By allowing the agreement to germinate and evolve through the slow introduction of its provisions, the EU group hoped the agreement would be more likely to be accepted by more countries and thereby expanding its geographic scope and influence over time.[109]

While the proposals in the EU report were considered to be far more reasonable than those put forth in the Munich Code, the idea of establishing a separate international competition law agreement under the auspices of the WTO once again faced criticism. One of the biggest criticisms raised was the fact that no business representatives were involved in drafting the report. The Union des Industries de le Communauté Européenne (UNICE), now known as Business Europe repeatedly voiced its concerns regarding this issue:[110]

> UNICE is concerned about a binding multilateral agreement on specific competition rules concluded in the WTO as opposed to clear objectives or guidance for a voluntary set of rules. [The] WTO is not intended or equipped to operate at the private-to-private level. UNICE fears that a binding agreement cannot but result in [a] binding review of specific essentially private cases by bodies that are inappropriate and ill equipped for that task. This will greatly slow down commerce and escalate private disputes to international problems.

Despite these criticisms, the report succeeded in triggering further calls to discuss the incorporation of competition policy into international trade law. At the WTO's 1996

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108 Ibid.
109 Ibid.
110 UNICE, 'Preliminary UNICE Comments on the Commission Discussion Paper: Trade and Competition: WTO Framework on Competition Rules, (1999) UNICE Paper No. 1/30/1, available at http://trade.ec.europa.eu/doclib/docs/2005/april/tradoc_122186.pdf.

Singapore Conference, EU officials called for the establishment of a working group devoted to competition policy.[111]

The Efforts of the WTO

The formation of the working group on trade and competition law in the WTO was met with enthusiasm from a large number of member states. Hundreds of communications were submitted from these member states debating the merits of introducing competition law and policy into the international trade law system.[112] Between 1998 and 2001, the working group published several reports, based on the papers submitted by WTO members, outlining the issues the group was concentrating on as well as discussing the possibility of establishing a WTO competition law framework. Under the proposed framework, all members to the WTO would implement and apply their domestic competition laws alongside the agreed international principles. The framework would develop progressively, beginning with all member states adopting a common structure for their competition law systems before moving on to consolidating the more common elements of competition policy, such as the prohibition on hard-core cartels. Finally, these components would be consolidated in order to determine which of them could be incorporated into the WTO dispute settlement mechanisms.[113]

The group's efforts were bolstered in 2001 at the Doha ministerial conference when the WTO issued a declaration in support of its work.[114] It was decided that competition law and policy would be included in the next round of negotiations. Despite this promising affirmation, the United States and a number of developing countries rejected requests to put competition law on the agenda for the Cancun ministerial conference. One of the reasons given for this refusal was the issue that developing countries still lacked the necessary experience to properly negotiate on issues concerning competition law and

[111] WTO, 1996 Singapore Ministerial Conference of the Parties to the WTO, Singapore Ministerial Declaration WT/MIN(96)/Dec.

[112] See for instance the paper submitted by Japan: 'Non-Paper on Trade and Competition by the Japanese Delegation to the WTO,' reprinted in (1996) International Business Law, Vol. 26, No. 11 at 463.

[113] Van Miert, Karl, 'The WTO and Competition Policy: the Need to Consider Negotiations,' Address before Ambassadors to the WTO, Geneva, 21 April 1998.

[114] WTO, Doha WTO Ministerial 2001: Ministerial Declaration, (2001) WT/MIN(01)/Dec/1.

policy.[115] The Cancun ministerial conference in 2003 therefore failed to produce any sort of agreement on the matter. This was in large part due to a group of twenty-nine developing countries, including India and China, combining their bargaining power and refusing to accept the inclusion of the Singapore Issues regarding competition law should not proceed to negotiation.[116] In July 2004, the working group was officially disbanded and competition law was subsequently removed from formal discussions in the WTO.[117]

Since the failure of the WTO to establish a separate competition law agreement, there have been no subsequent attempts to form a global, harmonised competition law agreement.

Establishing a Global Framework

Developing a working global competition law framework would likely be far easier than achieving total cooperation and approval from many different jurisdictions during negotiations for a harmonised global competition law.

In contrast to an established international agreement, a globalised framework would consist of a serious of networks between existing competition law authorities. Chapter Two outlined the different ways in which international organisations such as the International Competition Network and the OECD have fostered greater cooperation amongst its members in combating international cartels. This section will propose developing a more cohesive and structured framework in which developing countries can gain the support they need.

While bilateral and regional cooperation with regards to competition law exists between trading partners, these agreements are usually concluded between developed countries or developing countries with larger economies. By and large, most competition law systems are built around an 'effects' doctrine – that is, the competition law authority will only become involved in a case if the anti-competitive behaviour has a direct effect on their own

[115] Ibid.
[116] Ibid.
[117] Kröll, Daniela, *Toward Multilateral Competition Law? After Cancun: Re-evaluating the Case for Additional International Competition Rules Under Special Consideration of the WTO Agreement*, (2007) Peter Lang Publishing at 162-169

economy. In theory, this approach works quite well. It would be ludicrous to suggest that competition law authorities should be responsible for policing anti-competitive behaviour that not only affects another jurisdiction altogether but that also has no effect on theirs. However, the waters have become increasingly murkier as competitive practices between businesses have shifted from a largely national context to an ever more global one. For instance, some international cartels such as export cartels are domiciled in one jurisdiction but only have effects abroad. Eleanor Fox has also described the gaps in which a country that has suffered harm can seek reparation when relying solely on a national competition law framework. Fox identifies four existing possible gaps where a global framework could potentially correct:[118]

The first gap Fox identifies relates to the fact that many developing countries lack an effective competition or antitrust law system, which makes them easy victims when targeted by international cartels.[119] The second gap described by Fox is more evidentiary and affects both developed and developing countries.[120] In cases such as international cartels, where cartel members may be abroad, the evidence needed to successfully prosecute them would also be abroad. Therefore, even if the competition authority has a reasonably good case, it may fail due to its inability to gather the required evidence. The third gap relates to the way industrial policy is affected.[121] Industrial policy in an exporting country can conflict with the competition policy in the importing country. Fox argues that in some instances, the exporting country may attempt to adopt restraints such as price-fixing in order to protect its domestic firms from the importing country's own competition laws, as seen in China's arguments in the case concerning the vitamin C cartel. The fourth and final gap Fox describes outlines the problem of input cartels.[122] National competition laws are normally subject to an effects doctrine where a national competition law authority will only become involved in cases that cause direct, substantial, and reasonably foreseeable effects within the domestic market. In addition to export cartels, this can cause problems in global business transactions. For instance, if a cartel fixes prices on a component manufactured in

[118] Fox, Eleanor M., 'International Antitrust and the Doha Dome,' (2003) Virgina Journal of International Law, Vol. 43.
[119] Ibid.
[120] Ibid.
[121] Ibid.
[122] Ibid.

one country that is then shipped to another in order to be assembled and the final product is then shipped to a third country, where then does the liability lie? It is important to note that none of these gaps can be corrected through the application of national laws alone.

A global competition law framework could remedy several of these problems that are otherwise difficult to solve on a national level, namely the fact that developing countries, even those with a competition law system of their own, are incapable of protecting themselves from international cartels and the difficulties both developing and developed countries have in obtaining the necessary information for successful prosecution. Fox proposes developing an international competition law framework built on the foundations already established by international organisations such as the ICN.[123] The framework directive could therefore include prohibitions on hard-core international cartels, including import and export cartels, market blocking, and unjustified monopolistic practices. By providing a basic structure, different jurisdictions would have the option of following the framework's directive by inputting it into their competition laws on their own terms, rather than having a separate binding agreement foisted upon them. The framework could also work closely with organisations such as the International Competition Network in order to foster cooperation between national competition law authorities with regards to information exchanges and positive comity. With regards to information sharing, however, special attention would need to be given when considering the issue of confidentiality. Many leniency programmes are dependent upon the promise of confidentiality in order to remain successful.[124] Without the agreement to keep information confidential, cartel members would be less likely to cooperate with competition law authorities. Therefore, countries with leniency programmes that rely on confidentiality agreements would be less able to cooperate with others.

The European Union has been one of the most vocal supporters of establishing a global competition law framework, and has been lobbying for the inclusion of competition law into

[123] Fox (2003)
[124] OECD. Trade and Competition from Doha to Cancun: From Doha to Cancun.

the WTO since the 1990s.[125] Following the WTO's decision not to address competition law issues in 2004, the EU has scaled back on their original proposals for a global competition law agreement in favour of a more relaxed 'framework.' Nevertheless, the current European proposals are still largely problematic for many developing countries. There are three main elements in the EU proposals: 1) domestic competition law legislation should contain prohibitions on hard-core cartels; 2) domestic competition laws should also adhere to the core WTO principles of non-discrimination, transparency, and procedural fairness; and 3) the multilateral framework will also be subject to the WTO's dispute settlement system.[126]

Developing countries are most likely to take issue with the second aspect of this proposal – that the principles of non-discrimination, transparency, and procedural fairness should be made binding on all members and must be adopted into their competition laws.[127] Developing countries have long argued that these principles are not universally applicable to all issues as they were first developed in by the GATT in order to reduce barriers to international trade.[128] Therefore, to apply them now to competition policy may not be appropriate and would likely not achieve the desired results. With regards to the procedural fairness requirement, a key concern developing countries may have is that their legal systems may differ too greatly with those developed countries and they may not have the financial resources to meet the standard set by the notion of 'fairness.' The concept of fairness has different meanings according to different legal systems as well as political and legal cultures.[129] As such, there is no global consensus on the exact definition of procedural fairness when applied to the context of competition law enforcement.

Developing countries, particularly those from Asia, are also likely to take issue with the outright ban on hard-core cartels in the European proposal. The main problem with such a ban is there has been no consensus on the definition of what constitutes a 'hard-core'

[125] See Danov, Mihail, 'Global competition law framework: A private international law solution needed,' (2016) Journal of Private International Law, Vol. 12, No. 1 at 77-105.
[126] Sarkar, A. N. *Enhancing Global Competitiveness: Advantage India*, (2009) I.K. International Pvt Ltd at 225.
[127] Sarkar at 226.
[128] Ibid
[129] Ibid

cartel.[130] Furthermore, the proposal apparently assumes that all 'hard-core' cartels have negative effects in every market in every country, regardless of their level of development, which is contentious. Historically, for Asian developing countries, cartelisation formed the foundation of many of their industrial policies.[131] It would therefore be difficult separating which cartels ought to be prohibited and how to change their laws accordingly. The issue of which laws to change can also be applied to developed countries. Most developed countries have either had exemptions or continue to maintain such exemptions allowing for small and medium-sized firms to cooperate in order to counteract the effects of a dominant firm in the market. Therefore, a universal prohibition on hard-core cartels in the global framework would arguably unduly limit the freedom countries have in determining their own policies.

Any proposed globalised framework should therefore contain concessions for developing countries. Developing countries have often benefited from special and differential treatment in various contexts. For instance, the agreements within the WTO contain 145 special provisions geared towards helping developing countries. These provisions are classified under five main headings:[132]

1. Provisions intended to enhance market access by increasing trade opportunities.
2. Provisions that require WTO members from more developed economies to protect the interests of developing countries. These are usually phrased broadly and generally and use language such as 'best endeavours,' and encourage members to 'give particular attention to,' or take 'special regard' of the needs of developing countries when implementing new measures.
3. Provisions that allow for more flexibility. Developing countries are given more flexibility in implementing rules that relate to market access, exemptions, or subsidies. This is one of the most important examples of

[130] Sarkar at 227.
[131] Ibid.
[132] WTO Committee on Trade and Development, 'Implementation of Special and Differential Treatment Provisions in WTO Agreements and Decisions,' (2000) WT/COMTD/W/77.

special and differential treatment and forms the basis of 48 of the 145 special provisions within the WTO.

4. Provisions granting developing countries longer transitional time periods. For instance the Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS) allows developing countries to take an additional five years while least developed countries are granted a delay of up to eleven years in order to bring their legislation in conformity with the Agreement, subject to a few exceptions. The Agreement on Trade Related Investment Measures (TRIMs) also gives least developed countries, developing countries and developed countries seven, five, and two years respectively to rectify any inconsistent trade-related investment measure.
5. Provisions giving technical assistance when needed. These provisions acknowledge that in order to implement the WTO agreements, developing countries need an adequate legal and institutional framework and therefore needed additional assistance in this regard.

In a global competition law framework, special and differential provisions should allow for flexibility as well as providing developing countries with adequate support, particularly in relation to international cartels. In terms of flexibility, developing countries ought to be allowed to incorporate provisions that may violate core principles of non-discrimination such as creating exclusions or exemptions that would discriminate against foreign firms.[133] For instance, as stated in earlier in this chapter, several developing countries have advocated for the abolishment of allowing countries to exempt export cartels from their competition laws, with the exception of developing countries themselves. By restricting developed countries' abilities to exempt export cartels while at the same time allowing developing countries to do so, competition in the global market can expand to include more players. However, these provisions would also need to be transparent in order to remain accountable. Transparency can take the form of regulations designed to limit the scope of such provisions. For example, returning to the example of export cartel exemptions, while developing countries should be allowed to employ them, limitations should be set in order

[133] OECD. *Trade and Competition from Doha to Cancun: From Doha to Cancun*, (2003) OECD Publishing.

to ensure the exemptions are not abused. For instance, these limitations can include, but by no means should be limited to, assessing the combined market power of any proposed export cartel in order to ensure it does not ultimately dominate the market.

Additionally, developing countries typically lack the resources and institutions needed to meet procedural fairness requirements in competition law enforcement. For instance, as discussed in Chapter Four, a lack of human resources and expertise is one of the biggest problems developing countries face when attempting to enforce their competition laws. Limited financial resources can also have a grave effect on enforcement. Special and differential provisions should therefore give more time and resources to them as opposed to developed countries. These provisions can include encouraging cooperation between jurisdictions involved in international cartel cases to share evidence and expertise with one another as well as giving developing countries more time to conduct their investigations.

The OECD has proposed establishing a Competition Policy Review Mechanism (CPRM) in addition to its existing peer review programme that would outline a peer review system to be implemented in a multilateral framework on competition.[134] In a public policy context, peer review constitutes an examination of a particular governmental activity by a peer group made up of experts from other countries or independent organisations. All peer review programmes share a general framework. Peer review groups organise meetings and provide continuity between individual reviews.[135] The members of the peer group are also responsible for setting the review criteria or the standards to be used when judging the subject's performance. Criteria can include policy recommendations and guidelines, specific indicators and benchmarks as well as legal norms. The peer group would also appoint a secretariat whose role and responsibilities typically vary depending on the review process.

Bilateral or Regional Cooperation

To date, the only bilateral or regional agreements that contain competition law provisions are predominately concerned with free trade. Generally speaking, only countries that wish

[134] OECD. *Trade and Competition from Doha to Cancun: From Doha to Cancun*, (2003) OECD Publishing.
[135] Ibid.

to join the European Union or signing free trade agreements have provisions regarding cooperating in competition law issues. Bilateral or regional cooperation agreements specifically targeting competition policy have not yet been established between any jurisdictions.

Chapter Four discussed the difficulties developing countries face when attempting to address competition law issues through regional or preferential trade agreements, particularly when attempting to enter into these agreements with developed countries. Developing countries are likely to face similar challenges if they wish to establish a bilateral or regional agreement devoted to competition policy. For instance, while such an agreement may be feasible between developed jurisdictions such as the EU and the United States as well as developing countries with larger markets like China, India, and Brazil.[136] However, bilateral cooperation between developed trading partners and developing partners from smaller economies is difficult to facilitate due to an imbalance in powers. For developing countries, one of their main concerns is that their domestic competition law authority may become overwhelmed with requests to cooperate through requests from their foreign counterparts for specific information related to the opening of their domestic markets.[137] Depending on the volume of the requests, competition law authorities in developing jurisdictions may be unable to conduct their own investigations or research into practices or behaviours affecting competition in their own markets.[138] In addition to potentially overburdening competition law authorities in developing countries, a sudden increase in different bilateral and regional agreements would create difficulties in cross-implementation where provisions in one agreement may clash with those of another.

This increase is one of the biggest obstacles in using bilateral or multilateral agreements to combat international cartels. If an international cartel from one jurisdiction targets another and there is no agreement between the two nations, there is very little the targeted nation can do protect itself, particularly if it is a developing country. Developing countries must therefore enter into cooperation agreements with both developing and developed countries

[136] UNCTAD, *A Positive Agenda for Developing Countries: Issues for Future Trade Negotiations,* (2000) UNCTAD/ITCD/TSB/10 at 408.
[137] Ibid.
[138] Ibid.

in order to solve this issue. However, the sheer number of cooperation agreements a developing country would have to enter into in order to make international cartel enforcement effective makes this strategy nigh impossible. At the moment, there are approximately over one hundred countries with domestic competition laws and competition law authorities. Therefore, any developing country wishing to enter into bilateral cooperation agreements in order to combat the spread of international cartels would need to sign agreements with over one hundred countries.

One of the other difficulties with bilateral cooperation between competition law authorities is determining the extent of what exactly cooperation entails. Competition law officials tend to refer to 'reporting' when referring to specific cases where cooperation took place, without elaborating on the particulars of that 'cooperation' and exactly was 'reported.' An example of this can been in the way the *Vitamins* cartel was handled. After U.S. antitrust authorities announced they would be investigating into the cartel activities of Hoffmann-La Roche, Basf Aktiengesellschaft and Aventis (now known as Rhône-Poulenc), other competition authorities initiated their own investigations. Among these competition authorities was Brazil's national competition authority, the Secretariat of Economic Law (SDE). The SDE was quick to publicise its cooperation with the U.S. antitrust authorities but did not provide any more details beyond that.[139] Additionally, during the *Lysine* cartel investigations, the SDE again reported that it had procured a 'great deal' of documents with cooperation from the U.S. Department of Justice but again failed to provide any details on the nature of these documents and their importance in the case.[140]

There is considerable uncertainty where bilateral cooperation entails the exchange of information, namely whether it includes all information kept by the competition authority or authorities in question, including confidential information. Indeed, with regards to the exchange of information, this uncertainty appears to be the greatest weakness of bilateral cooperation. Under most bilateral agreements, competition law authorities are prohibited from sharing confidential information with other authorities without the express consent of the parties involved. Therefore, in situations where companies have refused to give consent

[139] Guzmán, Andrew T., *Cooperation Comity and Competition Policy*, (2011) Oxford University Press at 70.
[140] Ibid at 294.

and the competition authorities are thus unable to share confidential information, it can be almost impossible for these authorities to successfully conduct their investigations.

Several countries have already recognised the inherent frustrations in these circumstances and have taken it upon themselves to devise some exceptions. For instance, the United States enacted the International Antitrust Enforcement Assistance Act (IAEAA)[141], which allowed the Department of Justice and the Federal Trade Commission to exchange confidential information with other countries, provided they have established an agreement with each other. This led to the first, and only, IAEAA agreement, which was signed with Australia in 1999. The United States-Australia Mutual Antitrust Enforcement Treaty allows the parties to cooperate with each other when obtaining or distributing evidence related to antitrust or competition law issues, even if providing such evidence would violate the laws of the distributing country.[142] It is important to note that this agreement solely pertains to antitrust law enforcement and only relates to the exchange of information.

In addition to the cost and difficulties associated with entering into bilateral cooperation agreements, as noted above, these agreements are still predominately concerned with free trade. Therefore, any competition law chapter contained therein may not be wholly effective in combating international cartels. Indeed, Jane Rennie noted, after examining various competition law provisions in various FTAs, these provisions tended to be 'ritualistic rather than responsive,' and lacked 'functional definition.'[143] However, encouraging bilateral or multilateral cooperation and including competition law provisions in such agreements can be a step towards harmonising competition law between more countries or establishing a global framework for competition law.

Extraterritorial Application of Competition Laws

[141] International Antitrust Enforcement Assistance Act of 1994, 15 U.S.C. ss. 6201-6212.
[142] Agreement on Mutual Antitrust Enforcement Assistance, U.S.-Australia, 27 April 1999, reprinted in Trade Regulation Report, Vol. 4.
[143] Rennie, Jane, 'Competition Provisions in Free Trade Agreements: Unique Responses to Bilateral Needs or Derivative Developments in International Competition Policy,' (2009) International Trade Law, Vol. 15, No .2 at 71.

While many countries' competition and antitrust laws contain effects doctrines limiting their ability to pursue anti-competitive behaviour solely to conduct affecting their own jurisdictions, in cases involving international cartels and developing countries, it may be possible to apply the competition or antitrust laws of another country extraterritorially. Extraterritorial application of laws is when a country imposes or applies their laws in another's territory.

There are several advantages to applying competition laws extraterritorially; these can be divided into three categories: first, advantages to the state itself; second, advantages to other states; and third, protecting weaker economies from the spread of international cartels.[144] Turning first to the advantages a state enjoys when it applies its competition laws extraterritorially, in cases where a jurisdiction is able to do so, it retains control over how its domestic laws are applied. For instance, one of the most prevailing arguments the United States has made on the numerous occasions in which the possibility of enacting an international competition law agreement was debated is the fear that such an agreement would detract from their own sovereignty, and thus detract from its effectiveness.[145] By applying its laws extraterritorially, a country can ensure there will be no confusion as to its interpretation or application. This is important because different countries often have differing opinions on how to regulate anticompetitive behaviour. Even in cases where competition laws are markedly similar, the way in which they are applied may be very different. Competition law terms such as the relevant 'market' and what constitutes a 'substantial lessening of competition' are notoriously difficult to define. By applying domestic competition laws extraterritorially, a national competition law authority can therefore reduce some of the uncertainty with regards to the outcome of the case.

Other countries can also benefit from a state applying its laws extraterritorially. These are called spillover effects. While the state applying its laws will mainly target the anticompetitive behaviour that specifically affects their own market, other countries can derive numerous benefits if the case is successful. For instance, the case of free riding,

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[144] Sweeney, Brendan J., *The Internationalisation of Competition Rules,* (2009) Routledge at 223.
[145] American Bar Association, Sections of Antitrust Law and International Law and Practice, *Report concerning Private Anticompetitive Practices as Market Access Barriers*, (1999) American Bar Association at 17.

where developing countries essentially piggyback onto previously successful cases decided by developing countries in order to launch their own investigations, has been discussed earlier in the preceding chapter. Furthermore, if a country successfully applies its laws extraterritorially against an international cartel, there is a chance that cartel will terminate its operations completely, and not solely in the relevant country's own market.

Finally, countries that apply their laws extraterritorially can protect those countries that do not have effective competition law systems, most notably developing countries. It has been repeatedly stated in this thesis that international cartels are more likely to target developing countries because of their inability to detect and prosecute them. If developed countries are confined to only pursuing anticompetitive conduct that takes place within their own borders, this trend will continue. The presence or possibility of extraterritoriality may mean that international cartels are less incentivised to set themselves up in a developing country. While this may not wholly prevent the spread of cartels, it may contribute to a reduction in its numbers.

However, extraterritorial application of any laws, not just competition laws, is not without its inherent difficulties. The main issue regarding extraterritoriality is the concept of territorial sovereignty in international law. International law prevents nations from unilaterally exercising its jurisdiction on a global scale and places limitations in the form of internationally recognised customs and practices. The rules of jurisdiction do, however, allow nations to enforce their laws territorially – that is, the principle of territoriality enables countries the right to govern the actions of all persons within its territory.[146] International laws limit the circumstances in which a country can enforce its own laws beyond its borders; however, there are ways around this. For instance, the nationality principle allows countries to apply their laws extraterritorially in the event that a person is a national of that country, regardless of whether the conduct occurred in a foreign jurisdiction or not.[147] Customary international law also contains provisions for universal jurisdiction, but only for exceptional circumstances, most notably piracy. Other circumstances in which a country

[146] Jennings, Robert and Watts, Arthur (eds.), *Oppenheim's International Law*, (1996), Oxford University Press at 456-488.
[147] *Passport Seizure Case* (1955) 22 ILR 73.

may exercise its jurisdiction extraterritorially remain controversial and may not be entirely accepted by the foreign nation.

Furthermore, by applying domestic competition laws extraterritorially to international problems, such as international cartels, the emphasis will most likely be on domestic, not global, welfare. It has been stated in the previous chapter that a global welfare standard should be the most appropriate welfare standard to adopt when considering the application global reform options. A national competition law authority is primarily involved in correcting the losses suffered by domestic consumers as a result of an international cartel and is thus not likely to be concerned with the effects that cartel has on foreign consumers. If one were to reach beyond the scope of international cartel enforcement, given its propensity towards a domestic welfare standard, extraterritorial enforcement of domestic competition laws may not maximise total welfare as effectively as if one were to adopt a global standard. For instance, a national competition law authority may block a proposed merger or joint venture on the basis that it will result in domestic welfare losses, when, in the global market, those welfare losses can be externalised to foreigners.[148]

Another problem with extraterritorial application of competition law in international cartel cases is its effectiveness. While an international cartel may be asked to cease its operations in other jurisdictions following the successful outcome of a case in which a country has extraterritorially applied its domestic laws, it is in no way obligated to do so. Therefore, a developing country that relies on another country to step in to apply their own domestic laws extraterritorially is not absolutely guaranteed that the international target will stop targeting their market.

Extraterritorial application of domestic laws can also create conflicts between the country applying its laws and the target country. The most controversial instances of extraterritorial application of competition laws have occurred in cases where anti-competitive conduct is considered unlawful by the country wishing to exercise its laws but is not prohibited in the country in which it occurred. This jurisdictional conflict can have serious repercussions on

[148] Sykes, Alan O., 'Externalities in Open Economy Antitrust and their Implications for International Competition Policy,' (1999) Harvard Journal of Law and Public Policy, Vol. 23, at 92-93.

the relationships between trading partners, as described by the *Daishowa*[149] case regarding export cartels in Chapter Two. In addition to the potential for disagreements between the policies or laws that are being applied extraterritorially, there may also be difficulties related to conflicts over procedure.[150] In any case involving extraterritorial application of laws, even where the target nation is amenable to the idea of another country coming in, conflicts over perceptions of sovereignty and extraterritoriality are likely to arise.

In cases where the target state disagrees with the law that is being applied or the procedural aspects of the case, they can retaliate by exacerbating the inherent challenges countries face when applying their laws in another country. For instance, the problems associated with gathering evidence in a foreign country can be made even more difficult if the target country chooses to apply evidence-blocking laws.[151] While the Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents as well as the Hague Convention on the Taking of Evidence Abroad have both contributed somewhat to lessening this problem between signatory jurisdictions, it is still a very real problem when dealing with non-signatory states.[152] Many jurisdictions, such as the United States have therefore recognised that in order for extraterritorial application domestic laws to be effective in cases involving international cartels, the target state must be willing to cooperate with the applying state. As a result, most jurisdictions have signed bilateral cooperation agreements with one another in order to facilitate cooperation in evidence sharing, as discussed earlier in this chapter.

While bilateral cooperation agreements can encourage countries to share evidence in international cartel cases, many countries are still suspicious of countries request this information in the course of applying their laws extraterritorially. Requests in this regard are often perceived to be 'fishing expeditions' by the foreign nation and are therefore not

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[149] *Daishowa International v. North Coast Export Co. Ltd.,* 1982-2 Trade Cases (CCH) §64, 774 (ND Cal, 1982).
[150] Gerber, David, 'Is Reconciliation Possible? The U.S.-European Conflict Over the Globalization of Antitrust Law: A Legal Experience Perspective,' (1999) New England Law Review, Vol. 34 at 125.
[151] See for instance, the French blocking statute, Law no. 80538, 16 July 1980, which imposes criminal sanctions on parties who communicate to foreign public authorities documents or other information, or respond to discovery requests.
[152] The Hague Convention on the Service Abroad of Judicial and Extra-Judicial Documents in Civil and Commercial Matters, (1969) 20 UST 361, 15 November 1969; The Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters, (1970) 23 UST 2555, 27 July 1970.

favourably received.[153] This can be seen in the response to attempts by the U.S. to extraterritorially apply their laws in the *Uranium* litigation, which triggered the rise of 'blocking' legislation.

Westinghouse Electric Corporation of the United States was sued by twenty-seven electricity utilities for breach of contract after failing to honour its fixed term contracts with regards to the supplying various nuclear power stations with uranium.[154] Commentators on the case at the time noted that the potential damages in the suit were, 'the highest price package of private lawsuits in U.S. history,' and if successful, would render Westinghouse insolvent.[155]

In response, and desperate to avoid insolvency, Westinghouse brought charges before the U.S. District Court, accusing twenty-nine domestic and foreign uranium producers of violating U.S. antitrust laws through the formation of an international cartel. Westinghouse claimed the cartel's activities led to a shortage of uranium and a sharp increase in prices, rendering it commercially incapable of fulfilling its contractual obligations.[156] Foreign cartel members included uranium producers from Australia, the UK, South Africa, and Canada. Simultaneously, the DOJ also initiated its own criminal investigation into the alleged cartel.

The issue of extraterritoriality arose when Westinghouse, with assistance from the U.S. courts, initiated widespread discovery procedures in the foreign jurisdictions. The extent of the jurisdiction requested by the U.S. alarmed the governments of Australia, South Africa, the UK, and Canada, who saw it as a 'fishing expedition.'[157] Each nation subsequently passed legislation that effectively blocked the extraterritorial jurisdiction of the United

[153] See Caylor, Marissa L.P. 'Modernizing the Hague Evidence Convention: A Proposed Solution to Cross-Border Discovery Conflicts During Civil and Commercial Litigation,' (2010) Boston University International Law Journal, Vol. 28.
[154] *Re Westinghouse Electric Corporation Uranium Contracts Litigation*, 405 F Supp 316 (Judicial Panel on Multidistrict Legislation 1974); see also Eagan, William, 'The Westinghouse Uranium Contracts: Commercial Impractibility and Related Matters,' (1980) American Business Law Journal, Vol. 18 at 281.
[155] Joscow, Paul L., 'Commercial Impossibility, the Uranium Market and the Westinghouse Case,' (1977) The Journal of Legal Studies, Vol. 6, No. 1 at 119-76.
[156] *Re Westinghouse Electric Corporation*
[157] Taylor at 57.

States.[158] Since the Westinghouse litigation incident, more countries have adopted blocking statutes such as New Zealand, the Netherlands, Denmark, Finland, France, India, Norway, and Sweden. There are normally two types of blocking statute, although both can be merged into one whole statute. Discovery blocking statutes, such as those adopted in the Westinghouse incident, limit the extent to which foreign claimants can obtain evidence and can also restrict the parameters of requests for commercial documents to be used in foreign cases. Judgment blocking statutes block the enforcement of foreign judgments, in whole or in part, that the national authority deems to be detrimental to national welfare. Blocking legislation has proven useful in cases of extraterritorial application of laws. For instance, an Australian Parliamentary Committee specifically created in 1983 to review the benefits of the Australian blocking statute in relation to the extraterritorial application of U.S. antitrust laws during the Westinghouse litigation noted:[159]

> Despite firm Australian representations to the U.S. administration opposing U.S. attempts to regulate the legitimate interests of Australian companies, the U.S. administration and courts showed no serious concern for Australia's expressed interests. It was not until the Foreign Antitrust Judgements (Restriction of Enforcement) Act was enacted in 1979 that the Westinghouse case was settled out of court, even then involving U.S. $11 million payable by the Australian defendants (together with extremely high legal costs).

It is important to note here that while the foreign defendants of the uranium international cartel were considered to have violated U.S. antitrust law, the cartel was originally formed as a response to the United States Atomic Energy Commission's trade boycott to foreign uranium producers. Given that the U.S. market at the time held approximately 70 percent of the world market for uranium, the closure of the U.S. domestic market to foreign producers caused them serious economic hardship. The international uranium cartel was

[158] Price, R. Edward, 'Foreign Blocking Statutes and the GATT: States Sovereignty and the Enforcement of US Economic Law Abroad,' (1995) George Washington Journal International Law & Economics, Vol. 28.
[159] See Joint Committee on Foreign Affairs and Defence, 'Australian-United States Relations: the Extraterritorial Application of United States Laws,' (1993) Australian Government, Canberra, ch. 3.

therefore initially formed as a defence to the boycott and was established with blessings from the Australian, British, South African, and Canadian governments.[160]

By subsequently attempting to apply their laws extraterritorially, the United States was perceived to be infringing on the sovereign rights of the governments of Australia, the UK, South Africa, and Canada to govern their own domestic policies.[161]

As can be seen, United States has been among the most prolific in bringing cases of anti-competitive conduct extraterritorially, to the chagrin of many nations. Its current stance is outlined in the *Antitrust Enforcement Guidelines for International Operations 1995* issued by the United States Department of Justice and the Federal Trade Commission. The guidelines contain provisions allowing for the exercise of antitrust laws extraterritorially in instances where:[162]

- The conduct is considered a violation of American antitrust laws;
- The conduct has a direct, substantial, and reasonably foreseeable effect on American domestic or import commerce, or export commerce by domestic firms; and
- The U.S. courts have jurisdiction over the foreign firms participating in such conduct. This last instance also involves an analysis of any agreements the United States may have with the foreign nation.

Extraterritorial application of competition and antitrust laws is not solely limited to the United States. The EU has also adopted a similar approach in terms of its effects doctrine, as best illustrated through the *Dyestuffs* and *Wood Pulp* cases. In 1985, the European Commission fined a number of foreign producers of wood pulp, including those from Canada, Finland, and the U.S., for engaging in cartel behaviour that was held to be in

[160] Utton, Michael A., *International Competition Policy: Maintaining Open Markets in the Global Economy*, (2006) Edward Elgar Publishing at 127.
[161] Taylor at 58.
[162] U.S. Department of Justice, 'Antitrust Enforcement Guidelines for International Operations,' (1995) at 3.12.

violation of the then EEC's competition laws.[163] The defendants appealed on the grounds that the EEC did not have jurisdiction. The American producers also attempted to rely on the exemptions granted to export cartels under the Webb-Pomerene Act.[164] The ECJ rejected these arguments on the basis that while the cartel agreements were concluded outside of the EEC, Article 85 would still apply if their implementation occurred within its territory. The Webb-Pomerene Act therefore did not grant immunity from prosecution in a foreign jurisdiction.

On the other hand, other countries have a much more circumscribed approach to the issue of extraterritoriality. For example, in contrast to the approaches adopted by the U.S. and the EU, Australia does not apply its laws extraterritorially unless the person or firm in question is incorporated, conducts business, or has assets in Australia.[165]

Anti-competitive behaviour such as hard-core international cartels, in which the relevant conduct is unquestionably illegal in a number of jurisdictions, may be less controversial when it comes to extraterritorial application of competition laws. However, it is important to reiterate that countries only apply their laws extraterritorially in order to serve their own national interests. It is highly unlikely that a country would instigate a case against an international cartel on behalf of another, even if that other country were a developing country. Additionally, full extraterritoriality is commonly only exercised by the most developed economies and remains the exception, rather than the rule.[166]

Chapter Three also highlighted the difficulties foreign plaintiffs, particularly those from developing countries, face when attempting to use foreign courts, such as the United States. Indeed, as reiterated above, developed jurisdictions are often not at all motivated when faced with the option of prosecuting anti-competitive behaviour whose negative effects are largely felt elsewhere. However, many of these countries do not recognise the inevitable effects harms on foreign welfare can have on global welfare in a global market that is

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[163] European Commission, 'Commission Decision of 19 December 1984 relating to a Proceeding under Article 85 of the EEC Treaty,' (1985) (IV/29.725-Wood Pulp) OJ L 85/1 (Wood Pulp).
[164] Webb-Pomerene Act, 1918, 15 U.S.C. ss 61-66 (2005).
[165] Australian Law Reform Commission, 'Legal Risk in International Transactions,' (1996) at 6.3.
[166] Taylor, Martyn D. at 65.

becoming increasingly more interdependent. Developed countries with the resources to identify and prosecute international cartels and protect their domestic consumers, particularly competition and antitrust law powerhouses such as the EU and the United States, are typically blind to the interests of consumers in developing countries who continue to suffer from the effects of global competition law offences.

Extraterritoriality has been criticised by a number of developing countries. This opposition can be seen in the official statement of China, and the Group of 77, a United Nations coalition of developing countries, at UNCTAD's Sao Paolo Conference.[167] The conference report summarised their opinion:[168]

> The Group of 77 and China expressed its deep concern at the increased application of coercive economic measures and unilateral sanctions against developing countries, including the new attempts at extraterritorial application of domestic law, which constituted a violation of the United Nations Charter, the principles of the multilateral trading system and the WTO rules. The Group of 77 and China firmly rejected the imposition of laws and regulations that entailed extraterritorial consequences and all other forms of coercive economic measures, including unilateral measures against developing countries, and reiterated the urgent need for their immediate repeal.

Although this statement was made in relation to unilateral trade sanctions,[169] however, it is entirely possible that this same attitude can be applied to competition law as well. It is more common for developed countries, which have the resources and the strength of their established competition law systems to fall back on, to apply their domestic competition laws than it is for developing countries, which lack these resources, to do so. Thus, it is not

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[167] UNCTAD, 'Communication from the Group of 77 and China regarding the application of coercive economic measures and unilateral sanctions against developing countries,' UNCTAD, Doc TD/411 (6 August 2004).
[168] UNCTAD, 'Report of United Nations Conference on Trade and Development on its Eleventh Session, UNCTAD, Doc TD/412 (20 August 2004) at 39.
[169] See also Group of 77 and China, 'Declaration by the Group of 77 and China on the Fifth WTO Ministerial Conference,' Cancun, 10-14 September 2003.

surprising that developing countries would protest in this regard, especially in instances where developed countries have applied their laws against them.

For developing countries seeking to apply their competition laws extraterritorially, not only must they already possess a strong legal system, but they must also obtain the approval of foreign governments. Indeed, many jurisdictions, including the United States and the EU, acknowledge that in order to effectively apply laws extraterritorially, the foreign government must agree to fully cooperate with the domestic government, especially when collecting evidence.[170] Thus, the process of applying competition laws extraterritorially is not unlike forming a bilateral or regional agreement, along with its associated difficulties. As a result, it may be more beneficial to begin the discussion on reform with some suggestions on how to support developing countries in not only establishing but also building on whatever competition policy regimes they may already have.

Which Reform Measure to adopt then?

The reform methods proposed in this thesis have been categorised as 'Domestic Reform' and 'Global Reform.' To that end, as stated in the beginning of this chapter, domestic reform strategies should be adopted in conjunction with each other. That is, reform options under the 'Domestic Reform' heading should be adopted alongside those under the 'Global Reform' heading. This section will therefore evaluate which reform options under each specific heading is the most achievable, effective, and realistic.

<u>Domestic Reform</u>

Before any of the global reform options can take place, developing countries must establish and strengthen their own competition law systems. To that end, they can make use of both the OECD's programmes on peer review as well as UNCTAD's programmes on technical cooperation. In doing so, a developing country can use UNCTAD's Model Law on Competition as well as their training activities in order to obtain a better understanding of

[170] Griffin, Joseph P., 'EC and U.S. Extraterritoriality: Activism and Cooperation,' (1993) Fordham International Law Journal, Vol. 17, No. 2 at 358.

competition law issues and how to effectively address them. Once a competition law system is established, using the Model Law as a starting point, and the training activities as guidelines, a developing country can use the peer review system in order to obtain feedback and advice on how to better improve their enforcement mechanisms.

Developing countries can also take advantage of foreign direct investors in order to encourage the development of healthy competition in the market. Increasing the amount of FDI in the country however, should only take place after the country has strengthened its own competition law system by making use of the technical cooperation and peer review programmes. This is because FDI can come with risks, such as the foreign firms unduly infringing on domestic firms' rights to participate fully in the market. In these instances, a strong competition law system can help to dissuade foreign firms from taking an unfair advantage in the domestic market they are investing in.

Global Reform

Once a developing country has addressed their domestic competition law issues, we can begin fighting international cartels on the global front. Out of the reform strategies that have been discussed under the 'Global Reform' heading, establishing a global, harmonised competition law agreement specifically designed to target international cartels, would be the most ideal. However, as discussed above, there have been many attempts to establish such an agreement, and each was unsuccessful. Therefore, while a harmonised competition law agreement is the most desirable outcome, it is likely not the most feasible when considering the other global reform strategies discussed in this thesis.

Rather than enacting one binding international agreement, it would be more practical, and therefore effective, to encourage developed countries to negotiate more bilateral or regional agreements with developing countries that contain provisions addressing international competition law concerns, such as international cartels. However, in order to do so, the parties must ensure that they possess, or else, comparable bargaining powers. At the moment, many developing countries, which lack functioning competition law systems, are in much weaker positions than their developed counterparts, which make negotiating bilateral or multilateral agreements a one-sided affair. This is the main reason why developing countries must first address their own competition law issues before engaging with the global community.

Additionally, a global competition law framework may also be more likely than establishing an international competition law agreement, particularly if more countries are willing to negotiate multilateral agreements between themselves. The ICN has made great strides in establishing a global competition law network between both developed and developing jurisdictions alike. However, it is argued here that these developments are not enough to fully address the problem of international cartels. For instance, like many developing countries, China's competition law system is based upon the EU model. Nevertheless, while their system may be based on another's, it is very likely that the two systems have matured and developed independently and are applied differently according to each jurisdiction's individual needs. However, China itself is not a member of the ICN or the OECD. The voluntary nature of membership of these organisations can be an impediment to effective discussions on global competition law issues because some views may not be entirely represented. A global competition law framework would serve to address some of these inadequacies. On the other hand, as outlined above, establishing such a framework can be a difficult task and it unlikely that it will be accomplished in the next few years.

Conclusion

While the effects of international cartels are a global problem and not solely felt by developing countries, they are usually the ones to suffer the most greatly. As such, reforms strategies designed to curb the scourge of international cartels should initially focus on implementing strategies designed to help developing countries protect themselves. As stated in the previous chapter, domestic reform measures such as the strategies designed to help developing countries implement their own competition law systems, should be applied with a domestic welfare standard in mind. In doing so, developing countries can ensure their own specific needs and goals are met first before the global issues surrounding international cartels are addressed.

As previously stated in Chapter Four, developing countries often face great difficulties when attempting to implement and enforce a competition law system on their own due to a lack of resources and expertise. Consequently, while this thesis separates proposed reform measures into 'domestic' reform, meant to aid developing countries specifically, and 'global' reform, which addresses international cartels on a global scale, the domestic reform measures proposed in this thesis contain provisions designed to encourage developed countries to take an active role in helping developing countries help themselves. Some of these proposals, such as those pertaining to foreign investment, may not directly contribute to the ultimate goal of establishing effective competition law systems for developing countries but they do contribute to improving their abilities and motivations to do so. Other proposals such as the OECD peer review scheme and UNCTAD's technical cooperation programmes have a more active role in assisting developing countries improve the competition laws in their respective jurisdictions. In this regard, the proposals should be read and considered in sequence; only by first implementing strategies to enable developing countries gain the motivations and resources to establish their competition law systems can those systems then be improved upon and effectively enforced against international cartels.

With regards to the proposals concerning global reform, these clearly require a more concerted effort between developed and developing countries to address the worldwide issues pertaining to international cartels. While a global, harmonised competition law agreement specifically designed to target international cartels would be the most effective method of addressing the effects of these cartels, it is also one of the most difficult to successfully implement. Negotiating a binding agreement between many different countries, each having their own goals and agendas, is notoriously difficult. Implementing a global competition law agreement in which both developed and developing countries can agree to the terms, let alone be persuaded to sign is likely to be nothing more than a pipe dream. There have been many attempts in the past to establish a binding global competition law agreement and all of them have failed. A less ambitious, but more feasible approach would be to encourage more bilateral or multilateral cooperation between developed and developing countries. While there may still be issues regarding the imbalance in bargaining power between parties, there is already evidence that bilateral and multilateral trade agreements with competition law provisions can be useful when investigating and sanctioning international cartels.

Final Conclusions

This thesis dealt with the question of what effects international cartels have on both the global market and developing countries in particular. It also provided some solutions developing countries and the international competition community as a whole can employ in order to rectify the issues surrounding these cartels. While combating cartels has been one of the pillars of both domestic and international competition law policy, developing countries continue to suffer the brunt of the negative effects of international cartels. Because most developing countries have little to no functioning competition law policy, they are often the most likely targets of international cartels and therefore the most in need of assistance. Developed countries have the resources and mechanisms in place to detect, investigate, and prosecute international cartels targeting their domestic markets; however, developing countries rarely have such opportunities. This can be especially problematic in instances where cartels such as export cartels, are located in one jurisdiction but only target foreign jurisdictions. Without the financial or human resources to obtain the evidence needed to challenge these cartels, developing countries often find themselves in the hopeless situation of being subjected to the whims of the cartel but unable to do anything about them.

International cartels can have far-reaching effects on developing countries that go beyond the economic sector. These effects can extend beyond simply raised prices to include qualitative effects such as consumer poverty. Easing these burdens by combating the external problems is therefore vitally important as is establishing strategies in order to help developing countries implement their own competition law systems.

This thesis set out to determine the extent of the damage suffered by developing countries from international cartels. In doing so, the first substantive chapter drew on previous studies conducted by notable academics and economists on particularly egregious cartels. By analysing both the qualitative and quantitative effects international cartels, including export cartels, have on both developed and developing countries, I determined that while some effects, such as allowances for small and medium sized firms to form export cartels in order to gain access to the global market, can be beneficial to the domestic market, the majority of the most serious negative effects were felt in the foreign market, especially when the activities of these cartels were directed at developing countries.

After establishing the fact that developing countries are the most likely to suffer from the anticompetitive effects international cartels can have on the global market, Chapter Three moved on to discuss the current legislation different jurisdictions have put in place in order to sanction international cartels. This analysis included legislation from both developing and developed countries and also detailed the types of export cartel exemptions that are employed by the latter. It is clear from the analysis that there is a dichotomy between the effectiveness of the competition laws from developed countries and developing countries. We can see that many developing countries have not established any competition policies or laws of their own and those that have, few of them are effective in enforcing their laws in relation to anticompetitive behaviour that takes place beyond their borders. Some countries, such as Brazil, have been relatively successful when compared to other developing countries when investigating and sanctioning international cartels. However, the large majority of developing countries either lack the resources necessary to effectively enforce their competition laws in trans-border cases or they lack a competition law system of their own entirely. Therefore, having come to these conclusions, it was clear that the situation was in need for reform.

Chapter Four discussed the issues developing countries generally face when implementing and enforcing their own competition law systems. These difficulties arise from the specific characteristics all developing countries share, namely a lack of financial and human resources, a lack of expertise, and often governmental instability. The chapter ended by making some suggestions for reform on how developing countries can rectify some of these issues.

Chapter Five discussed what the suitable welfare benchmark should be when determining and applying the options for reform. It also set out the current framework for competition law regulation as well as some general goals for reform. It was established that whichever welfare benchmark is decided upon and subsequently applied to the reform options in Chapter Six will have a direct effect on its outcomes. For instance, while many countries eschew the direct application of consumer welfare in their competition law systems, however, in a report conducted by the ICN, it was found that many competition law systems employ a consumer welfare standard, some alongside other standards of welfare, even if they do not necessarily refer to it as such. In Chapter Six, the reform measures that were discussed were separated into two paths.

The first path of reform deals with reform on a domestic level, for example the development of strategies to help developing countries implement their own competition law systems. Here, discussion was made as to whether a consumer welfare or total welfare standard would be most appropriate. While there are differing opinions on the definitions of consumer and total welfare, it was suggested that a consumer welfare standard, while favoured by developed countries, may not be suitable for developing countries and therefore a total welfare standard may be more appropriate. Questions were also raised as to whether public policy considerations could also be included in the domestic reform process. Some countries, like Kenya and Swaziland, have incorporated public policy considerations into their competition laws in order to better serve their specific social needs and goals. The second stage of reform deals with reform on a global scale, for example the possibility of developing an international harmonised competition law agreement. Here, the proposed welfare benchmark discussed was the suitability of adopting a global welfare standard.

After establishing the appropriate welfare benchmark in both domestic and global reform proposals, Chapter Six suggested some solutions for reforming the situation on both a domestic and global level. One of these domestic reform options that were discussed related to developing strategies in order to help weaker economies implement their own competition law systems if they have not yet already done so. These strategies included encouraging more cooperation between developed and developing countries in international cartel cases as well as making use of services, like peer reviews and technical cooperation, provided by international organisations like the OECD and UNCTAD designed to support developing countries' competition law systems.

After implementing the proposed domestic reform strategies, the chapter moved on to discussing the possibilities for global reform. The most ambitious global reform strategy is undoubtedly the idea of negotiating an international harmonised competition law agreement. There have been many unsuccessful attempts in the past and it cannot be stressed enough that this strategy comes with many, possibly insurmountable challenges. Therefore, a more realistic global reform strategy is to foster greater cooperation between nations. There are several ways cooperation between developed and developing countries can be attained. The final chapter discussed the merits of encouraging the formation of bilateral or regional cooperation agreements as well as the ways in which developed countries could apply their competition laws extraterritorially to international cartels outside of their jurisdictions. Finally, as a compromise between implementing an international competition law agreement and negotiating hundreds of bilateral cooperation agreements, it was also suggested that a global framework of competition law designed to combat international cartels could also be established. Negotiating a global framework may be less laborious than attempting to draft a binding international competition law agreement most countries will agree to sign. A global competition framework may also establish a more comprehensive system of competition policies in the international community than simply considering a series of bilateral or multilateral cooperation agreements. Furthermore, no bilateral agreement dealing exclusively with competition law issues has been signed to date. A global competition framework could therefore be specifically tailored to address the most serious international competition offences, like international cartels.

It is, however, important to note that, while these strategies discussed in this thesis to help developing countries better combat international cartels and are thus designed in order to account for the unique challenges present in developing countries, they are by no means the final solution. Many developing countries face both political and economic difficulties and as such, an effective competition law system is often not one of their first priorities. Nevertheless, it has been discussed in this thesis that a working competition law system can help relieve some of these problems. This thesis has therefore also emphasised the importance of competition advocacy in order to encourage positive attitudes towards healthy competition in the market.

This final conclusion will discuss the theoretical and policy implications of this thesis as a whole and how it can be developed in future research projects.

Theoretical and Policy Implications of Research

The theoretical and policy implications of research into international cartels and developing countries can reach beyond merely aiding individual countries implement their own competition law systems. While developing countries are the most likely targets when considering international cartel behaviour, developed countries also often find themselves subject to the activities of international anti-competitive behaviour. While some of the solutions, particularly the strategies that are employed on a domestic level such as competition advocacy and reallocating of resources, may not be wholly applicable, governments of developed countries should nevertheless take note of the global suggestions for reform. Because international cartels often target markets foreign to their own, cooperation is often crucial when dealing with these types of cartels. Developed countries can also face the same difficulties developing countries do when attempting to collect evidence in a foreign jurisdiction, especially if there is no existing agreement in place. As such, most developed countries already have agreements allowing for the sharing of information in such cases. Some of these agreements have been discussed in the previous chapter.

The 2001 Nobel Prize Winner for Economic Sciences, Joseph Stiglitz said it most succinctly, '[A] strong competition policy is not just a luxury to be enjoyed by rich countries, but a real necessity for those striving to create democratic market economies.'[1] A successful competition law system will not only better regulate prices within the market, but also should also aim to support the countries around it. Therefore, it should not be too controversial to state in this age of globalisation, we should abandon this notion of 'laissez-faire' and . Given that international cartels are a global problem and are not solely limited to developing countries, a global approach, in which every country, both developed and

[1] Stiglitz, Joseph E. 'Competing over competition policy,' (2001) Project Syndicate, available at http://www.project-syndicate.org/commentary/stiglitz.

developing, band together and cooperate with one another would be the most ideal solution. However, in light of the United Kingdom's decision to leave the European Union, it would appear we are moving away from globalisation rather than towards it.

Implications for Future Research

While this thesis focused broadly on reforms for investigating and prosecuting international cartels, some of the global reform strategies discussed in the previous chapter can also be adapted for other international competition policy issues, such as merger regulation. This is especially relevant now as the future of international competition policy becomes increasingly uncertain. Following the United Kingdom's decision to separate from the EU, or 'Brexit', competition policy between these two jurisdictions will become more complicated in the future. At the time of writing, it is difficult to predict how these policies will change.

At the moment, Regulation 1/2003 governs merger regulation for Member States in the EU. This confers a number of benefits, the most important being what is known as the 'one-stop shop' for merger regulation. Companies from Member States wishing to merge need only apply to the European Commission once in order to obtain approval. Once the UK triggers Article 50 of the TFEU and withdraws its membership, this option will no longer be available to merger agreements with both a UK and EU dimension. Merging companies in these jurisdictions would need to apply to the UK's Competition and Markets Authority as well as the European Commission. This will greatly affect the relationships and conduct between businesses in either jurisdiction. For instance, applying to two separate competition law enforcement agencies may result in increased delays in the decision-making process as well as inconsistencies in the decisions themselves. For now, the CMA is bound by the decisions made by the European Commission. After 'Brexit,' this will change. UK and EU companies merging with one another may eventually find themselves in the awkward situation where one authority has allowed a merger while the other has not.

It can thus be seen that international competition law cooperation is vital for both international cartel and merger regulation. Strategies discussed in this thesis such as fostering cooperation between different jurisdictions and potentially developing harmonised provisions designed specifically for mergers. Drafting transnational merger regulations can incorporate similar provisions as international cartel regulation. Because companies in developed countries are often incentivised to merge with companies in developing countries through the encouragement of foreign investment, more emphasis is needed on formulating strategies to protect them. Considerations such as merging companies' combined market power and turnover along with what effect it will have on the developing countries market must be accounted for. If not, developing countries run the risk of seeing their local enterprises overtaken by larger, foreign firms. This can be seen in the concerns consumers in China had regarding the announcement of large, Western corporations merging with beloved Chinese companies. Indeed, along with cartel regulation, merger control should be one of the provisions discussed in any newly established competition policy. The characteristics that define and give developing countries their status also makes them highly susceptible to abuse of dominance conduct and monopolies. A domestic and international merger control policy would go a long way towards resolving many of these issues.

Other future research projects that could encompass this thesis include revisiting the inclusion of more competition law provisions in the WTO. Although this thesis discussed and subsequently discounted the possibility of establishing a comprehensive competition law agreement under the WTO, it is true that international trade law and international competition law share many characteristics. Indeed, the WTO has recognised the existence of these overlaps and has thus incorporated the use of some competition law provisions in its Agreements. For instance, the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS Agreement) contains some competition law provisions in relation to intellectual property law. The main provisions in the TRIPS Agreement that deal with the application of competition are Article 40, which deals with anticompetitive licensing practices, and Article 31, which deals with the use of a patent without authorisation from the patent holder. Article 31(k) in particular makes specific reference to the fact that members are not required the conditions needed to grant a compulsory license as laid out in the Article in order to remedy a practice that was previously held to be anticompetitive. These are only a few of the references to competition law that the TRIPS Agreement makes and it is important to note that many of these provision only make references to general principles of competition policy and not substantive rules on governing competition.

The inclusion of general competition law policies into the TRIPS Agreement was advocated for particularly strongly by developing countries. From this, we can deduce that while developing countries until now have been resistant to the idea of incorporating a general set of competition law rules into the WTO, they do recognise its importance in other areas of law.

This thesis has already discussed how developing countries banded together during the Cancun negotiations to block the adoption of even a minimal competition law agreement against the express wishes of many developed countries, particularly the EU. Should discussions or further research into the incorporation of competition law into the WTO ever take place, these negotiations must take greater account of the specific needs of developing countries and tailor any provisions that are discussed to suit them accordingly.

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