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MODERN-DAY SOLUTIONS FOR MODERN-DAY GLOBALISATION: PROPOSALS FOR CURBING IMPORTED ANTI-COMPETITIVE BEHAVIOUR

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Abstract

Cross-border conduct, such as cross-border cartels, export cartels, and abuse of dominance by multinational corporations, undertaken by firms in developed economies, can affect the economies of developing countries. This paper argues that such anti-competitive behaviour can only be curbed through the cooperation of the competition agencies of developing countries. Through looking at the harms of such conduct and assessing past and possible future solutions, this paper finds that creating a global competition law is not the only solution to this problem, but rather that plurilateral (or regional) and bilateral cooperation can be equally effective. Further, it finds that regional cooperation is not only effective in its own right, but also as tool to eventually reach an effective form of multilateral cooperation. Accordingly, it makes suggestions pertaining to international law instruments that can be used to limit cross-border anti-competitive conduct, the content of regional and bilateral agreements, and the role of international organizations in soft cooperation.

Key words: *competition law, export cartels, cross-border cartels, abuse of dominance, international cooperation*

1. INTRODUCTION

Markets in developing countries are not only affected by domestic anti-competitive behaviour, but also by cross-border practices, including those undertaken by firms in developed economies. These include cross-border cartels, export cartels, and abuse of dominant position by global service providers, including technology giants. Given increased globalization, including that of services, the harms of this behaviour may be easily imported into the markets of developing economies, threatening their economic development. This paper argues that one of the main ways to combat this is through cooperation between the competition agencies of developing economies. To do so, the paper first goes through different types of cross-border conduct, identifying the harms of such anti-competitive behaviour. It

then looks into the different forms of international cooperation, discussing the attempts that have previously been made and assessing the strengths and weaknesses of different approaches. Accordingly, the third section of the paper makes some suggestions as to viable options for cooperation going forward.

2. TYPES OF CROSS-BORDER ANTI-COMPETITIVE CONDUCT

Strategic trade theory lays out that the intervention of governments in free trade can provide opportunities for certain sectors to expand, thereby increasing national income.[1] This is one reason states work together through platforms such as the World Trade Organization (WTO) to deal with tariff and non-tariff barriers. However, free trade could also be impeded by private actions of undertakings – namely anti-competitive conduct. This conduct includes export cartels, cross-border cartels, and abuse of dominance by multinational corporations. The states most affected by such conduct are often developing countries. Firstly, their economies are more fragile, and hence more easily affected by the harms associated with anti-competitive conduct. These include, *inter alia*, higher prices, decreased quality, decreased customer choice, and, in some cases, decreased employment opportunities. Secondly, as developed countries may be home to the cartelists or the multi-national corporations, any benefit incurred from anti-competitive behaviour would be captured by these countries. As hosts, however, developing countries would be subject to the harms associated with anti-competitive behaviour in an exclusive manner. This imbalance makes it important for developing countries to aim to address such behaviour. Accordingly, the remainder of this section provides a summary of the nature and the types and harms of "imported" anti-competitive behaviour (cross-border and export cartels, as well as abuse of dominance by multinational corporations) before delving into the ways that this behaviour can be curbed.

Cross-border cartels describe cartels that originate in one state and impact other states (while possibly effecting the state of origin as well). Cross-border or international cartels can lead to significant price mark ups. A survey of around 2,000 estimated overcharges, resulting from cartels, shows that while the median overcharge for national cartels is 18.2%, that of international cartels is 25.1%.[2] Moreover, international cartels showed more "episodes" of increase, or phases for which the price effects differed. While most domestic cartels created one episode, the 1,042 international cartelized markets in the study had an average of 4.3 episodes, in-

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1 Becker, F., *The Case of Export Cartel Exemptions: Between Competition and Protectionism*, Journal of Competition Law and Economics, Vol. 3, No. 1, pp. 97-126, p. 98

2 Connor, J.M., *Price-Fixing Overcharges: Revised 2nd Edition*, SSRN, 2014, p. 53

dicating that international cartels are more likely to reform once they have fallen apart.[3] Accordingly, cross-border cartels can be more harmful than domestic cartels, as well as more difficult to prosecute.

Even more difficult to uncover are export cartels, which are cartels which concern export markets, or the markets of target states, and which may include agreements or arrangements regarding: setting an export price, dividing export markets, exclusivity in exporting, fixing resale prices of foreign distributors or sales quotas, or, having associations refuse the export of non-members.[4]

Similar to cross-border cartels, the practices of dominant undertakings can span over multiple states. This is especially true given increased globalization and the growth of large technology companies. Such companies are often based in developed countries and reach a global scale. Any abuse of their position, whether exploitative or exclusionary, would easily affect all geographic markets in which they operate. At the very least, it would prevent local players from rising, thereby reducing consumer choice and possibly deteriorating the quality of the incumbent's existing services.

Such practices may be easier to prove than cartel activity (for example, by relying on the effects of the abuse on the target market as evidence). However, a competition authority may still face difficulties in building a strong case if it is unable to have a multinational undertaking cooperate in meetings or in providing evidence.

The common factor between these types of conduct is that 1) the jurisdiction in which they originate may not be the most harmed by the cartel (in the case of cross-border cartels or cross-border abuse of dominance) or may not at all be directly harmed by the cartel (in the case of export cartels), making it 2) difficult to ascertain which competition authority (or authorities) are best suited to prosecute the case. The upcoming section explores the question of cross-border jurisdiction.

3. CROSS-BORDER JURISDICTION

The examples of the United States (US) and the European Union (EU) are used to explore this point. These two examples are used given the different approaches of these two jurisdictions and given the relatively large size of their economies.[5]

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3 *ibid.*, p. 37

4 Becker, F., *op. cit.*, note 1, p. 100

5 World Trade Organization, *World Trade Statistics 2023*, 2023 [https://www.wto.org/english/res_e/statis_e/statistics2023_e.htm#:~:text=In%202023%2C%20world%20trade%20in,trajectory%2C%20increasing%20by%209%25.], accessed 1 December 2024

The US, on one hand, provides an explicit exemption for export cartels. In 1918, the US Congress passed the Webb-Pomerene Export Trade Act of 1918 (WPA), explicitly exempting export cartels from the prohibition laid out in Section 1 of the Sherman Act. The main motive behind the WPA were concerns that US companies were, on the global scale, disadvantaged by not being able to cooperate and face foreign cartels.[6] Under similar conditions, and a few decades later, the Export Trading Company Act of 1982 (ETC) was passed. The ETC created the certification-provision, which allowed exporting undertakings to apply for a certificate setting limits to their antitrust liability before engaging in export. Holders of the certificate are largely immune from public enforcement and would only be subject to single, rather than treble, damages in the case of private damage claims. In the same year, the Foreign Trade Antitrust Improvements Act of 1982 (FTAIA) passed, encouraging US companies to engage in export collusion as long as any impact on the US market would be incidental and insubstantial.[7] To date, the US employs an explicitly exemption of export cartels.

The EU, on the other hand, provides an implicit exemption for export cartels. In order to understand this exemption, the following paragraphs explore the EU approach towards jurisdiction (including over agreements concluded outside of the EU but implemented in the Union) and the general public international law principles governing antitrust jurisdiction.

In 2006, the EU Commission began investigating a cartel between 6 undertakings spanning over 6 jurisdictions, including the EU, relating to Liquid Crystal Display (LCD) screens. In its 2010 report, the Commission explored the question of jurisdiction: can an agreement between undertakings be investigated by the EU if the agreement took place outside of the EU but was implemented in it?[8] The Commission cited the territoriality principle, which was explored in detail by the General Court (GC) in the *Woodpulp* case (1988).[9] In that case, the GC clarified that the "territory" in question in the one in which the anti-competitive conduct is implemented – if it referred to the territory in which the agreement was concluded, undertakings could easily circumvent the prohibition laid out in Article 101 TFEU. The test for jurisdiction hence is one of implementation: EU jurisdiction is established if the conduct is implemented in the EU. The GC soon

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6 Becker, F., *op. cit.*, note 1, p. 102

7 *ibid.*, p. 104

8 European Commission, Commission Decision relating to a proceeding under Article 101 Treaty on the Functioning of the European Union and Article 53 of the Agreement on the European Economic Area (COMP/39.309 – LCD – Liquid Crystal Displays), 2010, p. 62

9 Joined cases T-89, 104, 114, 116, 117 and 125 to 129/85 A. Ahlström Osakeyhtiö and others v Commission of the European Communities [1988] ECR 988-05193

added another layer to the test in its 1999 *Gencor* decision, the qualified effects test.[10] The case established that the EU Commission can intervene under the principles of public international law when it is foreseeable that a proposed transaction would have an immediate and substantial effect on the EU. The case also established that fulfilling either the implementation or the effects test would grant jurisdiction – the test is not cumulative. This was demonstrated in the 2017 case of *Intel*.[11] That decision also clarifies that both limbs of the test pursue the same objective: establishing that the agreement was implemented in the EU or that it was sufficiently *probable* that the agreement would affect the EU.[12] This is done by considering the conduct in question as a whole. Accordingly, the criteria of the effects test laid out in *Gencor*, that the effects are immediate and substantial, are fulfilled if the conduct is, for instance, part of an overall strategy to foreclose competition, including in the EU.[13] Notably, if the threshold for the effect test was any higher – if it required that the effects of the agreement concluded abroad must actually materialize in the EU – there would be an "artificial fragmentation of comprehensive anti-competitive conduct" as agreement concluded outside of the EU would not be subject to the "by object" analysis.[14]

Accordingly, EU case law established that the EU Commission has jurisdiction to investigate anti-competitive agreements, such as export cartels, if they may possibly have an effect on the European market. However, Article 101 TFEU clearly states that anti-competitive agreements must affect the internal market in order to be considered illegal. Hence, an implicit exemption exists: the EU Commission would not have any jurisdiction over a pure export cartel (including one that is concluded in the EU) which has absolutely no likelihood of effects on the EU market.

Some commentators argue that both the US and the EU exemptions do not hold. The main premise of this argument is that by purely applying the territoriality test, a cartel would be under the jurisdiction of the competition authority of the state in which it was concluded.[15] In that sense, the effects principle is not a limit to jurisdiction, but a means to expand it. Under that argument, an export cartel that is concluded on US or EU territory is within the jurisdiction of the US/EU, as the territoriality requirement is fulfilled through the conclusion of the agreement on US/EU territory. However, while this argument suggests a theoretical mode of

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10 Case T-102/96 Gencor Ltd v Commission of the European Communities [1999] ECR II-00753

11 Case C-413/14 P Intel Corp. v European Commission [2017], paras. 40-65

12 *ibid.*, para. 51

13 *ibid.*

14 *ibid.*, para. 57

15 Becker, F., *op. cit.*, note 1, p. 107

application of the doctrine, in the case of the EU, the courts have already come to a conclusion on how to apply the principle. As mentioned above, in the case of *Woodpulp*, the court established that the "territory" is where the implementation or effects of the conduct takes place. So, the courts may be hesitant to consider the territory in question to be the territory in which the agreement takes place, as that has been understood to be immaterial. In the case of the US, the explicit exemptions provided in statute make it unlikely that the US antitrust authorities would pursue conduct with no impact on the US economy, or even impact that is only incidental and unsubstantial. The bar is evidently a bit lower in the EU, as any foreseeable effects on the internal market would suffice.

Accordingly, as a matter of legal jurisdiction, the US and EU would currently not pursue anti-competitive conduct, including that concluded on their territory, unless a level of impact on their economy is met. The next question then becomes, even if such jurisdictions had these powers, *should* they exercise them? The following paragraphs present three reasons as to why cross-border conduct, including export cartel agreements, would not effectively by curbed if investigated solely by the developed jurisdictions on the territory of which the conduct is concluded.

Firstly, even if jurisdictions such as the US and EU were to expand their jurisdiction vis-à-vis conduct occurring on their territory and affecting other jurisdictions, this might be at odds with the principle of comity. In the context of competition law, the principle can be used as a principle of recognition, i.e. to assert jurisdiction over anti-competitive conduct in another jurisdiction, or as a principle of restraint, meaning that it can be used to abstain from intervening to avoid interfering in the interests of a foreign jurisdiction.[16] In other words, the principle provides "an option to exercise deference" so that competition authorities do not duplicate investigations and conclude with opposing decisions.[17] While the principle does not pose an obligation on a jurisdiction to pursue certain conduct, utilizing it as a principle of recognition may result in antitrust laws of one state being used to address conduct in another, despite that state employing different antitrust laws. In the case of export cartels, for instance, if the EU were to apply its own competition laws to an export cartel which hypothetically only affected a third jurisdiction, which also employed a competition law, conduct which would otherwise be addressed by the third jurisdiction's law would be assessed under foreign legislation. This may not always be appropriate; states, ideally, draft and enforce laws customized to their own economies, and applying foreign competition legislation may result in contradicting outcomes.

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16 Martínez, A.R., *Too Much, Too Many: The Principle of International Comity in Digital Markets*, accessed 2 December 2024

17 *ibid.*

The second reason is similar. An investigation by, following the above example, the EU Commission into conduct only impacting a third jurisdiction would not be coherent, as the EU Commission may not understand the nature of the market in question. The real impact of the cartel would be taking place in an economy and environment which is unfamiliar to that authority.[18] While in most jurisdictions, it would suffice to have evidence of the occurrence of the cartel without having to prove its effects (on the target market), it would still be difficult for the investigating agency to ascertain specific facts, such as for instance, the market share of the exporters in the target market (for the purpose of de minimis requirements). Moreover, the regulating state may be unaware of certain industrial policies that may affect that market, promulgated by the target state. In that sense, "any protection of competition in a foreign market is necessarily incomplete" and may almost risk infringing the fundamental principle of non-intervention into another state's economic decisions.[19]

Thirdly, such intervention by the EU Commission, hypothetically, may cause a rivalry between competition authorities. This point was raised in the UK Competition and Markets' Authority (CMA)'s report (2021) on the acquisition of Giphy by Facebook (Meta).[20] In that case, third party commentators argued that UK intervention is an overreach of jurisdiction, since both parties to the transaction were US entities with no presence in the UK, and that this makes the UK "merger policemen".[21] While the CMA's jurisdiction was established in that case, such a reputation for an established authority may harm the newer competition agency (the agency in the developing, target market). In the example above, if the agency in the host country finds that there is no export cartel but the agency in the target market does prove the cartel, the cartelists are more likely to challenge the sanction imposed by the latter or ignore it altogether. Accordingly, the agency in the developing jurisdiction will have wasted resources in investigating the infringement. It would also have lost out on a potential fine. Notably, in the case of *Facebook/Giphy*, the Australian and Austrian authorities also investigated the acquisition. There is no evidence of any cooperation between the three authorities in the investigation, and they all arrived at different conclusions.[22]

To conclude, an investigation into cross-border conduct originating in a developed country by the competition authority in that country may result in an outcome that is harmful for the target country. This is because the competition agency in

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18 Becker, F., *op. cit.*, note 1, p. 114

19 *ibid.*

20 CMA, Completed acquisition by Facebook, Inc (now Meta Platforms, Inc) of Giphy, Inc. – Final Report, 2021, p. 48

21 *ibid.*, Appendix H

22 Spiegel, Y., *The Facebook-Giphy Merger*, SSRN, 2024, p. 5

the host country would be applying its own rules to a third state; it would not have sufficient expertise to investigate conduct in that state; and, it may arrive at an outcome that is harmful for the target state. For that reason, this paper explores an alternative solution: cooperation between competition authorities. The forms of cooperation are addressed in turn in the following section.

4. PAST AND CURRENT MODELS OF INTERNATIONAL COOPERATION

This section explores the three types of competition agency cooperation, denoted as: the multilateral, or global, approach; the plurilateral (regional) approach; and the bilateral approach. It then turns to the role of international organizations in enhancing soft cooperation.

4.1. The multilateral approach

It is often argued that the ideal form of cooperation, for the purpose of the enforcement of competition law and hence, although perhaps indirectly, the curbing of imported anti-competitive behaviour, is the creation of a global competition law.[23] Notably, this has been attempted multiple times in past century.

As early as 1927, the League of Nations discussed a global attempt at controlling restrictive business practices.[24] Later, a more concrete endeavour was taken by the United Nations Conference on Trade and Development (UNCTAD) through Chapter V of the Havana Charter in 1948.[25] The Chapter dealt with conduct such as price-fixing and market allocation.[26] It also explicitly mandated that members would "co-operate with the organization to prevent, on the part of private or public commercial enterprises, business practices affecting international trade which restrain competition, limit access to markets, or foster monopolistic control …".[27] Indeed, the Charter set up a system where signatories could consult one another, through the International Trade Organization (ITO), regarding suspected anti-

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23 Becker, F., *op. cit.*, note 1

24 Ham, A.D.; *International Cooperation in the Anti-Trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities*, Common Market Law Review, Vol. 30, 1993, pp. 571-597, p. 572

25 Choi, Y.S.; Hienemann, A., *Competition and Trade: The Rise of Competition Law in Trade Agreements and Its Implications for the World Trading System*, World Competition, Vol. 43, No. 4, 2020, pp. 521-542, p. 526

26 Matsushita, M., *International Cooperation in the Enforcement of Competition Policy*, Washington University Global Studies Law Review, Vol. 1, No. 463, 2002, pp. 463-475. p. 464

27 Article 46, para. 1, Havana Charter for an International Trade Organization, E/Conf. 2/78, 1948

competitive conduct, with the aim of reaching a mutually satisfactory resolution.[28] Alternatively, a member state, or a private entity within its jurisdiction, could file a complaint at the ITO, which the ITO would investigate.[29] The ITO would then recommend remedial action for the member state from which the conduct originated, which the latter would have to report that it had followed.[30] Compliance with these recommendations was not a legal obligation, but, members would be under political pressure to comply, as they would otherwise have to explain their reasons for not doing so.[31] Finally, the Charter also provided a paragraph, Article 53, focused on practices in certain service fields, such as telecommunications, transportation, insurance, and banking. It offered a similar mechanism for remedial solutions, but it did not explicitly list prohibited practices in these fields, nor did it require member states to address them in national laws.

However, the Havana Charter was soon abandoned, and accordingly so were its competition provisions.[32] Had it succeeded, the Charter would have created a global investigatory body concerned with applying anti-trust provisions. It would have ensured a form of cooperation between member states that would have enabled this body to address cross-border activities. As will be demonstrated later in this paper, these types of evidence-gathering powers are crucial for the strengthening of competition enforcement in developing countries, although it may not require a transnational organisation.

A similar, yet softer, attempt was undertaken by the UNCTAD again in 1980, when its General Assembly accepted a "set of multilaterally agreed principles and rules for the control of restrictive business practices".[33] The code is non-binding, although it does contain valuable provisions regarding offering technical assistance to developing countries (the importance of such support is discussed in more detail in Section 3.2).

Other UN organizations also undertook similar attempts: in 1953, the UN Economic and Social Council (ECOSOC) submitted "Draft Articles of Agreement", largely mimicking Chapter V.[34] Some minor differences included slightly more proscriptive prohibitions, as well as an exemption for government-mandated con-

28 *ibid.*, Article 47

29 *ibid.*, Articles 46, 48

30 *ibid.*, Article 48

31 Nakagawa, J., *Harmonization of Competition Law*, in: Nakagawa, J. (ed.), International Harmonization of Economic Regulation, 2011, pp. 188-214, p. 191

32 Matsushita, M., *op. cit.*, note 29, p. 464

33 Ham, A.D, *op. cit.*, note 27, p. 572

34 Nakagawa, J., *op. cit.*, note 34, p. 192

duct. Moreover, similar to the Havana Charter, the ECOSOC Draft created an independent organization responsible for the execution of the agreement.[35] However, the ECOSOC draft failed to come to fruition, as the US did not ratify it. As one of the articles of the draft stipulated that it must be accepted by countries accounting for at least 65% of the world's imports and exports, and as the US was, at the time, the largest importer and exporter, the draft faced the same fate as the Havana Charter.[36]

Around the time, during the Ninth Session of the Contracting Parties of the GATT in 1954, discussions took place regarding adding provisions to the GATT addressing the regulation of restrictive business practices. This was also abandoned at the time, following the sentiment resulting from the abandonment of the ECOSOC Draft that such provisions are premature. However, in 1958, the members of the GATT decided to establish a Group of Experts on Restrictive Business Practices. Notably, the majority of the Group was opposed to the creation of a super-national body tasked with enforcing a sort of global competition law, given the jurisdictional issues this organization would have vis-à-vis national authorities. GATT discussions of the topic came to a close soon after, precisely in the Seventeenth Session in 1960.[37]

Later attempts were made by the "Munich group of competition law experts" who created a Draft International Antitrust Code in 1993.[38] The Draft created an International Antitrust Authority as well as an International Antitrust Panel, which would review the decisions of the former if challenged. The Draft was clear on substance and would have direct effect, meaning that it could be invoked by private parties before national courts. The proposal would be that the code would be Annexed to a plurilateral treaty under the WTO, and that it would only apply to those who signed it. Notably, scholars at the time made proposals that the global law should outlaw export cartels, further suggesting that member states could exempt three industries from such ban.[39] Again, the code failed to take any formal form, mainly due the opposition by the United States, both regarding the substantive and procedural elements of the code.[40]

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35 *ibid.*

36 *ibid.*, 193

37 *Ibid.*, 194

38 Hoekman, B., *Competition Policy and the Global Trading System: A Developing-Country Perspective*, World Bank Policy Research Working Paper, No. 1735, 1997, p. 2

39 Scherer, F.M., *Competition Policies for an Integrated World Economy*, Brookings Institution, Washington D.C., 1995

40 Gifford, D.J., *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry*, Minnesota Journal of International Law, Vol. 6, No. 1, 1997, p. 5

The most recent major attempt at a global approach towards competition law, and the final one to be addressed in this section, was that made at the 2001 WTO Doha Round. Members of the WTO discussed the "Singapore Issues", which included competition policy and its interaction with trade. A working group on the topic was created, but most Singapore Issues were abandoned following the Cancun Ministerial Conference in 2003.[41] The working group has been inactive since 2004.[42]

Evidently, it is difficult to draft a globally applicable, enforceable competition code.[43] Differences in industrial policy and legal tradition would it make it very difficult for countries to agree on the substance of such a code. Indeed, it would be difficult for countries of different legal systems and political ideologies to agree on one identical form of competition law, especially if it were to have direct effect. In fact, it is largely contended that there is no "one size fits all" competition regime, and that each jurisdiction should draft and enforce its competition laws in a way that is appropriate for its legal regime and economic goals.[44] On the procedural side, the creation of a global antitrust authority is also difficult, given questions of jurisdiction, the extent to which its decisions would be binding, and because "nations differ widely in their willingness to trust officials to make socially responsible choices through regulation, as opposed to market mechanisms".[45] Moreover, while attempts have halted in the past few years, it is difficult to envision that they would be any more successful in the present day; current debates in antitrust and trade policy highlight increased divergence and protectionism, which would make it even more complicated to arrive at a multilateral agreement in the next few years.

For instance, the 2019 *Siemens/Alstom* merger decision highlights the tensions that may exist, perhaps in specific industries, resulting from the growth of global undertakings in local markets. The Commission blocked this merger, finding that it would have cut competition in the markets for signalling systems and very-high speed trains, depriving consumers (including train operators) of choice and increasing prices. In its decision, the Commission addressed the potential entry

41 Choi, Y.S., Hienemann, A., note 28, p. 527

42 Anderson, R. *et al.*, *Competition Policy, Trade and the Global Economy: An Overview of Existing WTO Elements, Commitments in Regional Trade Agreements, Some Current Challenges and Issues for Reflection*, OECD Global Forum on Competition, 2019, p. 10

43 Gifford, D.J., *op. cit.*, note 43, p. 29

44 Gal, M.S.; Fox, E.M., *Drafting Competition Law for Developing Jurisdictions: Learning from Experience*, in: Gal M.S. *et al.* (eds), The Economic Characteristics of Developing Jurisdictions, Edward Elgar Publishing, 2015, p. 299

45 *ibid.*

of Chinese competitors into the European market, stating that they would not be present on the market in the foreseeable future.[46] This, however, was met by disagreement from France and Germany, which, a few days after the decision, jointly issued a statement on the importance of creating European Champions. In their manifesto, France and Germany made two main arguments relating to the substance of the EU merger control regime, namely that it should take into consideration 1) state aid received by foreign competitors in their home state, and 2) the need for European firms to compete on the global market rather than just the European market.[47] In other words, it would not be surprising if national competition regimes were to move towards more protectionist approaches, given the globalized nature of today's economy, and the appetite of some jurisdictions to growth their own local undertakings rather than face competition from abroad.

The following section explores a perhaps more palatable form of cooperation: the plurilateral approach.

4.2. The plurilateral approach: regional cooperation

Regional agreements addressing competition law may be more successful than multilateral agreements. If, as laid out in Section 2, one of the main goals of developing countries in cooperation is to shield their markets from the anti-competitive practices of more developed economies, then it would make sense for developing neighbours to work together, rather than expect the majority of jurisdictions to cooperate. Furthermore, neighbouring jurisdictions may have similar views regarding industrial policy and protectionism, perhaps due to similar natural resources or competitive advantages. This would make cooperation easier. Neighbouring countries may not necessarily have converging competition regimes – despite their geographic proximity, they could still have different legal traditions as well as divergent political or economic goals. It is however more likely that they will have many cultural and historical factors in common.

One example of this is the Arab region. Most Arab countries employ a mix of civil and Islamic (Sharia) law regimes, while some more heavily rely on the latter (such as Saudi Arabia). Accordingly, the influence of legal tradition on their competition regimes should be similar throughout the region, even if the substance of the procedural aspects of their competition laws is not identical.

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46 *Siemens/Alstom* (M.8677) Commission Decision 300/07 [2019] OJ 300/14, para. 1073

47 Liran P., *The Siemens/Alstom Merger Case: How European Merger Policy Respond to Global Competition*, Dublin Law and Politics Review, Vol. 1, No. 33, 2020, pp. 33-40

Perhaps accordingly, most Arab countries (the 22 members of the Arab League) currently employ a competition law regime. While in some cases, this may have been directly influenced by their cooperation with third jurisdictions, such as the EU for instance[48], it could also indirectly be attributed to the Sharia law obligation on individuals to trade fairly.[49] In fact, Sharia law aims to safeguard the freedom to compete, while prohibiting certain practices, such as artificially inflating prices or hoarding products.[50] In other words, the culture, as well as the legal regime in the Arab region, taken by example, is very similar, perhaps making cooperation on the competition front more feasible. Some scholars have found that having a similar and accepting culture or attitude towards competition does indeed play a role in promoting cooperation.[51]

To that end, the competition authorities of the Arab region have recently joined the Arab Competition Network (ACN), created jointly by the Arab League and the Egyptian Competition Authority in 2022.[52] The Network aims to enhance the capacity building of its individual members through workshops and training programs, focusing on different areas of competition enforcement and on advocacy.[53] Since its creation, the ACN has hosted over 30 workshops, training courses, conferences, and events. Technical teams across the different authorities have been created and have issued guidelines on enhancing the institutional structure and efficiency of the members' competition authorities.[54] Moreover, different international organizations, namely the Organization for Economic Cooperation and Development (OECD), the United Nations Economic and Social Commission for Western Asia (UN-ESCWA), and UNCTAD, have also played a role in enhancing soft cooperation between Arab states by establishing the Arab Competition Forum in 2020.[55] The Forum similarly provides a platform for Arab competition authorities to meet and exchange knowledge.

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48 Choi, Y.S., Hienemann, A., *op. cit.*, note 28, p. 524

49 Dabbah, M. M., *Competition Law and Policy in the Middle East*, Cambridge, 2009, 23

50 *ibid.*

51 Gerber, D., *Global Competition: Law, Markets, and Globalization*, Oxford, 2010

52 Saudi Press Agency, *Arab Competition Network Launched to Enhance Communication, Cooperation Regarding Competition Protection*, 2022 [https://www.spa.gov.sa/2338002], accessed 10 September 2024

53 Bremer, *Arab Competition Network Poised to Increase Inter-agency Cooperation*, 2023 [https://www.bremerlf.com/resources/arab-competition-network-poised-to-increase-inter-agency-cooperation], accessed 10 September 2024

54 Egyptian State Information Service, *ACN 3rd Conferences Kicks Off in KSA*, 2024 [https://www.sis.gov.eg/Story/191910/ACN-3rd-conference-kicks-off-in-KSA?lang=en-us], accessed 10 September 2024

55 OECD, *Arab Competition Forum* [https://www.oecd.org/en/networks/arab-competition-forum.html], accessed 10 September 2024

Such examples of soft cooperation can prove especially useful in regions with diverging experience, where older competition authorities may be able to share their expertise with younger authorities. Moreover, while a network such as the ACN did not create a common competition law or a multi-national authority or court, it could play a role not only in capacity building, but in providing the platform for future bilateral agreements between states to provide support on investigations, for instance. As will be discussed further in the next section, bilateral agreements can facilitate evidence gathering in the case of export cartels or other cross-border anti-competitive conduct. Such forms of cooperation would minimize the occurrence of cross-border or imported anti-competitive behaviour within such regions.

As will be discussed further below, this may however require amendments to national legislation, enabling member states to share information amongst one another, such as within the European Competition Network. For instance, Article 18 of Spain's Competition Act 15/2007 states that the National Competition Commission may exchange with "the National Competition Authorities of other Member States and use in evidence any matter of fact or of law, including confidential information, under the terms of Community law". Including such provisions in statute would give it legal standing. However, this may be easier to do within regional economic communities, which would be created through international treaties.

For example, the Common Market for Eastern and Southern Africa (COMESA) combines 21 member states in Africa and addresses competition matters through the Competition Regulations, promulgated in 2004, enforced by the COMESA Competition Commission (CCC). Article 8 of the Regulations clarifies that the CCC has the power to "monitor, investigate, detect, make determinations or take action to prevent, inhibit and/or penalise undertakings" regarding trade between its member states.[56] It can summon persons to appear before it and give evidence and request documents needed for its investigations.[57] It can then remedy proven anti-competitive activity and penalize it, namely through: ordering its termination or nullification; issuing a cease and desist order; ordering payment of compensations to the parties harmed; or imposing fines.[58] Moreover, mergers above a certain threshold are notifiable to the CCC if both the acquiring firm and target firm or either of them operate in two or more of its member states.[59] The CCC then

[56] Article 8(1), COMESA Competition Regulations (2004), Official Gazette of the COMESA Vol. 17, No. 12, 20 November 2012

[57] *ibid.*, Article 8(2)

[58] *ibid.*, Article 8(3)

[59] *ibid.*, Article 23(3)

assesses whether the economic concentration is likely to substantially prevent or lessen competition, without the realization of efficiencies or without justifications relating to public interest grounds.[60] In other words, the CCC has the power to investigate anti-competitive conduct and assess economic transactions that may affect its member states. However, unlike the members of the European Competition Network, the laws of the members of the COMESA do not necessarily provide a mechanism to share confidential information with one another or with the CCC.[61] Finally, aside from acting as a multi-national competition authority, the CCC also plays a role in enhancing cooperation between the competition authorities of its members and providing them avenues for training and growth, as per its functions laid out in Article 7 of the Regulations.[62]

Both types of soft and more concrete cooperation can be useful for the capacity building of the member states involved. They can play an even more prominent role in making more permanent legal changes, through serving as platforms through which competition agencies, and the governments they belong to, can work together to lobby for the multilateral agreements that may be otherwise difficult to achieve. The previous section discussed the multiple attempts at forming a global competition law or authority. Arguably, if such attempts were to be made again, especially for the purpose of curbing practices such as export cartels, the governments of developing countries could benefit from working together through such networks to build a common argument and hence stand a strong front, as well as support their own national negotiation teams before participating in multilateral discussions. This can be seen from the experience of Mauritius and Zambia in utilizing their membership of the COMESA and the Southern Africa Development Community (SADC) to enhance their participation in WTO negotiations.

One study into this topic, although not specific to competition law negotiations, found that "many poor countries do not have the capacity to influence significantly the WTO negotiations or to implement the commitments agreed multilaterally".[63] However, the study found that participation in regional com-

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60 *ibid.*, Article 26(1)

61 Member states may still be able to share confidential information with the CCC or its member states through other means, such as through drafting written agreements with parties under investigation granting the authorities consent to do so. Naturally, undertakings may be unwilling to do so, except perhaps in the case of merger investigations.

62 These include: "(c) help[ing] Member States promote national competition laws and institutions, with the objective of the harmonization of those national laws with the regional regulations to achieve uniformity of interpretation and application of competition law and policy within the Common Market" and "(g) facilitate[ing] the exchange of relevant information and expertise".

63 Bilal, S.; Szepesi, S., *How Regional Economic Communities Can Facilitate Participation in the WTO: the Experience of Mauritius and Zambia*, in: Gallagher, P. *et al.* (eds), Managing the Challenges of WTO

munities can enable countries to access the two-stage policy process needed to participate in multi-national negotiations: 1) to identify strategic interests and be informed of the consequences associated with the different policy options, and 2) to identify their own negotiation strategy.[64] Membership in a regional network can help in these two aspects through offering capacity building programs, offering technical papers, disseminating information on the issues under discussion, as well as sharing the burden of engaging in WTO debates.[65] This is especially true in the cases of least developing countries (LDCs) with little experience and/or minimal resources for informing and training officials to participate in multi-national negotiations, as such assistance can be very hands-on and has included training on "trade negotiations, customs valuation and facilitation, [and] notifications".[66] Nevertheless, it is worth noting that regional cooperation is not only useful in the context of the Secretariat of the regional organization helping its member states, but in fact, some member states may be "better equipped and have more expertise and experience at the national level to deal with WTO matters".[67] In other words, the fact that the regional organization provides a platform for different governments to meet, and for the ones with more experience to provide assistance to their less experienced counterparts, is in itself a valuable feat. By the same token, soft cooperation through networks, such as the ACN, could also have significant impact in empowering the countries of the developing world in pushing for legal reforms that would protect their economies from imported anti-competitive conduct.

Accordingly, it is suggested that plurilateral cooperation, especially through regional integration, may be easier to carry out than multilateral cooperation, given the higher likelihood of neighbouring countries to having similar legal, political, and economic backgrounds, as well as having similar interests. Moreover, such regional cooperation could also eventually lead to multilateral cooperation, as the support of regional organizations to their member states, and of the member states to one another, can enable states to negotiate for treaties that would be beneficial for themselves and their neighbours. Such cooperation is also helpful for general capacity-building, especially as it pertains to enforcement. Perhaps more helpful for enforcement, however, is bilateral cooperation between member states or between their competition authorities, as discussed in the next section.

Participation, Cambridge, 2005, pp. 374-393

64 *ibid.*, p. 382

65 *ibid.*, p. 383

66 *ibid.*, p. 384

67 *ibid.*

4.3. Bilateral cooperation

Bilateral cooperation between governments, where it relates to competition law, takes multiple forms. It may be carried out through a free trade agreement (FTA), which could include a competition chapter that either mandates that both countries employ a competition law, or that they will both cooperate on competition matters, or both. For instance, the Korea-China FTA contains a chapter which includes competition provisions that follow EU competition law. This "neutral" model of a third jurisdiction, rather than that of one of the parties to the agreement, may have been chosen because both the competition regimes of both states were already heavily influenced by the EU regime.[68] Other trade agreements, such as those between the EU and various Mediterranean states, for instance, explicitly mandate that a competition law would eventually be adopted by the non-EU party.

Including such provisions in FTAs may be less critical today: most countries already employ a competition law regime. What may be more important to include are provisions explicitly mandating cooperation between the two governments on competition matters through both soft cooperation (such as knowledge-sharing and capacity building) as well as assistance in evidence gathering. This would resolve the issues discussed above in the section on jurisdiction. For instance, if an export cartel were to originate in the EU and was found to be outside of the jurisdiction of the EU Commission, the Commission would cooperate with the authorities in the target jurisdictions to aid them in gathering the evidence required to prove the infringement. This is especially useful in the case of cartels, as the evidence for them is often contained in meeting minutes, internal documents, or with the employees of the undertakings involved. Without the power or practical ability to conduct a dawn raid, request such information, or interview employees, it would be difficult for the authority in the target jurisdiction to prove the violation.

Alternatively, in the case of cross-border abuse of dominance, for instance, if one party to the agreement is investigating conduct of a multinational corporation that operates in both states, it would notify the other state. The two states would then be able to discuss theories of harm and build cases in their own respective jurisdictions. Moreover, provisions could also be added to ensure that states would notify one another if they are carrying out an investigation that may affect trade in either of the states, even if assistance is not required. Accordingly, such cooperation would save resources for competition authorities, as it would make investigations more efficient. Authorities would then also be more likely to reach similar outcomes, making remedies, for instance, more likely to succeed.

[68] Choi, Y.S., Hienemann, A., *op. cit.*, note 28, p. 533

Including avenues for this type of cooperation in FTAs would give such cooperation legal status. However, such forms of cooperation do not have to take the form of FTAs – they could take place through "softer" agency-to-agency agreements. While such agreements do not have the legal status of treaties, they could still be operable if they are provided for in national statute.[69] They also provide an additional benefit in that they are a viable option for competition agencies in jurisdictions where governments do not prioritize competition policy and hence do not have an appetite for entering into more formal competition-related agreements.

In other words, competition agencies could ensure the legality of evidence sharing by laying out in their competition laws that the evidence they gather is confidential unless it is requested by national judicial bodies (for instance) *and* the competition authorities of other states, provided that this is assessed on a case-by-case basis and that this would not harm the interests of the state providing assistance.

One example of this is the case of New Zealand. New Zealand's Commerce Act 1986 lays out in Section 99E that the relevant minister can, on behalf of the Government, enter into cooperation agreements with overseas regulators, while Section 99F adds that the Commerce Commission (NZCC) could also, following approval from the Minister, enter into a cooperation arrangement with an overseas regulator. While this is common in many competition statutes, Sections 99I and J present an interesting example of the content of such agreements, as it pertains to providing "compulsorily acquired information" – i.e. information gather from market players that is not necessarily available in the public domain – and providing investigative assistance. On the basis of a cooperation agreement, an overseas regulator can provide such information as well as investigative assistance to overseas regulators if this is likely to help the regulator carry out their mandate and if this will not prejudice New Zealand's international trade interests. In the case of the latter, the Commission would refer the issue to the Minister of Trade, who may review the request and subsequently allow the provision of information. Upon providing information, the Commission would have the power to impose conditions that would help ensure that the information stays confidential. Finally, the Commission is not allowed to provide information that would incriminate a person, except in specific circumstances. Section 99K of the Act states that the Commission is to notify the persons who the information concerns that their information has been shared, after it is shared, unless this would compromise the investigation.

[69] Noonan, C., *The Fundamental Forces Shaping International Competition Law*, Oxford, 2008, p. 50

These provisions are indeed used in a Memorandum of Understanding (MoU) between the NZCC and overseas competition agencies. For instance, a cooperation agreement between the Commerce Commission and the Competition Bureau of Canada, carried out in 2016, refers to the above-mentioned provisions, allowing both competition agencies to exchange otherwise confidential information (which "is not in the public domain, and which has been compulsorily-acquired by the NZCC as a result of, or in relation to … its search and notice powers") for the purposes of enhanced enforcement.[70, 71] Moreover, in 2020, the competition agencies of the UK, Australia, Canada, New Zealand, and the US signed an MoU creating an avenue for the sharing of confidential information, "recognising that their respective jurisdictions all have some form of information sharing legislation that allows for sharing of confidential information in certain circumstances".[72] Similar provisions can be found in a MoU between Australia and Japan in 2015, although the terms are slightly more vague and cover "significant information" provided on a "case-by-case" basis, as long as it is not information which relates to a leniency application.[73]

Other provisions that could be included in MoUs and which may enhance the enforcement efforts of national competition authorities may relate to the provision of non-confidential information, co-ordination of investigations, and positive and negative comity.

Providing non-confidential information should generally be in line with most competition regimes, but explicitly mentioning it in MoUs may help clarify the procedural aspects (such as timelines) relating to providing such information.

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70 Government of Canada, *Cooperation arrangement between the Commissioner of Competition (Canada) and the New Zealand Commerce Commission in relation to the sharing of information and provision of investigative assistance*, 2016 [https://competition-bureau.canada.ca/how-we-foster-competition/collaboration-and-partnerships/cooperation-instruments-international-partners/cooperation-arrangement-between-commissioner-competition-canada-and-new-zealand-commerce-commission#requests], accessed 10 August 2024

71 Notably, Sections 29 and 30 of the Canadian Competition Act, similar to New Zealand's Commerce Act, allow for this type of cooperation.

72 CMA, *Multilateral Mutual Assistance and Cooperation Framework Between the CMA, ACCC, CBC, NZCC, USDOJ, and USFTC*, 2020, para. 1.7 [https://www.gov.uk/government/publications/multilateral-mutual-assistance-and-cooperation-framework-between-the-cma-accc-cbc-nzcc-usdoj-and-usftc], accessed 15 August 2024

73 OECD, *Inventory of International Co-Operation Agreements between Competition Agencies (MoUs)*, 2022, p. 59 [https://www.oecd.org/content/dam/oecd/en/topics/policy-sub-issues/competition-and-international-co-operation/2022-inventory-of-international-cooperation-agreements-between-competition-agencies-MOUs.pdf/_jcr_content/renditions/original./2022-inventory-of-international-cooperation-agreements-between-competition-agencies-MOUs.pdf], accessed 10 August 2024

Provisions regarding the coordination of information would generally cover instances where competition authorities are investigating the same incident, laying out that the agencies can exchange views and (often non-confidential) information relating to the matter. They may also provide for an option or obligation for the parties to inform one another of investigations that may relate to any of their respective interests.

Provisions relating to comity are less commonly found in MoUs. Addressing comity in an MoU would make it less likely that the principle is contravened by states, as discussed earlier in this paper. An example of this can be found in Article VI(2) of the 2006 MoU between China and Korea: "Where one Participant informs the other that a specific enforcement activity by the second Participant may affect the first Participant's interests in the application of its competition and consumer laws, the second Participant will endeavor to provide timely notice of significant developments relating to those interests and an opportunity to provide input regarding any proposed penalty or remedy".[74] Similarly, Paragraph 7 of the 2014 MoU between Korea and Japan states that "If a Side believes that anti-competitive activities carried out in the country of the other Side adversely affect its important interests, that Side, taking into account the importance of avoiding conflicts resulting from its enforcement activities with regard to such anti-competitive activities and taking into account that the other Side may be in a position to conduct more effective enforcement activities with regard to such anti-competitive activities, may request that the other Side initiate appropriate enforcement activities".[75]

Evidently, very significant forms of cooperation can take place through MoUs. Bilateral cooperation does not have to take the form of FTAs, which would be more costly, especially in terms of time, in order to negotiate between states.

Some commentators, however, would argue that bilateral agreements are costly irrespective of their form, as they take up staff resources and risk misuse of information.[76] However, the benefits associated with making investigations more efficient, through incurring evidence from abroad or coordinating in investigation efforts, as well as the broader benefits of curbing cross-border anti-competitive behaviour could potentially much outweigh any cost associated with entering into bilateral agreements. In fact, the data on MoUs shows that there is indeed an appetite for such agreements: Figure 1, prepared by the OECD, shows that co-operation

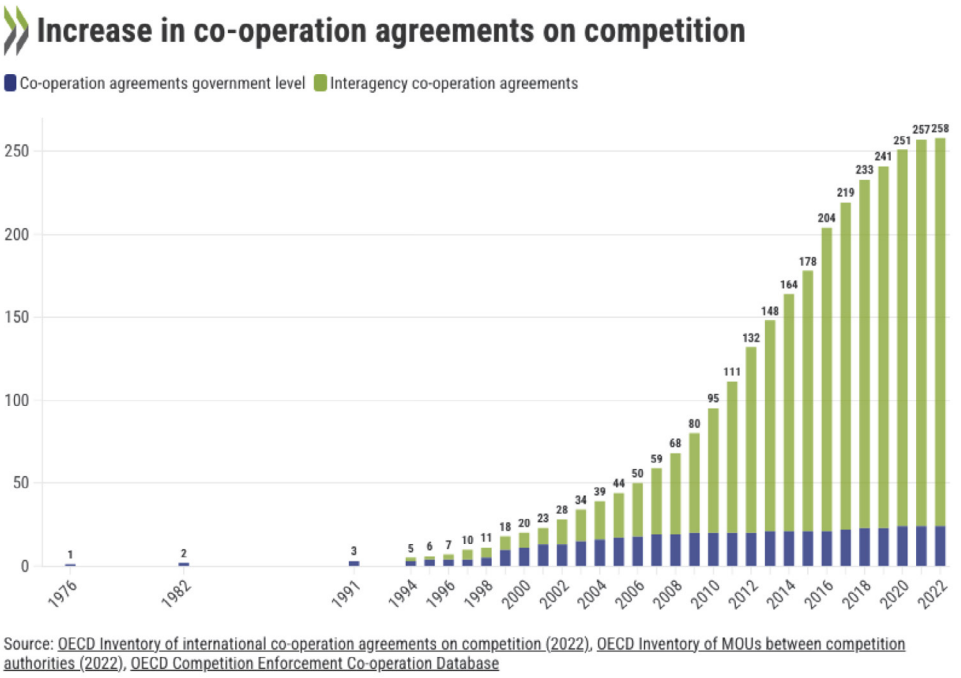
74 *ibid.*, p. 66

75 *ibid.*, p. 69

76 Noonan, C., *op. cit.*, note 72

agreements on the government level as well as interagency co-operation agreements have increased significantly from the 1990s to 2022.

Figure 1: Co-operation agreements on government and interagency level



Source: OECD, Increase in Co-Operation Agreements on Competition, 2022 [https://www.oecd.org/en/topics/sub-issues/competition-and-international-co-operation.html] accessed 30 August 2024

In conclusion, bilateral agreements can be a very powerful tool in aiding enforcement efforts of competition authorities, especially in cases that span across different jurisdictions, such as export cartels or cross-border anti-competitive behaviour. This form of cooperation may take place through inter-agency agreements, as well as this is provided for in national legislation. As mentioned previously, such inter-agency agreements may be facilitated through regional fora or regional treaties. Moreover, the efforts of international organizations in promoting soft forms of cooperation may also be helpful in this endeavour.

4.4. International organizations (soft forms of cooperation)

As mentioned various times throughout this paper, multiple international organizations (such as the International Competition Network, OECD, and UNCTAD) provide platforms through which officials of national competition agencies can meet and share expertise. Of significance are best practice guidelines, on

both substantive and procedural aspects. For instance, many of the provisions mentioned in the previous section on bilateral cooperation are recommended in the OECD's 2014 Recommendation Concerning International Cooperation on Competition Investigations and Proceedings.[77] Offering a compendium of best practices facilitates agency cooperation, and provides guidance for agencies, saving on resources and research efforts.

In that light, authorities from less represented areas should not only aim to utilize such material, but also to participate in the conferences and meetings that may affect the drafting of such guidance. Having the perspective of authorities with less resources or less experience is useful in ensuring that guidance published is indeed practical and useful for these agencies. However, as these authorities have less resources, international organizations should also encourage them to participate, as will be articulated in the following section on suggestions.

In summary, this section looked into the different forms of international cooperation for the aim of curbing cross-border anti-competitive practices. While it is often held that creating an international competition law with an international enforcing body is the ideal standard, it is evident that 1) plurilateral and bilateral cooperation should be considered important avenues for this endeavour, and 2) plurilateral cooperation, while useful in its own right, can eventually be used to encourage multilateral cooperation. The following section streamlines these observations into suggested solutions.

4.5. Suggested models of cooperation

As demonstrated above, creating a global competition law is a difficult task. Two solutions are proposed for this issue. Firstly, instead of attempting to create a competition law that covers all aspects relating to antitrust and merger control, a more viable option may be to attempt to create international legal instruments that target issues of international significance – i.e. export cartels and cross-border behaviour. For this endeavour, some scholars have suggested drawing inspiration from the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal. Under this convention, signatories must make it illegal to ship hazardous wastes to any country which prohibits the import of hazardous waste.[78] In applying this to the competition context, states would outlaw export

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77 OECD, Recommendation of the Council Concerning International Cooperation on Competition Investigations and Proceedings, 2014 [https://legalinstruments.oecd.org/en/instruments/OECD-LEGAL-0408], accessed 20 August 2024

78 Fox, E., *Imagine: Pro-Poor(er) Competition Law*, OECD Global Forum on Competition, 2013, p. 13 [https://regulationbodyofknowledge.org/wp-content/uploads/2013/03/Fox_Imagine_Pro-poor_

cartels that affect any state that prohibits cartels. This may be easier to agree on than a multinational competition law which thoroughly proscribes substantive and procedural aspects, especially given recent protectionist approaches.

However, as mentioned above, it is unlikely that most jurisdictions – especially those which exempt export cartels – would agree to cooperate on outlawing export cartels. For that reason, the second solution is that developing countries work together to and create a strong front for this cause. Through the sharing of expertise between national competition authorities and through the support of regional organizations, developing countries can 1) build a common argument for banning export cartels, 2) participate more effectively in multilateral negotiations.

In that sense, regional cooperation is important, as it provides states with a platform to support one another and exchange expertise. In some cases, regional cooperation can go further by creating a regional authority, concerned with cross-border competition conduct in the region.

Regional platforms can also create a basis for strong bilateral cooperation. As explained above, bilateral agreements, whether through free trade agreements (FTAs) or MoUs, although the latter may be easier to reach, can provide the legal basis needed by competition agencies to cooperate and limit cross-border practices. By agreeing to support each other on investigations, including through providing otherwise confidential information, competition agencies are more likely to be able to prosecute cartels and abuses of dominance originating from outside of their jurisdiction. However, this may require changes to national legislation, which developing countries should nevertheless consider given the benefits of saving on the human and financial resources associated with the investigation of cross-border activity, or, more generally, the benefits of avoiding the mark-ups associated with international cartels.

Finally, soft cooperation through international organizations can play a role in empowering the competition agencies of developing countries and in providing them with valuable technical material. However, these organizations should ensure that they are actively engaging with the perspective of developing countries in the process of drafting such material. One way to do this is by ensuring their participation in periodical meetings or conferences, perhaps by allowing online participation to meetings or by offering translation services. Another way this can be done is by diversifying the staff of the secretariat of these organizations, enabling employees of competition authorities of developing countries to join these organizations.

Competion.pdf], accessed 15 September 2024

5. CONCLUSION

The effects of anti-competitive conduct can be imported across borders. Those most susceptible to these effects are developing countries. Host states of such conduct often do not have the jurisdiction to investigate these practices, unless it impacts their economies. An investigation by the host state of such anti-competitive conduct may, in either case, by insufficient: the authority in question would not have the suitable legal tools or experience to investigate conduct impacting a foreign state. This paper hence argues that cooperation is the key to curbing the effects of cross-border conduct. However, multilateral cooperation, through a global competition law, has proven difficult – so other solutions should be considered. Targeted international agreements, similar to those found in other areas of law, should be attempted in the competition law sphere. Further, plurilateral (through FTAs or MoUs) and bilateral cooperation can be just as effective, while also being the way towards eventual multilateral cooperation. Finally, international organizations play an important role in capacity-building and in the representation of the perspectives of developing countries.

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