EFFECTS OF ANTICOMPETITIVE PRACTICES ON TRADE IN DEVELOPING COUNTRIES

by

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This thesis is dedicated to my family.

PUBLISHED AND SUBMITTED CONTENT

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LIST OF COMPETITION AUTHORITIES

ALBANIA	Albanian Competition Authority http://www.caa.gov.al/
ARGENTINA	Comisión Nacional de Defensa de la Competencia http://www.cndc.gov.ar/
ARMENIA	The State Commission for the Protection of Economic Competition of the Republic of Armenia http://www.competition.am/
AUSTRALIA	Australian Competition & Consumer Commission http://www.accc.gov.au/
AUSTRIA	Austrian Competition Authority http://www.en.bwb.gv.at/
BARBADOS	Fair Trading Commission of Barbados http://www.ftc.gov.bb/
BELGIUM	Belgian Competition Authority http://economie.fgov.be/en/entreprises/competition/
BOSNIA HERZEGOVINA	Council of Competition http://bihkonk.gov.ba/
BOTSWANA	Competition Authority http://www.competitionauthority.co.bw/
BRAZIL	Conselho Administrativo de Defesa Econômica http://www.cade.gov.br/
BULGARIA	Commission for the Protection of Competition http://www.cpc.bg/
CANADA	Competition Bureau http://www.competitionbureau.gc.ca/
CHILE	Fiscalía Nacional Económica http://www.fne.cl/ Tribunal de Defensa de la Competencia http://www.tdlc.cl/
CHINA	Anti Monopoly Bureau, Ministry of Commerce http://english.mofcom.gov.cn/ National Development and Reform Commission http://en.ndrc.gov.cn/
COLOMBIA	Superintendencia de Industria y Comercio http://www.sic.gov.co/
COSTA RICA	Comisión para Promover la Competencia http://www.coprocom.go.cr/
CROATIA	Croatian Competition Agency http://www.aztn.hr/
CYPRUS	Commission for the Protection of Competition http://www.competition.gov.cy/
CZECH REPUBLIC	Czech Office for the Protection of Competition http://www.uohs.cz/
DENMARK	Danish Competition and Consumer Authority http://www.kfst.dk/

DOMINICAN REPUBLIC	PROCOMPETENCIA, Comisión Nacional de Defensa de la Competencia http://procompetencia.gov.do/es/
EGYPT	Egyptian Competition Authority http://www.eca.org.eg/
EL SALVADOR	Superintendencia de Competencia http://www.sc.gob.sv/
ESTONIA	Estonian Competition Authority http://www.konkurentsiamet.ee/
EUROPEAN UNION	Competition Directorate http://ec.europa.eu/competition/
FIJI	Fiji Commerce Commission http://www.commcomm.gov.fj/
FINLAND	Finnish Competition and Consumer Authority http://www.kkv.fi/
FRANCE	Autorité de la Concurrence http://www.autoritedelaconcurrence.fr/
GERMANY	Bundeskartellamt http://www.bundeskartellamt.de/
HONDURAS	Hungarian Competition Authority http://www.gvh.hu/
ICELAND	Icelandic Competition Authority http://www.samkeppni.is/
INDIA	Competition Commission of India http://www.cci.gov.in/
INDONESIA	Commission for the Supervision of Business Competition http://eng.kppu.go.id/
IRELAND	Competition Authority http://www.tca.ie/
ISRAEL	Israel Antitrust Authority http://www.antitrust.gov.il/
ITALY	Autorità Garante della Concorrenza e del Mercato http://www.agcm.it/
JAMAICA	Fair Trading Commission http://www.jftc.com/
JAPAN	Japan Fair Trade Commission http://www.jftc.go.jp/
KAZAKHSTAN	Agency for Competition Protection http://azk.gov.kz/
KENYA	Competition Authority of Kenya http://www.cak.go.ke/
KOREA	Fair Trade Commission of the Republic of Korea http://ftc.go.kr/
LITHUANIA	Competition Council of the Republic of Lithuania http://kt.gov.lt/
LUXEMBOURG	Conseil de la Concurrence http://www.concurrence.public.lu/

MACEDONIA	Commission for Protection of Competition of the Republic of Macedonia http://www.kzk.gov.mk/	
MALAYSIA	Malaysia Competition Commission http://www.mycc.gov.my/	
MALTA	Malta Competition and Consumer Affairs Authority http://mccaa.org.mt/	
MAURITIUS	Competition Commission of Mauritius http://www.ccm.mu/	
MEXICO	Comisión Federal de Competencia Económica http://www.cfc.gob.mx/	
MOZAMBIQUE	Competition Regulatory Authority	
NAMIBIA	Namibian Competition Commission	
NETHERLANDS	Authority for Consumers & Market https://www.acm.nl/	
NEW ZEALAND	Commerce Commission http://www.comcom.govt.nz/	
NICARAGUA	PROCOMPETENCIA, Instituto Nacional de Promoción de la Competencia http://www.procompetencianic.org/	
NORWAY	Norwegian Competition Authority http://www.konkurransetilsynet.no/	
PAKISTAN	Competition Commission of Pakistan http://www.cc.gov.pk/	
PANAMA	Autoridad de Protección al Consumidor y Defensa de la Competencia http://www.autoridaddelconsumidor.gob.pa/	
PAPUA NEW GUINEA	Independent Consumer & Competition Commission http://www.iccc.gov.pg/	
PERU	INDECOPI http://www.indecopi.gob.pe/	
PORTUGAL	Autoridade da Concorrência http://www.concorrencia.pt/	
ROMANIA	Competition Council http://www.consiliulconcurentei.ro/	
RUSSIA	Federal Antimonopoly Service of the Russian Federation http://en.fas.gov.ru/	
SERBIA	Commission for Protection of Competition http://www.kzk.org.rs/	
SEYCHELLES	Seychelles Fair Trading Commission http://www.ftc.sc/	
SINGAPORE	Competition Commission of Singapore http://www.ccs.gov.sg/	
SLOVAK REPUBLIC	Antimonopoly Office of the Slovak Republic http://www.antimon.gov.sk/	
SOUTH AFRICA	Competition Commission http://www.compcom.co.za/	Competition Tribunal http://www.comptrib.co.za/

SPAIN	Comisión Nacional de los Mercados y la Competencia http://www.cnmc.es/
SRI LANKA	Consumer Affairs Authority http://www.caa.gov.lk/
SWEDEN	Swedish Competition Authority http://www.kkv.se/
SWITZERLAND	Competition Commission http://www.weko.admin.ch/
TAIWAN	Fair Trade Commission http://www.ftc.gov.tw/
TANZANIA	Fair Competition Commission http://www.competition.or.tz/
THAILAND	Office of Thai Trade Competition Commission http://otcc.dit.go.th/
TUNISIA	Competition Council http://www.commerce.gov.tn/
TURKEY	Turkish Competition Authority http://www.rekabet.gov.tr/
UKRAINE	Antimonopoly Committee http://www.amc.gov.ua/
UNITED KINGDOM	Office of Fair Trading http://www.oft.gov.uk/
UNITED STATES	Antitrust Division of the Department of Justice http://www.justice.gov/atr/ Federal Trade Commission http://www.ftc.gov/
URUGUAY	Comisión de Promoción y Defensa de la Competencia http://www.mef.gub.uy/competencia.php
VENEZUELA	Superintendencia para la Promoción y Protección de la Libre Competencia (PROCOMPETENCIA) http://www.procompetencia.gob.ve/
VIETNAM	Vietnam Competition Authority http://www.vca.gov.vn/
ZAMBIA	Zambia Competition and Consumer Protection Commission http://www.ccpc.org.zm/
ZIMBABWE	Ministry of State Enterprises Anti-corruption and Anti-monopolies http://www.zim.gov.zw/

1. INTRODUCTION

1.1. Scope

A global market allows producers to expand their horizon beyond their national borders and an increase in trade tends to lead to an increase in competition making the interplay between international trade and international competition of an ever-increasing importance.

Economic liberalization has resulted in a higher degree of economic interdependence which has led to the formation of multilateral, bilateral and trade co-operation agreements aiming at facilitating the cross-border exchange of goods and services. The spill over effects that trade and competition brings along (innovation, lower prices, better quality and variety of goods and services, etc.) are well known.

Accordingly, an effective trade and competition framework is crucial for the development of a country and that is why many developing economies have recently adopted competition laws. Restrictive competition practices affect both developing and developed economies yet in developing economies consumers are arguably impacted to a greater extend. In countries with limited resources or in the process of development, it is important that the purchasing power of the consumers are not further diminished through anti-competitive practices. The question that then follows is whether current mechanisms are prepared to properly address these kinds of situations.

A significant number of developing countries have simply mirrored competition policies of other economies such as the US and the EU without taken into consideration their institutional and market particularities. The market structure of developing economies poses a certain set of challenges, as most of these economies are fragmented and deal with political pressure, corruption and poverty[1].

[1] Fox, Eleanor M. (2020). Making markets work for Africa: markets, development, and competition law in Sub-Saharan... Africa. Oxford university press us. Pg. 160-180

As evidence shows, the former has resulted in mismatch between 'transposed' competition policies and their effective implementation in those countries.[2] This is further exacerbated in cases where there is a cross-border dimension as the current regulatory framework does not offer an adequate solution when addressing transnational anticompetitive practices.

Restrictive trade practices continue to be dealt mostly domestically despite the ever-increasing cross border dimension of trade flows. In this regard, international institutions such as OECD, UNCTAD, WTO and ICN have stressed on the importance of implementing strong competition laws during the past decade.

When a transnational violation of competition law takes place, it causes significant harm. Transnational anti-competitive conducts can take the form of price-fixing among foreign producers, an abuse of dominant position or mergers between foreign firms. In this regard, the embracement of extraterritoriality in competition law has been a gradual process. The former refers to the extent to which jurisdictions are permitted to apply their domestic laws to conducts that occur outside their jurisdictions but have effects within their borders.

Among developing economies, the earliest adopters of extraterritoriality in competition law were Brazil, Costa Rica and Turkey, in 1994.[3] The proliferation of competition culture has added an external pressure on small and young competition authorities, which often experience many difficulties in addressing these challenges due to, among other factors, lack of proper resources, limitation arising from regulatory gaps or loopholes, etc.[4]

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[2] Rodriguez A.E. and Menon Ashok, The causes of competition agency ineffectiveness in developing countries, 79 Law & Contemp. Probs. 37 (2016)

[3] UNCTAD_ extraterritoriality.

[4] DAF/COMP/GF/WD (2017)

'Challenges faced by small agencies and those in developing economies' (oecd.org, 2017) <https://one.oecd.org/document/DAF/COMP/GF/WD(2017)23/en/pdf>

The investigation intends to focus on two main issues: (i) how transnational anticompetitive practices impact trade in developing economies[5] and (ii) the need to have strong international co-operation mechanism to deal with transnational competition cases.

For the purpose of analysing the above-mentioned issues, the investigation establishes a co-relation between trade and competition. The investigation further assesses the drafting of competition laws within developing economies, as most young economies have faced difficulties in implementing their competition policies (especially with regards to extraterritoriality).

The dangerous precedent of transposing policies directly from experienced competition regimes such as the EU and USA has not always proven to be a success story as no economy is the same. The investigation showcases the former through the analysis of the experience in jurisdictions such as Algeria, China, Egypt, Indonesia, India, Malaysia, Morocco, Mozambique, Nigeria, Trinidad and Tobago, among others.

For a smooth implementation and enforcement of competition law in developing economies the investigation proposes a set of changes that, if implemented with the help of international institutions such as OECD or UNCTAD, can facilitate a more optimal solution for small and young economies.

Thus, the objective of the investigation is to provide a multi-jurisdictional analysis focusing on small and young economies and their adaptation to the global competition culture and conducts. The ultimate goal is to provide an idea of how anticompetitive practices are impacting trade in these economies and lay out some proposals of reform.

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[5] The study analyses over 35 jurisdictions and these jurisdictions are chosen for the purpose of the investigation form a cluster of small and young economies based on three aspects: first, their level of economic development. Second, their enforcement of competition law and lastly on their experience in dealing with transnational competition law cases. For instance, countries like Bangladesh, Ghana, Guinea, Jamaica, Nigeria, Pakistan, Seychelles, Togo, Trinidad and Tobago have limited experience when it comes to competition law enforcement. In other cases, countries like Angola, Ethiopia, Egypt, Indonesia and Malaysia, Vietnam and Zimbabwe the competition law enforcement is on the verge of development and still needs a push from other experienced competition authorities. In case of competition authorities from Argentina, Brazil, China, India, Philippines and South Africa, they have overcome several challenges, especially in cases dealing with transnational cases having anticompetitive effect; and have learned from their past experiences. But still have scope for development.

1.2. Methodology

International damages arising from anti-competitive practices have, at some point, to be narrowed or determined on a territorial basis. Transnational violation of competition law causes immense harm, not only in a given jurisdiction but to its trading partners.

Accordingly, the answer to the former question requires a two-tier approach: (i) an analysis of the international instruments currently in place and (ii) a study of different jurisdictions. The thesis is divided into four parts:

i. Cross-border analysis on competition regimes

First, for the purpose of the investigation, competition regimes of different jurisdictions have been analysed. This section explains the concept of developing economies based on the World Bank and IMF criteria. This section also provides an in-depth analysis of the relevant market concept in various jurisdictions and its further explains different types of anti-competitive conducts.

The resources for conducting the aforementioned analysis are, *inter alia*, competition and trade laws, reports from international institutions at the forefront of international competition law matters and conference papers where these issues are discussed and debated among leading authorities in the respective fields.

ii. Relation between trade and competitions law

This section combines the study of the theoretical and economic relation between trade and competition laws. For the purpose of the investigation, this section is divided into two parts: (i) the analyses the role of trade and competition in development and (ii) the co-relation and interaction between trade and competition law.

The resources for conducting the analysis includes authoritative academic doctrine and literature, and in-depth empirical research on international trade, competition and on international institutions.

The section also discusses competition provisions in Free Trade Agreements (FTAs) and applicable cases from jurisdictions such as Chile, Egypt, Latin America, Middle East, Philippines have been dealt with.

iii. Anti-competitive practices in developing countries.

This part of the investigation focusses on anti-competitive practices in developing countries. This section deals with extra-territorial scope of competition law and investigates three main conducts: (i) international cartels, (ii) cross-border abuse of dominant position and (iii) merger control regimes in developing economies.

This section analyses cases across several jurisdictions and, how certain jurisdictions apply extra-territorial scope in cross-border cases. The cases chosen for the purpose of investigation shed a light on how various competition regime respond to cases with similar characteristics. Different competition regimes respond differently to such cases as it depends on their economic development and market structure.

To determine such impact, a comparative review of competition laws in various jurisdictions is conducted. Other useful research materials include, competition acts, publications, enforcement policies and regulations, guidelines, reports etc. It also includes a thorough research on how international organizations such as the WTO, the ICN, OECD, or the UN Conference on Trade and Development together with regional competition and trade agreements that are contributing to the enforcement of competition policies for cases with have affects more than one jurisdiction.

iv. Global competition rules.

The last part of the thesis investigates global competition regulatory framework. This section is divided into five subsections: (i) international institutions and competition law, (ii) drafting of competition law for the developing economies, (iii) in depth analysis of the WTO´s working group on the interaction between trade and competition policy (WGTCP), (iv) are trade agreements enough for competition related policies? and (v) if there is a need for stronger international co-operation in competition enforcement.

For the purpose of investigation, a diversity of materials has been included from international intuitions (WTO, OECD, UNCTAD; ICN), WGTCP papers, the international co-operation agreements, capacity building and training programs. For the chapter on drafting competition law for developing economies, several competition regimes, guidelines from different jurisdictions have been analysed such as Algeria, Egypt, EU, Indonesia, Jordan, Morocco, Tunisia etc.

To examine various stance taken by countries on the need for multilateral competition agreement and the challenges they can face; a thorough analysis of more than 30 WGTCP papers are accumulated and examined.

To analyse the need for strong co-operation agreements, help of several surveys conducted by OECD and ICN have been included. The last part of this chapter is investigated with the help of capacity building and training programs conducted by international institutions and governments in several young and small jurisdictions.

Even though the present investigation covers several developing economies to provide a clear picture on how these countries are affected by the trade restrictive conducts, the investigation is not an exhaustive. The investigation has tried to accumulate information on many developing economies, however there are certain limitations due to the lack of available information in some cases.

Further, the investigation suggests two recommendations that, if implemented by regional and international institutions, can facilitate the implementation of competition regime in the economies which are more vulnerable to be harmed by restrictive trade practices.

1.3. Classification of developing economies

Development is a concept which is difficult to define. It has been discussed and argued by many economists and international organizations, but the definition till date is unclear. Dudley Seers (1969)[6] suggested that development takes place when countries experience a reduction or elimination of poverty, inequality and unemployment.[7]

The developing and developed country taxonomy became clearer in in the 1960s. It has been used to categorize countries policy discussions.[8] However, the criteria for classifying countries according to their level of development have no particular definition.

Further, it is important to note that the process for classification of a developing country can be more complex as the countries become more heterogeneous over time. Countries are nowadays constantly developing in terms of social, economic and political changes.[9]

Even though it is difficult to classify countries depending on their development, these classifications bring a clear dimension on the economic growth of particular country. The reason why there should be classifications of countries can be mainly summarized for two main purposes: analytical reasons and operational reasons.[10]

The analytical reason of a country classification simplifies the complexity and diversity of countries into a relatively simple and homogeneous classification; thus, making it simple to understand the inter-country difference.

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[6] Dudley Seers was a British economist who specialized in development economics.

[7] Dudley Seers, 'The meaning of development' (*Institute of Development Studies*, 1969) <Https://Www.Ids.Ac.Uk/Files/Dmfile/Themeaningofdevelopment.Pdf>

[8] A4id.Org. (2018). Understanding the developed/developing country taxonomy | *A4id*. [Online] Available at: Http://Www.A4id.Org/Policy/Understanding-The-Developeddeveloping-Country-Taxonomy/

[9] Tezanos Vázquez, S. And Sumner, A. (2013). Revisiting the meaning of development: a multidimensional taxonomy of developing countries. Journal of Development Studies, 49(12), Pp.1728-1745

[10] ibid 1728-1745.

Further, in regards to the operational reasons, the purpose extents to the international institutions and organizations and their ability to categorize countries for the fund and the resource distribution.[11]

For instance, under the WTO the enabling clause is the legal basis for the generalized system of preference (GSP), where developed economies offer a non-reciprocal preferential treatment, such as zero or low duties on imports to products that are originated in developing countries.[12] In trade relation between the US and China, one of the complaints which the US has raised relates to the developing economy status of China which is accepted by the WTO; because due to this classification China has been receiving preferential treatments.[13] Classification of countries can allow better resource and policy allocation which depends on the income growth of a particular country.

For the purpose of this thesis, we would consider the classification of the countries based on their income level with the help of the World Bank statistics. The World Bank's classification of economies as low, low- middle, upper-middle and high-middle has a long history. Over the years the summarizing trend has provided with a vast variety of development indicators.[14]

The World Bank in its world development report has made it public since 1978 a classification of countries according to the levels of per capita income.[15] The term low- and middle-income countries, even though developed by World Bank, has been used by many multilateral and bilateral institutions such as the OECD. The World Bank each year updates its results depending on the international inflation.

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[11] ibid 1728-1745.

[12] 'WTO special and differential treatment provisions' <www.wto.org>.

[13] Jeff Manson and David Lawder, 'Trump targets China in call for WTO to reform "developing" country status' <https://www.reuters.com/article/us-usa-trade-wto-idUSKCN1UL2G6>.

[14] 'A review of the analytical income classification' <Http://Blogs.Worldbank.Org/Developmenttalk/A-Review-Of-The-Analytical-Income-Classification>

[15] 'The world development report' (*Openknowledge.Worldbank.Org*,1978) <Https://Openknowledge.Worldbank.Org/Bitstream/Handle/10986/5961/Wdr%201978%20-%20english.Pdf?Sequence=1>

The World Development Indicator[16] database consists of 189 world bank member countries and are classified so that data can aggregate, group and compare data of interest and for presentation, which provides classification based on geographic region, by income group and by the operation of the World Bank Group lending category.[17]

In this thesis, we will focus on the income group of the countries. The income is measure using the gross national income (GNI) per capita.[18] According to the classification of World Bank, the GNI per capita of the countries remains the same for a particular fiscal year (i.e., until 1 July of the following year), even though the GNI per capita estimates have been revised during this period of time.[19]

Further to specify and simplify the use of the terms developing and developed economies in the thesis, the lower-middle income and upper-middle income countries will be considered as developing economies or countries (i.e. GNI per capita between $ 1,006 and $ 3,955 and between $ 3,956 and $ 12,235 respectively) While the high-income economies or countries will be considered as developed economies which will include countries with (GNI per capita of $ 12, 236 or more).[20]

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[16] 'World Development Indicators | Databank' (*Databank.Worldbank.Org*,2018) Http://Databank.Worldbank.Org/Data/Reports.Aspx?Source=World-Development-Indicators.

[17] 'How does the world bank classify countries? – World Bank Data Help Desk' (*Datahelpdesk.Worldbank.Org*,2018)<Https://Datahelpdesk.Worldbank.Org/Knowledgebase/Articles/378834-How-Does-The-World-Bank-Classify-Countries>

[18] GNI Per Capita - Gross National Income (GNI) is the sum of value added by all resident producers plus any product taxes (less subsidies) not included in the valuation of output plus net receipts of primary income (compensation of employees and property income) from abroad. GNI per capita is gross national income divided by mid-year population. GNI per capita in us dollars is converted using the world bank atlas method.

[19] 'How does the World Bank classify countries? – World Bank Data Help Desk' (*Datahelpdesk.Worldbank.Org*,2018) <Https://Datahelpdesk.Worldbank.Org/Knowledgebase/Articles/378834-How-Does-The-World-Bank-Classify-Countries>

[20] 'How Does the World Bank Classify Countries? – World Bank Data Help Desk' (*Datahelpdesk.Worldbank.Org*, 2018) <Https://Datahelpdesk.Worldbank.Org/Knowledgebase/Articles/378834-How-Does-The-World-Bank-Classify-Countries>

2. TYPES OF ANTICOMPETITIVE PRACTICES

Competition law and policy are important to protect consumers and industrial users from the abuse of anti-competitive practices. These practices can hamper the growth of the economy and can slow the development process of any economy, especially developing economies.[21] The existence of effective and healthy competition among companies, industries, manufacturer and producers is a defining element of free market economy. For a smooth functioning of competition in the market, it is necessary to remove any negative agreements or practices which may affect the market.[22] Competition policies consists of measures to promote firm entry and rivalry by the enforcement of antitrust laws. It consists of improvement of the regulations and administrative procedures by governmental bodies, and it focuses on business behaviour of the entities that perform commercial functions in the relevant market.[23]

To understand better the different kinds of practices which can lead to restrictive trade practices, below we will discuss in brief cartels, abuse of dominant position, and their different types. We will also discuss merger and merger control, as mergers and acquisitions can sometimes raise competition issues, they can reinforce a dominant position and can hinder the maintenance of competition in the market, for instance by giving rise to collusive oligopolies. The main pillar of competition law is the prohibition against restrictive agreements as these measures affect the way a market functions. [24] Restrictive agreements are mainly of two types, horizontal agreements and vertical agreements. Horizontal agreements are between undertakings that operate at the same level of supply chain in the market, this may include an agreement between two or more

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[21] International trade center 2012, 'Combating Anti-Competitive: A Guide for Developing Economy' pg. 4-5 <https://www.intracen.org/combating-anticompetetive-practice/>

[22] 'Anti-Competitive Practices | CNMC' (*CNMC.Es*, 2018) <Https://Www.Cnmc.Es/En/Ambitos-De-Actuacion/Competencia/Conductas-Anticompetitivas>.

[23] 'Step Ahead: Competition policy for shared prosperity and inclusive growth; 2017 IIS 4530-M1069; ISBN 978-1-4648-0945-3 (Paper); ISBN 978-1-4648-0946-0 (Internet)' (2017) <https://statistical.proquest.com/statisticalinsight/result/pqpresultpage.previewtitle?docType=PQSI&titleUri=/content/2017/4530-M1069.xml>.

24 'Step Ahead: Competition Policy for Shared Prosperity and Inclusive Growth;2017 IIS 4530-M1069; ISBN 978-1-4648-0945-3 (Paper); ISBN 978-1-4648-0946-0 (Internet)' (2017) <https://statistical.proquest.com/statisticalinsight/result/pqpresultpage.previewtitle?docType=PQSI&titleUri=/content/2017/4530-M1069.xml>.

manufacturers or two or more retailers or two or more patent owners.[25] Vertical agreements are agreements which take place between undertakings at different level of production or distribution chain in a certain market.

Currently there are 129 countries which have adopted competition laws with wide range of policy goals with their domestic competition laws.[26] The US and EU competition laws have been considered the pioneers in developing and implementing competition laws. It is important to understand their standing on restrictive trade agreements. Competition law in the United States is primarily defined by Section 1 of the Sherman Act, which prohibits any agreement that unreasonably restraints competition and affects interstate commerce.[27] Section 2 of the Sherman Act makes it unlawful for any person to:

> *"monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations . . .."*[28]

Similar to Section 1 of Sherman Act in the US, Article 101 of the Treaty on the Functioning of the European Union (TFEU), henceforth referred to as TFEU applies to both horizontal and vertical agreements. While Section 2 of the Sherman Act and Article 102 of TFEU prohibits abusive conduct by companies that have dominant position in a particular market. [29] Article 101 TFEU states that:

> *"the following shall be prohibited as incompatible with the internal market: all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of*

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[25] (*Uk.Practicallaw.Thomsonreuters.Com*, 2018) <Https://Uk.Practicallaw.Thomsonreuters.Com/4-107-6695?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True&Comp=Pluk&Bhcp=1>

[26] Anu Bradford and others, 'Competition Law Gone Global: Introducing the Comparative Competition Law and Enforcement Datasets <https://scholarship.law.columbia.edu/faculty_scholarship/2514>.

[27] Refer To Section 1 Of Sherman Act 1890 (Amended Version)

[28] Section 2 of the Sherman Act

[29] Article 101, 102 TFEU https://ec.europa.eu/competition-policy/antitrust_en

> *competition within the internal market, and in particular those which".*[30]

The Spanish Competition Act 15/2007 specifically prohibits *"any collective agreement, decision, or recommendation, or coordination or consciously parallel practices that produce or could produce the effect of impeding, restricting, or falsifying competition in the markets"*. [31]

The Competition Act of India makes it very clear that the main aim for the economic development of the economy is to have strong competition laws which prevent the competition from being distorted and which ensures freedom of trade within the country.

> *"An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto."*[32]

Several jurisdictions[33] while analysing the legality of an anticompetitive agreement, apply the *`per se rule'*, *`rule of reason´*, *`economic approach´*. The per se rule applies in categories of agreement that are presumed to violate competition rules, for instance hardcore cartels. While in case of '*rule of reason*' it is an analysis used to determine the legality of the agreement which may restrict the competition. Under this approach, the courts may analyse both the positive and negative effect of such restrictive agreement.[34]

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[30] Article 101 TFEU

[31] Article 1 of Law 15/2007 of Spanish Competition Act.

[32] Indian Competition Act, 2002 No. 12 of 2003 [13th January, 2003.]

Australia, Argentina, Botswana, Burundi, Cameroon, Chile, COMESA, ECOWAS, Ethopia,, India, Kenya, Mauritius, Mozambique, Malaysia, Seyshells, USA.

[34] 'Rule Of Reason | Practical Law' (Practical Law, 2022) <https://uk.practicallaw.thomsonreuters.com>

The EU competition law does not recognise a `rule of reason´; The Court has always interpreted the rule of reason as being 'an examination balancing the pro- and anticompetitive effects of the agreement at issue'[35] The EU commission has embraced a more economic based approach to analyse the restrain to competition in a market. [36] Below we will analyse the approach taken by EU and USA to determine if an agreement restricts competition.

In the US, courts apply the 'rule of reason' to decide if the collusive behaviour constitutes an unreasonable restraint on competition and also consider if the firms which are involved have market power, as it can be seen form the Leegin case below.

For instance, since the 2007 decision by the United States Supreme Court in *Leegin*, all vertical restraints are subject to the *rule of reason*[37] rather than a *per se rule*[38]. Prior to this 2007 decision, vertical territorial restrictions and maximum resale price maintenance were judged by the *rule of the reason*, while minimum resale price maintenance was *per se* illegal.

It is the Leegin case[39] which led to the interesting debate of the minimum resale price debate. Leegin sold belts under the name 'Brighton'; this was sold by small retailers like 'Kay's Kloset. Leegin provided with a specific pricing and distribution policy to its retailers. In the duration of time Kay Kloset became a leading retailer chain, but Leegin were not happy with the store policy and stopped the distribution on the grounds that Kay's Kloset was violating the distribution policy and also the applying heavy discounts to its customers. Key's Kloset sued Leegin for violation of the antitrust laws, stating that Leegin violated its *per se rule* against minimum resale price maintained, which was established by the US Supreme Court in previous case of Dr *Miles Medical CO v. John*

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[35] Teva UK and Others v Commission, T-679/14, EU: T:2018:919 paragraph 243

[36] Monti G, "EU Competition Law and the Rule of Reason Revisited" [2020] SSRN Electronic Journal ISSN 1572-4042

[37] **Rule Of Reason** is a judicial doctrine of antitrust law which states trade practice violates the Sherman Act only if the practice is an unreasonable restraint of trade, based on the economic factor.

[38] **Per Se Rule** is a judicially created principle of antitrust law that a trade practice violates the Sherman Act, if the practice is in restraint of trade, regardless of whether it actually harms anyone.

[39] *Leegin V. Psks, Inc. 551 U.S._ (2007)*

D. Park & Sons[40] stating that the appropriate standard for testing the lawfulness if minimum resale price agreements is a *rule of reason* and not the *per se* standard. The Leegin decision led the courts to review the minimum resale price agreements case by case. And the Federal and State law upheld that the enforcers and private plaintiff will have the burden of proving that the particular agreement is anticompetitive or not.[41] The above is a pioneer case followed over the years, thus dealing the vertical restraint cases based on each case differently and applying the rule of reason in most of the cases.

In the US, rule of reason cases has four stages which triggers the burden-shifting analysis in such cases. During the first stage, the burden is on the plaintiff to show the market power and anticompetitive effect, once this is established, the second part is for the defendant to show if that agreement brings in some efficiencies to justify such restriction on the competition. During the third stage the burden is on the plaintiff again, to justify that the defendant could have used a less restrictive method than what it has used. The fourth stage is balancing the positives and negative effect on the competition.[42]

While in the EU, the *rule of reason* approach is not of a general application but is limited to certain cases due to the context of Article 101(1) and 101(3) TFEU. Article 101 analyses the difference between the restrictive agreements by object or effect. In the case of Article 102, some abuse of dominance requires a more detailed effect-based assessment while other require objective justification. [43] The approach taken for the application of Article 101 is that while demonstrating an anti-competitive `object´ there is no need to consider the effects of the agreement leading the agreement falling in the Article 101(1) prohibition. When the object cannot be established, the effect must be established by the investigative authority.[44]

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[40] Dr. Miles Medical Co V. John D. Park & Sons 220 U.S. 373 (1911)

[41] (Supreme Court overrules 96-year-old rule in dr. miles and holds vertical price agreements are neither per se illegal nor per se legal, but subject to case-by-case test, 2007)

[42] Giorgio Monti, 'EU Competition Law and the Rule of Reason Revisited' <ISSN 2213-9419 http://ssrn.com/abstract=3686619>. Pg. 5

[43] Giorgio Monti, 'EU Competition Law and the Rule of Reason Revisited' <ISSN 2213-9419 http://ssrn.com/abstract=3686619>. Pg. 11

[44] Ibid 11

In the EU, the application of `*rule of reason´* is not used while assessing the potential effect of anti-competitive practices because any agreement which is found restrictive under the application of Article 101(1) would be exempted under the application of Article 101(3). As when the agreement has been said to be restrictive by object, then the burden falls on the cooperating parties to justify their agreement under Article 101(3) exemption criteria. [45]

In 2004, the ECJ in its judgement of `Cartes Bancaires v Commission´[46] states the distinction between `by object´ and `by effect´. The Groupement des Cartes Bancaires ("CB Group") was established in France as a main credit institution to manage the systems for bank card payments and withdrawal. The system competes and cooperates with Visa and Mastercard in France, it enabled the use of bank cards payments issued by CB members the issuing side to be affiliated with merchants and withdrawals from ATM which is also controlled by CB group as the acquiring side. Thus, it was a two-sided card payment system where it served the cardholder and merchants.

When the commission was notified by the CB group of the measure under Regulation 17/62, the commission found that the measures were to keep the price of the payment cards artificially high by taking advantage of major banks and to deter the entrance of new competitors. In 2012, CB Group contested the commission decision before the General Court (GC), but GC upheld the decision of the commission where it was established that he pricing measures had `object´ restriction but the GC did not examine the effect in this measure. [47]

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[45] PSL Lexis, 'Article 101(1) TFEU–the prohibition on restrictive agreements—overview' <https://www.lexisnexis.com/uk/lexispsl/competition/document/391329/55KB-7MM1-F187-511S-00000-00/Article_101_1__TFEU_the_prohibition_on_restrictive_agreements_overview>.

[46] 'Groupement Des Cartes Bancaires (CB) v European Commission' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=ecli%3AECLI%3AEU%3AC%3A2014%3A2204>.

[47] Frédéric Pradelles and Andreas Scordamaglia-tousis, 'The two sides of the Cartes Bancaires Ruling: assessment of the two-sided nature of card payment under Article 101(1) TFEU and full judicial scrutiny of underlying economic analysis ' no volume 10 <https://www.competitionpolicyinternational.com/>.

The CB group argued that the commission failed to apply the objective test properly as the main object of the measure was to avoid free-riding in the CB system and also that the GC did not take the two-sided operation of the payment system which involved multi-sided markets. The Court in its judgement expressly stated the concept of restriction of competition `by object' must be interpreted restrictively.

> *"The concept of restriction of competition by 'object' must not be interpreted 'restrictively'. The concept of restriction of competition 'by object' can be applied only to certain types of coordination between undertakings which reveal a sufficient degree of harm to competition that it may be found that there is no need to examine their effects, otherwise the Commission would be exempted from the obligation to prove the actual effects on the market of agreements which are in no way established to be, by their very nature, harmful to the proper functioning of normal competition"*

The court found that the GC had failed to apply the criteria of `by object´ in case of CB group, and `by object' type of analysis is not appropriate in a multi-sides arrangement such as in the CB group. As in this case CB group applied the measures to prevent free-riders to actively use it freely without contribution to the research and development of the two-sided system.

Thus, even though Article 101 preclude a direct transfer of the application of rule of reason, both the processes i.e., in the EU and the US used a complex system of burden shifting process. As both the system end result is to establish the legality of the practices and the effects in the relevant markets.

The scope of economic analysis in competition law and policy is drastically changing. A very important case where the EU courts leans towards a more economic approach is in its 2022 Intel decision, where the EU General court (GC) overturned the European

Commission's 2009 decision. The GC annulled the fine imposed by EC of €1.06 billion on Intel for the abuse of its dominant position in the rebate scheme. .[48]

In May 2009, the Commission found that Intel had abused it position of dominance in x86 Central Processing Units (CPUs). Intel was fined for giving rebates to OEMs on condition that they have to buy all or almost all of the x86 CPUs from Intel. The second restrictive practice in which Intel was engaged was for direct payment made to retails on the condition that they need to stock only x86CPUs. Intel also paid OEMs to halt and delay the launch of specific products which contained the competitors x86 CPUs and to limit the sale.[49]

The EC found the above practices to be illegal by nature, thus did not look in depth if these practices had anticompetitive effects. It conducted an as-efficient competitor (AEC) analysis, which was to show that an AEC test is not compatible with rebates in question in this particular case.[50] The Court of Justice of the EC applied the conditions of the Hoffman-La Roche case-law. [51] It states that the undertaking in a position of dominance if ties purchase or provides rebates will be restrictive. Even though the customer receives all of it requirement and it would not matter if the quantity were large or small.[52]

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[48] Case T-286/09 RENV, Intel v Commission

[49] Case T-286/09 RENV, Intel v Commission: Brice Allibert and Gabor and others Bartha, 'Commission Finds Abuse of Dominance in the Intel Case' no Competition Policy Newsletter.

[50] James Kilick, Assmakis Komninos and Peter Citron, 'EU General Court Demands a Vigorous Effects-Based Analysis for Rebates Cases and Annuls the European Commission's Intel Decision and the €1.06 Billion Fine' <www.whitecase.com>.

[51] The Court of Justice of the EC has consistently ruled that 'an undertaking which is in a dominant position on a market and ties purchasers — even if it does so at their request — by an obligation or promise on their part to obtain all or most of their requirements exclusively from the said undertaking abuses its dominant position within the meaning of article 82 EC, whether the obligation in question is stipulated without further qualification or whether it is undertaken in consideration of the grant of a rebate. The same applies if the said undertaking, without tying the purchasers by a formal obligation, applies, either under the terms of agreements concluded with these purchasers or unilaterally, a system of fidelity rebates, that is to say discounts conditional on the customer's obtaining all or most of its requirements — whether the quantity of its purchases be large or small — from the undertaking in a dominant position. Case 85/76 Hoffmann-La Roche, [1979] ECR 461, paragraph 89

[52] Summary of which appears in the Official Journal of the European Union (OJ 2009 C 227, p. 13).

The General Court in its ruling, stated that the commissions analysis is not complete, and the requisite used to determine the anticompetitive effects of rebates at issue are not considered while keeping the economic analysis of the market in mind.[53] The GC stated that the commission has to apply the foreclosure capacity of the scheme rebates:

> *"In the context of that analysis, it is for the Commission not only to analyse, first, the extent of the undertaking's dominant position on the relevant market, and, second, the share of the market covered by the contested practice, together with the conditions and arrangements for granting the rebates in question, their duration and their amount, but also to assess the possible existence of a strategy intended to exclude at least as-efficient competitors."* [54]

The GC has found in its investigation that the Commission had erred in law and in the application of AEC tests. After going through the AEC test, the GC found that there were many errors in the calculations, such as in the calculation of contestable share, valuation of conditional rebates etc. The commission did not take the correct criteria to establish the market share and the duration of the rebates in question. [55]

This decision points out a very crucial point that cases with antitrust infringements must be understood and analysed with an economic approach. An effect-based approach is more suitable in these cases then a form-based approach. Given the effect in the relevant market and the effect on customers for the duration of infringement and also a long-term period effect on the economy has to be calculated and analysed.

General Court of the European Union PRESS RELEASE No, 16/22 'The General Court Annuls in Part the Commission Decision Imposing a Fine of € 1.06 Billion on Intel'.

[54]General Court of the European Union PRESS RELEASE No, 16/22 'The General Court Annuls in Part the Commission Decision Imposing a Fine of € 1.06 Billion on Intel'.

[55] General Court of the European Union PRESS RELEASE No, 16/22 'The General Court Annuls in Part the Commission Decision Imposing a Fine of € 1.06 Billion on Intel'.

For the purpose of understanding the impact of anti-competitive practices on trade in the given market, it is important to first understand the market in which the restrictive agreement is entered. While in the second part of this section we will thoroughly analyse various types of agreements which may hamper competition.

2.1. Relevant Market

Defining a market allows to identify the boundaries of competition between firms, and to identify the scope of the competition in a given environment.[56] It is one of the most important analytical tools which helps in examining and evaluating the competitive constraints that a firm face and the impact which is endured in the behaviour on competition.[57]

Defining a market can be a complex procedure, depending on the types of market, one can determine the market shares and the concentration measures, which in most cases has a high possibility of being over calculated or one can under estimate the market power of firms and its potential competition effects. The productivity of the market affects trade to a great extent, and due to rapid innovation, increase in technology and trade liberalization, the market shares can fluctuate rapidly over time.

For instance, in cases relating to abuse of dominance, the market share of an undertaking can change overtime, thus, while assessing if a particular company has abused its position of dominance, the courts take several other factors into consideration.

Further, market definition also facilitates the identification of relevant competitors and is useful in evaluating the risk of potential co-ordinated effects of merger. The main goal for defining the market is to assess the existence, creation or strengthening of the market power, this in turn helps the firm to keep the prices above the long-run competitive level. Also, identifying the areas of competition in the market allows other

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[56] 'Commission notice on the definition of relevant market for the purposes of community competition law (97/C 372/03) (Text with EEA Relevance) (European Commission) 372/03 OJ C 372/5' <eur-lex.europa.eu>.

[57] 'OECD: Market Definition (Policy Roundtable)' (*OECD*, 2012) <Http://Www.Oecd.Org/Daf/Competition/Marketdefinition2012.Pdf>

relevant issues to be examined, such as, for example, potential barrier entries. The reason for defining the market is also very critical in the study of market structure, as it depends on the variations in the number of firms in a market and it is one of the relevant aspects to strengthen competition.[58]

Even though it is important to define the concept of market in competition laws, according to the OECD Report, it can be more challenging for a jurisdiction to adapt to alternative instruments or to embrace additional instruments if the concept of market deeply embedded into the competition laws. The legal consequences of moving away or not complying with from the definition of market in its totality may lead to increase uncertainty regarding the standards that will govern the assessment of competitive concerns and its outcome.[59]

Whereas market definition is a prerequisite in some jurisdictions such as Mexico, while in countries such as Chile the law neither establishes a requirement for market definition, nor specifies a methodology for its application. Article 58 of Federal Economic competition law (Mexico) not necessarily defines relevant market but determines the relevant market and sets criteria which may be considered while determining relevant market.[60] Further in the Chilean Competition Act 2009, relevant market has not been defined and the Chilean legal system does not consider the market share presumption but states that the competition in the relevant market must be proved based on the *rule of reason*.[61] Different economies have different ways of drafting their laws, we will analyse this in depth further in the thesis.

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[58] D. Daniel Sokol, 'Order Without (Enforceable) Law: why countries enter into non-enforceable competition policy chapters in free trade agreements' (*Papers.Ssrn. Com*, 2017) <Https://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=1005338>

[59] 'OECD: Market Definition (Policy Roundtable)' (*OECD*, 2012) <Http://Www.Oecd.Org/Daf/Competition/Marketdefinition2012.Pdf>

[60]'Federal Economic Competition Law' (*Cofece.Mx*, 2019) <Https://Www.Cofece.Mx/Wp-Content/Uploads/2018/03/Federal_Economic_Competition_Law.Pdf>.

[61] Marcia Pardo, 'Chile's Contribution: Competition Policy and Consumer Protection Policy When, How and Why They Interact' [2009] National Economic Prosecutor's Bureau Research Division <Http://Www.Fne.Gob.Cl/Wp-Content/Uploads/2017/10/Apec_0001_2009.Pdf>.

The term "*relevant market*" should be defined in a way that the competitive constraints firms face i.e., demand and supply side substitution[62] are captured as accurately as possible. With the help of the Hypothetical Monopolist Test (HMT) (which is also known as SSNIP test), one can help defining the term relevant market. According to this test, a market comprises all the products and the regions for which hypothetical profit-maximizing monopolist would impose a small but significant non-transitory increase in price and one needs to see the reaction of the customer due to the minor increase in the price.[63]

The methodology which the European Commission applies to the demand side and the supply side helps in understanding the concept of HMT and it can be briefly explained as follows.

This test helps answering one of the main questions in competition, that is, if the parties would change their preference to an easily substituted product or to another product located in another place when the main product has a hypothetical small increase in the price. The margin of the increase of price would be between (5% to 10%) permanent raise in the price. The test is supposed to reflect the actual purchasing decisions of the consumers. It will also determine if the consumer buys the particular product based on the decision of the price or also if other factors play an important role; such as quality, services, trademarks or the past experience of the consumers. The HMT is a proper tool to determine the competition in the market and

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[62] **Substitutability**: measure of the extent to which products may be seen as interchangeable from the viewpoint of producers or consumers.

Demand Side Substitution: a firms pricing policy for a specific product is disciplined if the consumers have the possibility to buy another product, which they judge as being equivalent by its nature, use and/ or price.

Supply Side Substitution: any additional competitive constraints on the firm may stem from the producers of the products capable of switching their production without delay towards the product in question at negligible cost and willing to enter into competition on the market segment concerned.

Relevant Market: the product substitutability is an important element in defining the relevant product markets.

[63] 'Commission notice on the definition of relevant market for the purposes of community competition law (97/C 372/03) (Text with EEA Relevance) (European Commission) 372/03 OJ C 372/5' <http://oxcat.ouplaw.com/view/10.1093/law:ocl/mn35.regGroup.1/law-ocl-mn35>.

if there are any competition constraints in the market and how the consumers behave during such a hypothetical circumstance. [64]

The EU Commission in its notice[65] has explained the basic principles for market definitions. In this notice, it has elaborated in detail three main competition constraints from an economic point of view, these constraints consist of demand substitution, supply substitution and the potential competition. In brief, it has explained that the demand substitution constitutes the most immediate and effective disciplinary force on the suppliers of the relevant market, which mainly concerns the pricing decision in the market.

For instance, in case of an easy availability of a substitute product in the market, a firm or a group of firms cannot have a significant impact on the conditions of sale. While, the supply side substitution the potential competition is less immediate than the demand side.

A practical test of the demand side substitution would be in the application to cases of mergers; the goal of demand-side analysis is to identify and include in the market only those substitutes whose prices and other characteristics constraint the ability of the merging firms and their rivals from raising prices or reducing output.[66]

To simplify things further, let's take an example of soft-drink bottles, in cases involving different flavour of soft drinks which belong in the same market. A question which arises is if the consumer shifts from flavour A to flavour B when there is a 5 per cent permanent increase in the price of the soft drink flavour A. In case the consumer shifts to another brand, let's say to flavour B, then the producers have to determine the correct amount or percentage of increase which would not lead the consumers to shift from one product to another.

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[64] 'Hypothetical Monopolist Test (Hm Test) - European Economic & Marketing Consultants' (*Ee-Mc.Com*, 2017) <https://www.ee-mc.com/expertise/merger-control/eemc-valuations.html> Accessed 25 July 2017.

[65] Official Journal of the European Communities, 'Commission notice on the definition of relevant market for the purposes of community competition law' no (97/C 372 /03) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:31997Y1209(01)&from=ES%20https://www.e-elgar.com/shop/gbp/market-definition-in-eu-competition-law-9781788118385.html>.

[66] ICN Report on Merger Guidelines (ICN 2004).

In cases of supply side substitution, what will be the reaction of the customers involved when a company in the market produces a wide range quality or grades of products. A good example would be ´paper´. There are many varieties of papers from low end to high end paper qualities in the market. In such cases the suppliers if wants to switch production to a low costing paper, it can be done relatively easily without incurring much cost.

From the above explanations of demand side and supply side substitution one can see that the definition of a market will vary depending on the product and the substitutions available for a particular product. [67] One of the last competition constraints is the potential competition. This particular constraint is not taken while defining the market because an effective constraint depends on the analysis of specific factors and circumstances related to the conditions of entry.

The EU Commission has provided with a vast definition to the term ´relevant market´. The relevant market is a combination of product market and geographic market, the above two elements play a key role in influencing the competition in the market.

The EU Commission has focused on this definition so that the consumers, producers and the competitors have a clear and transparent idea as to the functioning of the market.

- Relevant product markets are defined as follows: *'A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use'.* [68]

- Relevant geographic markets are defined as follows: *'The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished*

[67] Access to European Union Law: Definition of relevant market' (2017) <Http://Eur-Lex.Europa.Eu/Legal Content/En/Txt/?Uri=Celex:31997y1209(01)>

[68] Access To European Union Law: Definition of relevant market' (2017) <Http://Eur-Lex.Europa.Eu/Legal Content/En/Txt/?Uri=Celex:31997y1209(01)>

from neighbouring areas because the conditions of competition are appreciably different in those area'.[69]

The above explanation made by the EU Commission of relevant market underlines the fact that trade and competition is closely related. And this particular use of the definition can help developing economies in incorporating the definition and meaning of market and relevant market to enhance the overall competition provisions and use it to the best of their abilities. Many developing countries have adopted EU´s approach on competition law, as we will see it in part IV of the thesis.

However, it is important to note that the effect of international integration is not always determined in any one particular manner. The reduction of tariffs will only affect a firm if the given product competes with the product which has benefited from the tariff reduction.

As explained above, the term relevant market may not be the same in all situations as the market situations may change or adapt to new circumstances thus leading to ambiguity of any one particular definition of the relevant market. [70]

For instance, any slight change in the cost of transportation or any change on the technology side can lead different results in regards to the functioning of that particular market. Also, as explained above lowering of trade barriers or reduction of transportation costs enlarges the market and can impact the competitive pressure on firms. Further, we will discuss different agreements and practices which are subject to the control of competition law.

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[69] Access To European Union Law: Definition of relevant market' (2017) <Http://Eur-Lex.Europa.Eu/Legal Content/En/Txt/?Uri=Celex:31997y1209(01)>

[70] Jan De Loecker and Johannes Van Biesebroeck, 'Effects of international competition on firm productivity and market power' (2015) <Https://Www.Princeton.Edu/~Jdeloeck/Oup5.Pdf>

2.2. Horizontal Agreements: Cartels

Horizontal agreements are agreements between undertakings that operate at the same level of supply chain in the market, this may include an agreement between two or more manufacturers or two or more retailers or two or more patent owners.[71] Referring to a broad definition of horizontal anticompetitive agreements, this includes an illegal conduct for businesses acting together in a way that it limits competition, leads to higher prices of goods and services and restrict other businesses from entering the market.

A clear understanding of horizontal conduct on anticompetitive agreements has been explained by the Federal Trade Commission (FTC)[72]. It states that an agreement may be considered unreasonable when competitors interact to such a degree that they no longer are acting independently. These horizontal agreements consist of collusion between two or more competitors in the same market to gain market power. This is harmful to the competition and is almost always illegal. The horizontal anticompetitive agreements consist of arrangements which fix prices, market sharing and bid rigging.[73]

Horizontal agreements themselves are not illegal, we can see this in the EU Commission's Horizontal Guidelines, [74] it provides in detail the benefits and the negative effects of horizontal co-operation agreements in regard to the Article 101 TFEU. It states that these agreements can have a substantial economic benefit if the particular competitors in a particular case complement the activities, skills or assets. It can lead to a sharing of the risks, save costs, increase investment, increase technical know-how and also enhance the quality and variety leading to an increased innovation.

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[71] (*Uk.Practicallaw.Thomsonreuters.Com*, 2018) <Https://Uk.Practicallaw.Thomsonreuters.Com/4-1076695?Transitiontype=Default&Contextdata=(Sc.Default)&Firstpage=True&Comp=Pluk&Bhcp=1>.

[72] 'Anticompetitive Practices' (*Federal Trade Commission Ftc*, 2018) <Https://Www.Ftc.Gov/Enforcement/Anticompetitive-Practices>.

[73] 'Anticompetitive Practices' (*Federal Trade Commission Ftc*, 2018) <Https://Www.Ftc.Gov/Enforcement/Anticompetitive-Practices>.

[74] Guidelines on The Applicability Of Article 101 Of The Treaty On The Functioning Of The European Union to horizontal co-operation agreements <Http://Ec.Europa.Eu/Competition/Consultations/2010_Horizontals/Guidelines_En.Pdf>

However, in some cases of horizontal agreement it may lead to competition problems such as the parties may agree to fix prices, output or to share markets. It can also lead to an increase in the gain or increase in the market power due to collusion of the competitors, thus, likely to give rise to negative market effects and hampering the competition within the market.

Cartels form an important part of competition laws and policies; it is an anticompetitive practice which has legal consequences in almost all the competition legal systems in the world.[75] Cartels are group or groups of similar independent companies which join together or collude together to fix prices, to limit the production, to share markets or customers between them.[76] In cartels, instead of competitors competing against each other members collude to form a market where the two or more companies rely on each other; thus, distorting competition.

Further, some of the most common horizontal cooperation in the market includes information exchange, joint purchasing agreements and research and development agreements.

The main purpose of competition law is to protect the functioning of the market. And it is contradictory to the principles of competition law for undertaking or undertakings conspiring to fix the prices[77] or limiting the output. Horizontal agreements are between undertakings to fix prices, divide the markets, restrict output or to fix output a competitive tender are the acts which are deemed illegal[78] by most of the jurisdictions worldwide.[79]

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[75] Australia, Argentina, Botswana, Burundi, Cameroon, Chile, COMESA, ECOWAS, Ethiopia, EU, India, Kenya, Mauritius, Mozambique, Malaysia, Seychelles, USA.

[76] 'Competition - Cartels - Overview - European Commission' (Ec.Europa.Eu, 2018) <Http://Ec.Europa.Eu/Competition/Cartels/Overview/Index_En.Html>

[77] Price-fixing is the artificial setting or maintenance of price at a certain level, usually higher than the level at which it would be normal without the price-fixing agreement. price-fixing and output restrictions are typical to hard core cartels.

[78] Under the EU competition law, cartels are illegal and EC imposes heavy fines. even in the us cartels are illegal and severe fine are imposed in companies found involved in cartels.

[79] Refer to Competition Law, Richard Whish & David Bailey, Eighth edition p. 497

A cartel is formulated when a group of independent undertakings operating in the same relevant market collude together to fix prices, to limit production or to share market or customers between them. A hard-core cartel agreement is an agreement based on market division and on quantitative restriction which hamper the competition in the market directly.[80] In this kind of arrangement, companies instead of competing with each other, rely on one another to comply to an agreed course of action. Thus, reducing their incentive to provide the customers with better products or services at a fair price. This generally results in consumers being the victim as they end up paying more for a particular good or services in the market. Cartel is a way to hamper competition in a given market.

The illegal nature of cartel also leads competition authorities to impose heavy fines on participating undertakings. Secretive nature makes it difficult to detect as it generally involves many firms or undertakings in the particular industry and customers are rarely in the position to detect the existence of cartels. In 2021, the European commission fined Conserve Italia €20 million for taking part in canned vegetable cartel.[81]

Penalties for cartels can either be criminal or civil in nature or both. In Brazil[82], Mexico[83], South Africa[84], Canada[85], the United Kingdom[86] and the United States[87], price-fixing and other "hard-core" cartel violations can carry criminal penalties, while in other

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[80] 'Hard Core Cartels - International Competition Law' (*Internationalcompetitionlaw.Wikidot.Com*, 2018) <Http://Internationalcompetitionlaw.Wikidot.Com/System:Hard-Core-Cartels>

[81] Case AT. 40127 – Canned vegetable

European Commission, 'Antitrust: Commission Fines Conserve Italia €20 Million for Participating in Canned Vegetables Cartel' </ec.europa.eu>.

[82] Refer To Brazil's Economic Crimes Law (Law No.8,137/90)

[83] The 2006 and 2011 reform in the Mexico competition policy, which led to the criminalization of hard-core cartels. and changes were also made to the federal criminal code.

[84] As of 1 may 2016, the significant change came in the competition act of South Africa, where the directors and managers now face fines up to r500,000 and up to 10 years' imprisonment.

[85] Refer to Canada's competition act, Section 45 is the cornerstone of the provision regarding cartels. the offence of involvement in the cartel agreement is fine up to $25 million and/or imprisonment for up to14 years.

[86] Refer to *R V Whittle* (Peter) [2008] EWCA Crim 2560

[87] The United States Department of Justice's antitrust division has continued to pursue criminal cartel activity and also fines where necessary.

jurisdictions, including the EU[88] and some Latin American countries, cartels are prosecuted as civil violations.

However, there is a leniency program in case of cartels which are also applied by many jurisdictions. The leniency policy offers companies reduced fines or no fines all, if this undertaking involved in cartels self-report and hand over all the evidence to the particular competition authority in charge. The company which comes forward first with all the details regarding the colluded agreement has advantage of leniency policy.

This policy is interpreted in several jurisdictions, most of which provide a reduction of fine to the undertaking that has come with all the necessary evidence and information regarding the cartel, for instance EU[89], India[90] and Malaysia[91].

Due to increase of globalization, many international institutions such as ICN, UNCTAD, OECD have focused on the problems concerning cartels. The OECD anti-cartel program began with the publication in 1998 of the OECD council recommendations concerning effective action against Hard Core Cartel and with the most recently published recommendations in 2016.[92] This particular program is important as it illustrates as to

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[88] Articles 101 And 102 Of the treaty (TFEU) prohibit various anticompetitive practices. article 103 gives the European council powers to put in place an enforcement system, including the imposition of fines.

[89] **Eu Leniency Program**:

1. The rules of the EU leniency programme are set out in the notice on immunity from fines and reduction of fines in cartel cases *(*OJ 2006 C298/ 11*)*
2. The European commission's approach to the calculation of fines to be imposed on companies that have participated in cartels is outlined in the guidelines on setting fines imposed under Article 23(2)(A) Of Regulation 1/2003 (*OJ 2006 C210/ 02*) (Guidelines on Competition Fines).

[90] **Leniency Program in India:**

1. The Competition Act 2002 (*Competition Act*) provides for a leniency programme.
2. The Leniency Programme covers infringement of Section 3(3) of The Competition Act 2002 which deals with cartels.
3. The CCI administers the leniency programme. the director general, as the investigating arm of the CCI, conducts the investigation and files a report with the CCI.

[91] **Leniency Program in Malaysia:**

1. The Leniency is only available for a breach of Section 4(2) of the Competition Act 2010.
2. Article 4 (2) Explains horizontal agreement. refer to laws of Malaysia: Competition Act 2010. Article 4.

[92] Oecd.Org. (2000). *Hard Core Cartels*. <Http://Www.Oecd.Org/Competition/Cartels/2752129.Pdf>.

how the government enforcement of framework can protect against abuses of powerful enterprises. Its main aim was to call attention of the governments of different countries to the problems and issues related to international cartels, with a special focus on developing economies.

The UN understanding on the economic effects of cartels in developing countries launched a research program to help these economies by measuring economic effects of cartels.

The project plan consisted of three phases, first data collection, second, calibration and simulation and, third estimation of the impact of cartels on economic growth. [93] As already seen, cartels can lead to fix prices, share markets, restrict output and fix the output of competitive tenders. Here we discuss the various types of cartels which are prohibited by all the competition authorities.

2.2.1. Price fixing

Price fixing includes agreements between competitors to charge a specific price for particular goods or services. It is a horizontal agreement between undertakings to buy or sell a particular product or services in a manner that the market conditions are controlled by such competitors for their own advantage.

Price fixing includes agreements which set a minimum price, eliminate or reduce discounts, adopt a formula for calculating price, increase or maintain price. As already stated, various jurisdictions have either criminal or civil penalties for cartels which also include the fixing of price. For instance, in Ethiopia the Trade Competition and Consumer Protection Authority (TCCPA) on 28 January 2018 has filed charges against fourteen Ethiopian steel importers for allegedly fixing prices in contravention to Article 7(1) of the Ethiopian Trade Competition and Consumer Protection Proclamation.[94]

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[93] 'UNCTAD | Measuring the economic effects of cartels in developing countries' (*Unctad.Org*, 2019) <Https://Unctad.Org/En/Pages/Ditc/Competitionlaw/Researchpartnership/Measuring-The-Economic-Effects-Of-Cartels-In-Developing-Countries.Aspx>.

[94] The trade competition and consumer protection proclamation (No. 813/2013), which is the current competition legislation in Ethiopia, Came into Force On 21 March 2014. Refer to UNCTAD A review of competition policy in Ethiopia. <Http://Unctad.Org/En/Publicationslibrary/Ditcclp2017d3_En.Pdf>

The newly developed regulation on competition and consumer protection proclamation laws specifically state that the 'cartel conduct' including price fixing is harmful to the economy and is thereby per se prohibited. Once the per se prohibited effect is established the competition authority would require no further proof to penalize the conduct as it has a negative impact on the relevant market.[95]

2.2.2. Market Sharing

A market sharing cartel is an agreement between competitors to divide the market or markets among themselves by agreeing not to compete for each other's customers, or not to enter or expand into a competitor's market.[96] Market sharing restricts competition, forces the prices up and reduces the choice of the customers on the price and quality of goods and services.

The Australian Competition Consumer commission states that market sharing includes allocation of customers by geographical area, dividing contracts by value within the area, agreeing not to compete for established customers or expand into a competitor's market.[97]

2.2.3. Output restrictions

Output restriction are agreements between competitors that limit the quantity of goods or services which are produced. in a market or supplied in the market.[98] When an undertaking restricts supply of a certain product due to the market demand with the sole

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[95] 'Ethiopia competition agency files charges against fourteen metal producers' (*African Antitrust & Competition Law*, 2018) <Https://Africanantitrust.Com/2018/02/05/Ethiopia-Competition-Agency-Files-Charges-Against-Fourteen-Metal-Producers/>

[96] 'Market Sharing' (*Australian Competition and Consumer Commission*, 2018) <Https://Www.Accc.Gov.Au/Business/Anti-Competitive-Behaviour/Cartels/Market-Sharing>.

[97] 'Market Sharing' (*Australian Competition and Consumer Commission*, 2018) <Https://Www.Accc.Gov.Au/Business/Anti-Competitive-Behaviour/Cartels/Market-Sharing>.

[98] Competition Canada, 'About Cartels - Competition Bureau Canada' (*Competitionbureau.Gc.Ca*, 2018) <Http://Www.Competitionbureau.Gc.Ca/Eic/Site/Cb-Bc.Nsf/Eng/02442.Html>

purpose of hampering competition this conduct is amounts to a serious anti-competitive conduct.[99]

2.2.4. Bid rigging

Bid rigging is a particular form of collusive price-fixing behaviour by which firms co-ordinate their bids on procurement or project contracts. There are mainly two forms of bid rigging. First, firms agree to submit common bids which results into eliminating price competition. Second, firms agree on which firm will be the lowest bidder and rotate in such a way that each firm wins an agreed upon number or value of contracts.[100] Public and private organizations often rely upon a competitive bidding process to achieve better value for money. And when bid rigging impacts public procurement[101] it causes significant harm to the taxpayers, public procurement is a large part of the any economy.

Bid rigging takes place in various sectors and in various ways, such as cover bidding, bid suppression, bid rotation, market allocation.

2.3. Vertical Agreements

Vertical Agreements are agreements which take place between undertakings at different levels of the production or distribution chain in a certain market. The vertical agreements are likely to raise competition concerns when there is a degree of market power at the level of supplier or the buyer or at both levels.

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[99] 'Competition Commission - the competition ordinance (Cap 619)' (*Compcomm.Hk*, 2018) <Https://Www.Compcomm.Hk/En/Legislation_Guidance/Legislation/Legislation/Comp_Ordinance_Cap619.Html>

[100] 'Bid Rigging - Concurrences' (*Concurrences.Com*, 2018) <Https://Www.Concurrences.Com/En/Glossary-Of-Competition-Terms/Bid-Rigging>

[101] Public procurement refers to purchase by government and state-owned enterprises of goods, services and works. in order to provide the public of a nation with facilities, governments of a country use the taxpayer's money to finance big projects essentially like building roads, dams proving for schools etc. in case of tender bids on these public procurements which does harm the taxpayers to a great level as a result of the collusive price fixing agreements.

For instance, a manufacturer of mobile devices may have a vertical agreement with the retailer or even directly with the consumer. Vertical agreements competition may also be referred to as 'Intra-brand competition'[102].

Vertical agreements are likely to have effect on competition where the firm which is imposing the restraint has certain degree of market power[103]; in cases where buying power of distributors may have increased due to a collusive behaviour; it may result into the distributors pressuring the suppliers for the selection criteria, which may in turn foreclose market access to new and more efficient distributors. In case of vertical agreements, they are not always anticompetitive. According to the Vertical guideline set by the EU commission, which states that the vertical restraint may contain positive effects which may promote non-price competition and improve quality of services provided. The paragraph 16 of the EU Vertical Guideline has explained in detail nine situations in which vertical restraints may be justified in a given market such as 'economies of scale in distribution', 'capital market imperfection', 'uniformity and quality standardization' etc.[104] Also, the guideline in its hundredth paragraph provides for four negative results of vertical restraints such as, anticompetitive foreclosure of other supplier and its competitors, softening of the competition between the buyer and its competitors, and between suppliers and competitors etc.

Various jurisdictions have interpreted vertical and horizontal agreements in their respective competition acts and regulations. Different approaches have been adopted among different jurisdictions in regard to the inclusion of the two agreements. Even so most jurisdictions have incorporated the detailed meaning and definition of the

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[102] For the purpose of understanding the 'brand competition' there are mainly two divisions: (i) Intra-Band Competition: it is a competition among retailers or distributors of the same brand, it may be based on the price or non-price terms. for example, a pair of Levi jeans may be sold at lower price in a discount or specialty store as compared to the departmental store but without any store amenities and (ii) Inter-Brand Competition: the competition between firms that have developed brands or labels for their products in order to distinguish them from other brands sold in the same market. for example, differentiated products frequently develop and compete on basis of brands or labels, Coca-Cola vs. Pepsi cola, Levi vs. GWG jeans are few examples.

[103] Richard Whish, *Competition Law* (6th Edn, Oxford University Press 2009).

[104] Refer To The 'Guideline of Vertical Agreements 2022' ((2022/C 248/01) by EU Commission

agreements. Not all the jurisdictions have made a clear distinction between the two kinds of agreements but the reading of the particular article is self-explanatory.[105]

As mentioned in the Article 3(4) of CCI, an agreement at different stages or levels of the production chain includes tie-in arrangement, exclusive supply arrangement, exclusive distribution agreement, refusal to deal and resale price maintenance. Further, there are jurisdictions which do not provide different regulations for the two agreements but instead provide with a single provision that is applicable to both agreements.[106]

Though vertical restrictive agreements are regulated in different ways in different jurisdictions, some of these agreements are more prone to raise competition issues. Agreements such as exclusive dealing agreements where buyers agree to purchase most or almost all of its requirements from a seller. Or vice versa i.e., where sellers agree to sell their products to only one buyer, such kinds of agreements restrict competition. other such agreements are exclusive distribution arrangements, tying agreements, where manufacturers purchase product based on the condition that they also purchase the second product. [107]

2.4. Abuse of dominant position

Competition in the market results into many firms competing with each other, but what happens when in the particular industry or sector one of the firms gains a position which results into the firm holding more market share than the rests of the firms in the similar market. In this case, the firm is in a position that has the ability to influence other firms, affect the pricing of the product, influence the demand and supply in the relevant market.

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[105] Refer to The Competition Act of India 2002, Article 3 Sub-Section 3 And 4. 'The Competition Act, 2002 India' <https://www.cci.gov.in/sites/default/files/cci_pdf/competitionact2012.pdf>.

[106] Many jurisdictions apply the provision in the same regulation or article for instance, article 101(1) TFEU, which applies to both i.e., vertical and horizontal agreements. further, section 1 of the Sherman act (US) and Section 1 of act against restraints of competition of Germany are applicable to both the agreements.

[107] Vedia Jerez Horacio, 'Competition Law Enforcement & Compliance across the World: Systems, Institutions and Proceedings' (2014). pg. 30 < http://hdl.handle.net/10016/19717>

The concept of the dominance position was defined and clarified by the European Court of Justice in 1978. This came through the United Brands (Case 27/76)[108]. The Court referred dominant position as:

> "a *position of economic strength enjoyed by an undertaking which enables it to prevent effective competition being maintained on the relevant market by giving it the power to behave to an appreciable extent independently of its competitors, customers and ultimately of its consumers. In general, a dominant position derives from a combination of several factors which, taken separately, are not necessarily determinative*"[109] .

In the above case the firm holds a dominant position in the market. In most of the jurisdiction around the world, a firm holding a dominant position in itself is not illegal, but it becomes illegal when the firm starts to abuses its power. The firms with dominant position have a special responsibility to the consumers, other firms and they also have to maintain a healthy competition.

Almost all the jurisdiction having competition laws have provision regarding abuse of dominant position. The prohibition of abuse of dominant position is one of the core legal provisions in any given competition laws along with the prohibition of anticompetition agreements (such as cartel) and merger control.[110]

Some examples of jurisdiction with provision of abuse of dominant position are Section 2 of the Sherman Act 1890 in the US. In EU in TFEU Article 102, it prohibits any kind of abuse of dominant position.

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[108] Judgment of The Court Of 14 February 1978. - United Brands Company and United Brands Continental by V Commission of The European Communities. - Chiquita Bananas. - Case 27/76.

[109] 'Eur-Lex - 61976cj0027 - en - Eur-Lex' (*Eur-Lex.Europa.Eu*, 2019) <Https://Eur-Lex.Europa.Eu/Legal-Content/En/Txt/?Uri=Celex%3a61976cj0027#Co>. *European Court Reports 1978 Page 00207* Case 27/76, 1978 ECR 207

[110] Pranvera Këllezi, Bruce Kilpatrick And Pierre Kobel, Abuse of dominant position and globalization & protection and disclosure of trade secrets and know-how (Springer 2017).

The Section 2 of the Sherman Act 1890 states that: *"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 among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."*[111]

At an European level, Article 102 of TFEU states that: "Any *abuse by one or more undertakings of a dominant position within the internal market or in a substantial part of it shall be prohibited as incompatible with the internal market in so far as it may affect trade between Member States."* citing, among others, "*directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions……."*[112]

The Indian Competition Act 2002 also prohibits abuse of dominant position and further also explains what is considered as abuse of dominant position. And is similar to the Article 102 TFEU, Section 4 of Indian Competition Act also prohibits excessive pricing.

Abuse of dominant position can harm the relevant market to a greater extent. This fact has been realized since a long time and even though the concept of dominant position was explained in 1978, the concept was around since a long time.[113] The dominant firm can abuse its powers in many forms which will directly or indirectly harm the competition and the consumers. The assessment of dominance in a market is important to account the competitive structure. The EU commission focuses on the types of conducts which are most harmful to consumers and also to the competitors.

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[111] The Sherman Act 1890 Section 2.

[112]European Commission: Treaty of The Functioning of The European Union. Article 102

[113] Mihai Marginean, 'Positive and negative effects analysis in abuse of dominance' [2018] Munich Personal Repec Archive (Mpra) <Https://Mpra.Ub.Uni-Muenchen.De/83750/1/Mpra_Paper_83750.Pdf>.

Conducts which directly exploit the consumers such as charging excessive high price and any behaviour by such firms which my undermine competition in the internal market may infringe Article 102 of TFEU. [114]

In the EU, market share provides a useful indication to the commission of the market structure, and the commission will interpret market share depending on the market conditions. .[115] Like the EU, most of the economies with competition law determine the market and the market share, in Argentina, the antitrust laws apply to acts and behaviour that occurs in the Argentina territory and also on certain acts or behaviour that take place outside the country but has effect in Argentina.[116] We will discuss this in detail in the chapter of cross border abuse of dominant position.

Abusive conducts can be classified in two categories: (i) exclusionary abuse and (ii) exploitative abuse:

2.4.1. Exclusionary abuse

Exclusionary conducts are those practices which eliminate or weaken competition from the existing competitors or that create or reinforce barriers to entry of the new competitors which may weaken or eliminate competition from the market.[117] The EU commission focuses on the enforcement activity in relation to exclusionary conduct to

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[114] 'Communication from the Commission — Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' <https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=ES>.

[115] 'Communication from the Commission — Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' <https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=ES>.

[116] Camila Corvalán, The dominance and monopolies review _ Argentina (7th edn, The law reviews 2020). Pg. 1-10

[117] Comisión Nacional de Defensa de la Competencia, 'Guideline for the analysis of cases of exclusionary abuse of dominance' <https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf>.

safeguard the competitive process in the internal market. This is to ensure that the undertaking in the dominant position doesn't exclude the competitors. [118]

The effects of exclusionary abuse of dominance gives rise to "anticompetitive market foreclosure", it is a situation where the elimination or weakening of the competition would likely affect the profitability, other variables such as quality, variety or availability of goods of the firm in potion of dominance the particular market. [119]

2.4.1.1. Predatory Pricing

The dominant firm when sets the price of a particular product so low for a certain period of time that the competitors dealing in the same product and the same market may be forced to leave the market.[120] This behaviour of the dominant firms results into a low incentive for new firms to enter the relevant market and thus, gives the dominant firm the authority to exploit the market for its own benefit.

The above-mentioned traditional concept of predatory pricing has been subject to discussion, and it has been discussed that the benefits to predator is not only limited to the future gains in the market but also is seen as an investment in the reputation which could be beneficial in the long run by deterring entry to the product market.[121]

When a firm provides a product for a reduced price for certain time, it can do so because of many factors which may affect the manufacturing process, such as reduction in the prices of raw material, supply and demand of the products etc.

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[118] 'Communication from the Commission — Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=ES>.

[119] Comisión Nacional de Defensa de la Competencia, 'Guideline for the analysis of cases of exclusionary abuse of dominance' <https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf>.

[120] In China Section 17 prohibits for a firm to apply low prices without a proper reason.

[121] Richard A Posner, *Antitrust Law* (University of Chicago Press 1976).

However, if there is no justified reason for the low prices, the competition commission on investigation if finds that the dominant undertaking is doing so to restrict competition, can take actions against such undertakings.

In a case between two Indian companies Bharti Airtel Ltd. versus Reliance Jio Infocomm Ltd. the Competition Commission of India ruled that providing free services cannot by itself raise competition concerns, unless the same is offered by a dominant enterprise.[122]

In the above-mentioned case, the allegation against Reliance Jio Infocomm Limited is of predatory pricing which is in contravention of Section 4(2)(a)(ii) of the Competition Act, to use financial strength in other markets to enter into the telecom market. Reliance is providing same services as other telecom services but at a discount of 90 per cent. In this case the CCI after looking up at all the data and facts, came to the conclusion that it is difficult to establish Reliance Jio as a firm in dominant position, thus the alleged position of abuse of dominant position does not come into play. As it possesses only 6.4 per cent of the market.[123] The predatory pricing behaviours needs to be closely monitored by the competition authorities. If not regulated or kept a check on, it can harm the competition in the market and thus may hurt the market of a given economy.

2.4.1.2. Refusal to supply

Businesses have the right to decide their trading partners, it is based on the principle of party autonomy. Every undertaking, business have the right to refuse to deal with a particular client, company or manufacturers. However, even though this right seems to be a right all companies have, it is not always the case.[124] In many jurisdictions refusal to

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[122] In the Competition Commission of India, Case No. 3 Of 2017 In Bharti Airtel Limited V. Reliance Jio Infocomm Limited.

[123] In the Competition Commission of India, Case No. 3 Of 2017 In Bharti Airtel Limited V. Reliance Jio Infocomm Limited.

[124] 'Abuse of refusal to supply | law teacher' (Lawteacher.Net, March 2019) <Https://Www.Lawteacher.Net/Free-Law-Essays/Commercial-Law/Abuse-Of-Refusal-To-Supply.Php?Vref=1>

supply by a company holding a dominant position would be seen as an abuse of dominant position, if the refusal has no justified reason[125] [126]

> *"The term "refusal to deal" (or "refusal to supply") describes a situation in which one firm refuses to sell to another firm, is willing to sell only at a price that is considered "too high", or is willing to sell only under conditions that are deemed unacceptable. ".*[127]

Refusal to supply itself is not harmful to the market, also firms have right to deny the sale of goods they produce due to valid reasons. But when a company with dominant position in the market does that, it can be harmful to the market. It must be taken into account that not all jurisdiction only implement refusal to supply when a dominant firm is engaging in it, many times refusal to supply by a firm with unjustified reason can also be a cause of anti-competitive behaviour. [128]

2.4.1.3. Refusal to supply

Exclusive dealing are arrangements which require buyers to purchase all of its products or large extent of the products form the undertaking in dominant position, or it may be an arrangement which requires a supplier to sell all of its product or services or at least a large of its part to the firm with dominant position.[129]

2.4.1.4. Conditional rebates/discounts:

Conditional discounts are provided to reward the buyers for performing or refrain from performing a certain conduct. In conditional discounts, if the consumer purchases increase a certain threshold during a certain period of time, then the undertaking can

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[125] Article 82

[126] Section 3(4)(D) in the Competition Act 2002 (India)

[127] 'Refusal To Deal: OECD Policy Roundtable' (*Oecd.Org*, 2009) <Https://Www.Oecd.Org/Daf/43644518.Pdf>.

[128] Refer To Section 47 Exclusive Dealing, Competition Consumer Act 2010 (Australia)

[129] International Competition Working Group, 'Report on single branding/exclusive dealing' (2008) <https://centrocedec.files.wordpress.com/2015/07/report-on-single-branding_exclusive-dealing-2008.pdf>.

grant a conditional discount. [130] Conditional rebates can be retroactive or incremental rebates. In case of retroactive rebates, the discount is granted on the purchased after it has exceeded a certain threshold during a given period of time. While incremental rebates are granted only on those made excess than the required threshold.[131]

In 2007[132], the EU commission opened an investigation on the alleged infringement in the roof windows market, on inspection Velux, a Danish roof window manufacturer, the case was closed after an investigation of one and half year. In this case, the Velux distributing system was organized at a European level and the demand conditions were different across the countries depending on the weather, real estate and constructions regulations.[133] Velux also comprised of a company called RoofLITE, which served as a low-price and private label segment of the roof window.

The commission investigated both the companies, Velux was invested because it provided numerous discounts across various countries and Fakro, a Polish window manufacturer alleged that Velux had made it difficult for them to enter in markets such as France, the UK and Germany. Also, it was the commission wanted to further investigation of Velux had offered ither individual benefits to distributors.

On its investigation it was found out that Velux used incremental rebates and it varies from country to country and bonus were calculated on the total turnover during a particular period of time (normally six months). The maximum turnover bonus was 5 per cent and the 20-step discount function led to a very small discount that is between 0.2 per cent to 0.5 per cent. The commission did not find any evidence of RoofLITE to exclude competition in the market. Thus, in this case the commission rejected the

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[130]Comisión Nacional de Defensa de la Competencia, 'Guideline for the analysis of cases of exclusionary abuse of dominance' <https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf>.

[131] 'Communication from the Commission — Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=ES>.

[132] Case T-515/18 – Fakro v. Commission
Case AT. 40026 – Velux Commission Decision rejecting the complaint

[133] Svenda Albaek and Adina Claici, 'The Velux Case – an in-depth look at rebates and more' <https://ec.europa.eu/competition/publications/cpn/2009_2_10.pdf>.

complaint subject to Article 7(2)[134] of Regulation No. 773/2004.[135] A very important landmark decision on loyalty rebates was seen in the Intel case, where the General Court partially annulled the ECs decision to impose a fine of 1.06 billion euros on Intel for abusing its dominant position.[136]

2.4.1.5. Tying or Bundling

Tying is a conditional practice where the enterprise puts a condition on sale of one product requiring the buyer to buy the second product.[137] So the requirement to buy of the product is to also buy the second product. In bundling two or more products are sold in a package. Many jurisdictions including developing countries[138] have prohibited and consider it abuse of dominant undertakings.[139]

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[134] Article 7 - Rejection of complaints:

1. Where the Commission considers that on the basis of the information in its possession there are insufficient grounds for acting on a complaint, it shall inform the complainant of its reasons and set a time-limit within which the complainant may make known its views in writing. The Commission shall not be obliged to take into account any further written submission received after the expiry of that time-limit.

2. If the complainant makes known its views within the time-limit set by the Commission and the written submissions made by the complainant do not lead to a different assessment of the complaint, the Commission shall reject the complaint by decision.

[135] Svenda Albaek and Adina Claici, 'The Velux case – an in-depth look at rebates and more' <https://ec.europa.eu/competition/publications/cpn/2009_2_10.pdf>.

[136] Case T-286/09 RENV, Intel v Commission. Ref to pg. no. 29 of the thesis for detailed analysis of the case

[137] Case T-201/04 *Microsoft V Commission* [2007] Ecr Ii 3601, Para. 859

[138] Refer To Section 24 Of the Kenya Competition Act 2010

[139] Refer To Article 102 (D) TFEU

2.4.2. Exploitative abuse

Exploitative abuse enables the firms or undertakings with a dominant position in the market to increase its profits by abusing its position and thus harming the consumers. For instance, by charging excessive prices for products and services.[140]

For the assessment of dominance in the cases of both exclusionary and exploitative abuses, the EU commission takes into consideration the competitive structure of the market and the market position of the dominant undertaking and its competitors; i.e., if there are any entry of expansion constrains which can be imposed by the undertaking. Another factor which is taken into consideration is if the undertaking or the competitors in the market impose a constraint to the bargaining strength of the consumers.[141] Countries such as Egypt, India, Malaysia, Mozambique, Namibia, Nigeria, Seychelles, South Africa[142] also take into account the market structure and the restrains imposed by the dominant firms on the market, consumers and their competitors.

2.4.2.1. Excessive Pricing

Excessive pricing is an example of exploitative abuse; it is a type of abusive behaviour that occurs when prices are set significantly above the competitive levels as a result of monopoly or market power.[143]

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[140] Comisión Nacional de Defensa de la Competencia, 'Guideline for the analysis of cases of exclusionary abuse of dominance' <https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf>.

[141] 'Communication from the Commission — Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings' <https://eur-lex.europa.eu/legal content/EN/TXT/PDF/?uri=CELEX:52009XC0224(01)&from=ES>.

[142](Bowmanslaw.com,2022) <https://www.bowmanslaw.com/wpcontent/uploads/2021/07/Competition_Digital.pdf>.

[143] Vedia Jerez Horacio, 'Competition Law Enforcement & Compliance across the World: Systems, Institutions and Proceedings' (2014). pg. 30 < http://hdl.handle.net/10016/19717>

It is very difficult to establish a threshold for the excess prices above which the price may be considered to be excessive or unreasonable. The excessive pricing is considered unlawful in many countries when imposed by a dominant firm.[144]

Due to the uncertainty in determining whether price is excessive, the regulatory implementations of excessive pricing has always been in debate in many jurisdictions. It is difficult to access the threshold, above which the prices are excessive.[145]

In Brazil, the modern competition law[146] provided means to identify excessive pricing. But the experience with excessive pricing was not taken very well due to threshold difficulty and out of the 60 cases which were brought in front of the courts from 1994 to 2012 those prosecuting excessive price practice failed to produce a single conviction. i.e., when competition law was revised. Thus, leading to excessive price being struck from the list of antitrust offences once the competition law was revised in 2012.[147]

Article 102 TFEU prohibits any abuse by a firm having a dominant position in the market and which may *¨directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions ¨* [148] Many jurisdictions including all OECD countries prohibit excess pricing. Except the U.S., Canada, Australia, New Zealand and Mexico.[149]

The EU commission and the competition authorities use a standard test when they investigate matters concerning excessive prices. This test was developed in the United Brands case in 1978. As in the case the burden was on the Commission to prove that United Brands was charging excessive and unfair prices.

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[144] David Gilo And Yossi Spiegel, 'The Antitrust Prohibition of Excessive Pricing' International Journal Of Industrial Organization 61 (2018) 503–541. www.Elsevier.Com/Locate/Ijio

[145] David Gilo And Yossi Spiegel, 'The Antitrust Prohibition of Excessive Pricing' International Journal Of Industrial Organization 61 (2018) 503–541. www.Elsevier.Com/Locate/Ijio

[146] (Law 8.884/1994)

[147] Yannis Katsoulacos And Frédéric Jenny, Excessive pricing and competition law enforcement (1st Edn, Springer 2018). P. 173-174

[148] European Commission: Treaty of The Functioning of The European Union. Article 102

[149] 'Policy Roundtable Excessive Prices' (*Oecd.Org*, 2011) <Https://Www.Oecd.Org/Competition/Abuse/49604207.Pdf>.

> *"The United Brands test has two limbs, consisting in determining i) "whether the difference between the costs actually incurred and the price actually charged is excessive" and ii) "if the answer to this question is in the affirmative, whether a price has been imposed which is either unfair in itself or when compared to competing products".*[150]

Further in the case 177/16[151]the Court of Justice of the European Union provided detailed guidance on the concept of excessive pricing under Article 102 TFEU. The court stated that the difference between rates must be appreciable and should be significant and persistent of the facts in the given relevant market.[152]

Excessive pricing can certainly harm the market; however, it is crucial that the jurisdiction define or lay out rules to determine the threshold of excessive pricing.

2.5. Transnational Mergers

Mergers between undertakings are not restrictive practices as these companies merge by combining their assets can allow them to develop new products, which can increase efficiencies, thus reducing the production and distribution costs. However, sometimes these mergers can reduce competition in the market by creating or reinforcing a dominant position and can hinder the maintenance of effective competition in a given market by giving rise to a collusive oligopoly. Competition authorities can examine the proposed mergers by its merger control provisions, as a thorough examination of the impact of a merger in the particular market prior to its merger can prevent distorting of the competition.

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[150] Judgment Of 14 February 1978, United Brands And United Brands Continental V Commission, 27/76, Eu:C:1978:22, Paragraph 252; and Raphaël De Coninck, *Excessive Prices: An Overview Of Eu And National Case Law* (Concurrences 2017) <Https://Ecp.Crai.Com/Wp-Content/Uploads/2018/06/Excessive-Pricing-R.-De-Coninck-E-Competitions-2018.Pdf>.

[151] Latvijas Autoru Apvienība Vs Konkurences Padome, Case 177/16, 14 September 2017

[152] Kevin Coates And Others, 'Welcome Clarifications by The EU Court on The Concept of Excessive Pricing - Kluwer Competition Law Blog' (*Kluwer Competition Law Blog*, 2019) <Http://Competitionlawblog.Kluwercompetitionlaw.Com/2017/10/12/Welcome-Clarifications-Eu-Court-Concept-Excessive-Pricing/>.

Companies when combine forces together to merge or create a joint venture together can expand markets and benefit the economies. Mergers in itself do not fall under restrictive trade practices, but they need to be regulated and controlled. The reason for this is that when two companies have a strong hold in a relevant market, and they come together it can at times lead to the formation of a company holding a collective dominance. As seen from the above chapter on abuse of dominant position, holding a dominant position in itself is not illegal. But what is illegal is that the company abuses its powers. There are cases where when two companies have merged and have harmed the competition in the market.[153] Thus, for the market to run smoothly without any harm to the competition, ex-ante merger control is recommended. We will discuss this in depth in the chapter of mergers in cross-border transaction.

[153] American airline and us airways merged as American airline in 2005. this merger led to the high airfare and poor airline services, thus hurting the competition and the consumers. In 2015 charter and time warner cable merged. they did not oblige with their duty to continue with the innovation in the cable sector, further they also raised the prices.

3. RELATION BETWEEN TRADE AND COMPETITION

3.1. The role of trade and competition laws in development

The objective of the term ´Development´ is very broad, it is to modify the non-growing economies such that its routine functioning produces rising per capita GDP.[154]

The term ´Economic Development´ came into use in the late 1940s in response to the recognition that few countries of the world had achieved relatively high gross domestic product (GDP). Growth is an expanding process of economies while development is a wider term which also includes growth. The theory of economic development is relevant, and it had to be set in an institutional, cultural, religious and political environment. Initially the economists attributed problems with development to the market failure, but as every economy is different and markets succeeds in some while fail in other. The world economic and social survey[155], emphasized that as economies advance and there is an increase of international trade there is no "one-size-fits-all" blueprint. The survey further suggests that to speed economic development, economic planning as coordination tool is required.[156]

The economic development policies have gone through several marked shifts since WWI. During the period of 1945-1970s, one saw the constraints put on development by scarce capital and by scarce foreign investment. Labour was assumed to be in abundance and so it became crucial for the developing countries to save domestic incomes by way of implementing government led policies and investment was done in form of setting up State Owned Enterprises (SOE).

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[154]Joel Mokyr, The Oxford encyclopaedia of economic history (Volume 2) (Oxford University Press 2003). pg. 131

[155] The Survey has taken on several names over the course of its history. In 1947, it was called the Economic Report; and from 1948 to 1954, the World Economic Report. In 1955, the publication was renamed the World Economic Survey.; and since 1994, it has been called the World Economic and Social Survey. The year 1999 marked the launching of a companion publication entitled World Economic Situation and Prospects, to present short-term economic estimates. In this chapter, all of them are referred to as the Survey.

[156] United Nations, 'World Economic and Social Survey 2017'. < Chapter II Post-war reconstruction and development in the Golden Age of Capitalism> pg. 41.

The second generation of development policies was roughly between the period of 1970s, the emphasis shifted from income distribution and investment to health and education related policies. However, the second generation of development was seen as a supplement to the first generation of development rather than as a full rejection of it. During the 1980s there was a collapse of growth and crises in debt servicing, which in turn prompted the rethinking of policies throughout Latin America, Africa and Asia. This third generation of development policy marked a move backword towards the neo classical economics. [157]

During the early 1990s the development economists were calling for yet another generation of reforms, this reform would mainly address corruption, and the role of government to make a more efficient effort at delivering public services. However, the emphasis of all the above said generations are to increase cash flow and trade in the economies, especially in the developing economies. [158]

Trade and competition policies are a key factor in shaping the way an economy works. These policies have a very important role in the development pace of a particular economy and this is due to the result of opening of trade barriers while letting both domestic and international companies compete in a healthy environment.

These policies shape the incentive for firms and individuals to be more productive and for the markets to be more competitive, this in turn generates more employment leading to reduction of poverty. Over the years both trade and competition have played an important role incurring development in the economies.

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[157]Joel Mokyr, *The Oxford Encyclopaedia of Economic History (Volume 2)* (Oxford University Press 2003). pg. 133-134

[158] Ibid 133-134

Recently due to the opening of the trade barriers and reduction of tariffs, international trade has impacted economies in a significant manner. The international policies have also played an important role in shaping the role of development caused by trade and competition. This section will first deal with the role of international trade in development and secondly, the role of competition in development of economies and society in general.

3.1.1. Trade and development

History has shown that trade can be a powerful engine for economic growth. And depending on the pace of the development in various economies it can lead to increase in employment and reduce poverty.[159]

According to Schumpeter the basic idea of economic change involves two very distinct phenomena i.e., growth and development. Growth being a purely quantitative phenomenon, whereas the development consists of qualitative change. [160] For a better understanding of trade growth and development we will analyse it from a theoretical standpoint and also how international institutions have played a role in growth of trade and development.

3.1.1.1. Theoretical analysis of trade growth and development

The study of economic growth and development in relations to trade has been evolved through time, during the *Classical period* the interaction between international trade and economic growth consisted of two main ideas:

[159] Oecd.org. (2017). Trade for Growth and Poverty Reduction - How Aid for Trade Can Help - in - OECD. [online] Available at: http://www.oecd.org/publications/trade-for-growth-and-poverty-reduction-9789264098978-en.htm [Accessed 7 Nov. 2017].

[160] Uwe Cantner, Jean Luc Gaffard and Lionel Nesta, Schumpeterian perspectives on innovation, competition and growth (Springer 2014) pg. 10

The first main idea was pointed out by Adam Smith (1776), he pointed out that the international trade made it possible to overcome the reduced dimension of the internal market. As trade led to extension of the market, the labour division improved and the productivity increased. Hence, international trade led to the intensifying of the ability and the skills of the workers which in turn led to technical innovations and accumulation of capital, thus giving the involved or participating countries the possibility to enjoy the economic growth and development.[161]

The second idea was pointed out during the *Classical period* by Ricardo (1817), he presented with a dynamic economic growth model in its comparative cost model in international trade, which included three forces and two restrictions.[162] The three forces consist of savings, international trade and institutional element. While the two restrictions consisted of law of decreasing income and principle of population. He characterized the progressive States as having high savings, capital accumulation, production, productivity, benefits and labour demand forcing the increase of wages and demographic growth.[163]

After the Classical Period one saw the *Neo-Classical* and *Post Classical* growth. During this period, some economists discarded the theory of Ricardo, while economists like Marshal (1890) pointed out that ¨the causes which determined the economic progress of nations belong to the study of International Trade¨. And other economists like Young (1928) and Schumpeter (1912, 1942 and 1954) relied on the theories of Smith and applied to the changing economies.

Further during the *Empirical Period*, the economist focused on the economic growth and its relation to export theory. The empirical evidence was a key motivation for the ¨new trade theory¨ literature, mainly by Krugman[164] (1979,1980) that explained the feature of international trade in terms of the consumers love for variety and increasing returns to

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[161] Adam Smith, 1776 < Of the nature and causes of the wealth of nations < Of the Accumulation of Capital, or of Productive and Unproductive Labour. </i> (www.ibiblio.org Publishing 2007). Pg. 265-266

[162] David Ricardo, Chapter `On foreign trade´ in the on the principles of political economy (1817) (3rd edn, Batoche Books 2001).pg. 85 -104

[163] Oscar Afonso, the impact of international trade on economic growth (Universidade Do Porto, Faculdade De Economia Do Porto 2001). Pg. 4

[164] Paul Robin Krugman is an American economist and was awarded Nobel memorial prize in economics for his contribution to new trade theory and new economic geography.

scales.[165] This also shows a relation between the trade and the manufacturers entering the market, thus depicting a clear relation between trade and competition. The next section of this part will discuss the relationship between trade and competition in depth.

Now again, moving to the Krugman explanation, during this period the manufacturers differentiated products and concentrated production in a single location, while the consumers spread their expenditure across all the firms, and to various varieties. The combination of consumers inclination for variety and increasing returns to scale provided an entirely new intellectual framework for thinking about the causes and consequences of international trade. [166]

The Natural Law Philosophers of the 17th and 18th centuries had a deep impact on the late scholastic thoughts. Like Vitoria[167], many thinkers applied the Aquinas's idea of natural law [168] to international relations. Their aim was to derive from a moral and jurisprudential perspective and there were many natural law thinkers during this time that believed in the principle of freedom to trade.[169] Francisco Suarez (1612)[170] deeply believed in the theory that international commerce should be free and there should be no obligation from the natural law but from the law of nations. He asserted that ¨it has been established by the jus gentium[171] that commercial intercourse shall be free, and it would violate the system of law if such intercourse were prohibited without reasonable

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[165] Stephen J. Redding, 'Empirical approaches to international trade' [2006] London School of Economics and CEPR https://Www.Princeton.Edu/~Reddings/Pubpapers/Emptrade_Palgrave10web.Pdf pg. 8.

[166] Ibid 8

[167] Francisco De Vitoria was a Spanish Roman Catholic philosopher and jurist of renaissance Spain. he is the founder of tradition in philosophy known as school of Salamanca. he is noted for his contribution to the theory of just was and international law.

[168]Classical natural law theory such as the theory of Thomas Aquinas focuses on the overlap between natural law moral and legal theories.

[169] Douglas A Irwin, <Against the Tide: An intellectual history of free trade<> (Princeton University Press 1996) <http://www.loc.gov/catdir/toc/prin031/95025447.html>. pg. 22

[170]Francisco Suárez was a Spanish Jesuit priest and is regarded among the greatest scholastics after Thomas Aquinas

[171] Jus Gentium (Meaning Law of Nations) is a concept of international law within the ancient Roman system.

cause¨. The term free trade was apparently originated at the end of the sixteen centuries in a parliamentary debate over foreign trade monopolies.[172]

The work on free trade has been going on for centuries, however around 1820s Ricardo[173] tried explaining a notion that if a country is to pay a certain price for the foreign commodities and conveniences, it is for the countries interest to sell the commodities at a higher price. Although he could not explain the notion to its full extent. To this notion Torrens[174] gradually discovered that a country could shift the terms of trade in its favour of imposing a tariff. In his notion, he mentioned that tariffs should not be reduced unilaterally, as this would adversely affect the terms of trade between the countries. This theory was developed in the series of letters to the Bolton Chronicles in 1832.[175]

Later in the year 1844 Torrens in his book titled The Budget: On Commercial and Colonial Policies argued that:

> '*when any particular country imposes import duties upon the productions of other countries, while those other countries continue to receive her product duty free, then such particular countries draws to herself a larger proportion of the precious metals, maintains a higher range of general prices that her neighbours, and obtains, in exchange for the produce of a given quantity of her labour, the produce of a greater quantity of foreign labour*.'[176]

Torren's Policy recommendation sparked a controversy among the economist that even spilled over into the parliamentary debates during that period. To suppress the controversy John Stuart Mill asserted the theory of Torren´s.

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[172] Douglas A Irwin, <Against the Tide: An intellectual history of free trade<> (Princeton University Press 1996) <http://www.loc.gov/catdir/toc/prin031/95025447.html>. pg. 22

[173] David Ricardo was a British political economist, and most influential classical economist.

[174] Colonel Robert Torrens was a royal marine's officer in London and political economist. he was an independent discoverer of the principle of comparative advantage in international trade.

[175] Douglas A Irwin, *Against the Tide: An Intellectual History of Free Trade* (Princeton University Press 1996).

[176] Douglas A Irwin, *Against the* Tide: An intellectual history of free trade (Princeton University Press 1996).

Also, Torren´s and Mill developed a theory that considered two parts; first, under certain circumstances a tariff reduction could lead to a deterioration in the terms of trade (or, controversially, a tariffs increase could improve the terms of trade). Second, a country undertaking such tariffs reduction could conceivably suffer a net economic loss as a result.

From the above we can understand that the evolution of trade and development is a slow and steady process which has evolved over the years. Different economists have studied the relation between economic growth in a different manner but most of them have had the same point of views and end goals, i.e., to enhance trade while keeping development in mind of various economies. This gradual evolution of the role of international trade, the growth and its application in practice is a clear indicator of the fact that trade has played an important role in development.

The functionalist approach to institutions adopted in the 1980s-owed little to the theories of domestic politics but has drawn attention to more economic models. The idea that international institutions can influence state behaviour by acting through domestic political channels was recognized by scholars writing in the mid-1950s. The events which took place in the 1970s gave rise to the study of ¨international regimes¨ which defined the rules, norms, principles and procedures that focus expectations regarding international behaviour.

Over the years there has been a discussion about domestic institutions being a barrier at times in realizing the benefits for the whole society. Many scholars have stressed on the need for a unified institution to help the domestic countries, and producers to involve in free trade without being afraid of the competition or extreme regulations consequences. In cases respect to the settlement of territorial dispute researcher has been focused on need of dispute solving mechanism, for instance international arbitration.

Transferring the policymaking process to the international level, where exporters can see that they have a say and stake in the organization in order to gain the opining of foreign markets, can enhance the overall interest. [177]

Keohane (1983)[178] argues that the demand for international institutions will be greatest under constitutions of interdependence, when States face a dense network of relations with one another and where information is somewhat scarce.[179] This argument is important to determine that, if there is an inter dependence between two or more countries, apart from the political and legal support there will also be a development in regards to trade exchange between the nation's, leading to more competition in the market. The functionalists' analysists see international institutions as an important tool to help the states to solve problems. It has been observed that the root of this is the domestic failure of institutions and their resolutions involves turning into some type of international level. In the research in the theories and empirical studies of international institutions it has been observed that once a policy is delegated to international institutions, state behaviour will converge, as members will tend to adopt to similar monetary trade and defence policies. [180]

The doctrine of free trade and development has been subject to deep and searching scrutiny over the years. The debate in regards to the merits of international and free trade has been an ongoing and never-ending course of evolution. The doctrines on trade will continue to experience change as new theories and commercial policy come to force. However, it will be one of the most durable and robust propositions that economic analysis has to offer for the conduct of economic policies.

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[177] Lisa L Martin and Beth A Simmons, Theories and empirical studies of international institutions. Cambridge, Ma: MIT Press. (Mit Press 2001).

[178]Robert Owen Keohane: Is an American academic, and is associated with the theory of Neoliberal institutionalism as well as with transnational relations and world politics in international relations.

[179] Lisa L Martin and Beth A Simmons, 'Theories and empirical studies of international institutions' (1998) 52 729, 729–757<https://dx.doi.org/10.1162/002081898550734>. Pg. 742

[180] Lisa L Martin and Beth A Simmons, 'Theories and empirical studies of international institutions' (1998) 52 729, 729–757<https://dx.doi.org/10.1162/002081898550734>. Pg.730,737,742

3.1.1.2. The role of international institutions on trade growth and development

As seen through the theoretical analysis, international trade is an important tool which helps countries to reach their desired development goals. The theoretical research has played an important role in the formulations of various international institutions. It can be seen from the above that the empirical and other theories have impacted the increasing need of having an international institution. Especially in case of international trade and to promote free trade, the theories derived have played an important part.

The formation of these international institutions has provided a relevant tool to bring in development in various societies. As mentioned by Andrei A. Levechenko in the International Quality and International Trade:

> "*Empirical evidence, in particular the series of papers by La Porta, Lopez-de-Silanes, Shleifer and Vishny (e.g., 1997, 1998), and Acemoglu, Johnson and Robinson (e.g., 2001, 2002), suggests two important facts. First, institutions matter a great deal for economic performance. Second, developed countries ("the North") have much better institutions than developing ones ("the South")*". [181]

As various economies react to changes in a different manner, the opening of trade barriers may or may not bring in the same desired growth. International policies are shaped in a manner to assist countries to achieve their goals, however it must be taken care that even through there are many policies which focus on developing countries and assists in the process of development, each country reacts to these policies in a different manner. The impacts of trade reform and expansion on the poor are context-specific, depending on consumption patterns and on whether trade-induced growth occurs in areas and sectors where the poor live and are economically active.[182]

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[181]Andrei A. Levchenko, institutional quality and international trade (International Monetary Fund 2003) <: Http://Alevchenko.Com/Levchenko_Institutions_Trade_Final.Pdf> Accessed 23 January 2019.Pg. 3

[182] Joel Mokyr, 'The Oxford Encyclopaedia of Economic History' (2003) Volume 2 Oxford University Press 2003.

The impact of international trade on economic growth and development has led many international organizations to formulate both soft and hard laws to increase trade between countries. International organizations such as OECD, World Bank, WTO have played a significant part in shaping international trade.

The process of international organizations started in the year during the Convention of Vienna (1814-15). This proved to be a turning point in history, as it set a motion allowing many European States to set a series of innovation, invention and learning processes that shaped the core of the International Organizations.[183] The innovations agreed upon in Vienna were diplomatic regulation which provided with official titles of successive classes of the representative of the States. The above basic principle simplified both the bi-lateral and multi-lateral diplomacy which was in a way as evolved as a continuing process of the codification of customary diplomatic relations.[184]

According to Inis Claude[185], "*As states began functioning as political units, the sates realized the problems which arose out of the coexistence of such political units. And thus, there was a need felt to create an institutional devices and systematic methods for regulating such relations were felt.*" [186]

International Institutions have played a significant role in opening market and enhancing trade over the years. As mentioned by Geoffrey Allen Pigman, in 'Trade Diplomacy Transformed' the multilateral diplomacy began during the early 1900, which saw in the 1902 the signing of the Brussels Sugar Convention. The diplomats began to create institutions to serve venue for the implementation of the multilateral trade diplomacy. [187]

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[183]From the Congress of Vienna to Present-Day International Organizations' Vol. Li No. 3 2014 December 2014 Un Chronical.

[184] From the Congress of Vienna to present-day international organizations' (2019) Vol. Li No. 3 2014 December 2014 Un Chronical.

[185] Inis Lothair Claude, Jr. (1922 – December 23, 2013) was a leading scholar in international relations and international organizations.

[186] Inis L Claude, Swords into Plowshare: the problems and progress of international organization (New York, Random House, 1964), Pp. 17-18. (Random House 1964).

[187] Pigman, G. (2019). Trade Diplomacy Transformed: why trade matters for global prosperity. 1st Ed. Palgrave Macmillan UK, pg.11.

The institutions were granted powers, at first these powers were limited and certain power in the hands of these institutions have grown over the year, thus regulation the international trade and playing a key factor in enhance trade development.

The policy domain of national government such as the environmental, labour regulations, intellectual property protection, competition and industrial policies became a subject for the trade negotiations. Such domestic policy issues effected the trade relation between states and played a key element in development of international trade.

The conclusion of World War II saw an increase in many international institutions being created. These include the International Monetary Fund (IMF), World Bank and World Trade Organization (WTO). The result of the formation of such institutions has been a dramatic shift in the increase of economic development. Initially there were few apprehensions in regards to the formation of these institutions, as it was believed by some economics that the developing economies would be suppressed and would be taken advantage of by the developed and dominating economies. However, recent reports have shown that the formation of these institutions has opened market to a great extent, thus leading to a change in the mind-set of the people and bringing in trade and competition in the market.

3.1.2. Competition and development

Healthy competition could enhance the development of a society. When there is trade in the market, competition among firms is inevitable. Strong and coherent competition polices could lead to fair and healthy competition in the market. It is very important that these laws and policies be implemented well to favour both the consumers and various firms. According to the standard economic theory, competition is defined as a market situation where the suppliers strive for consumers in a way that induces them to become more efficient and capable of offering a wide variety of products and services at a relatively lower cost.[188]

[188]Marwa W. Gomaa, 'Competition and economic growth: an empirical analysis with special reference to MENA countries' [2014] Cairo University. Pg. 193

As mentioned in the United Nations Conference on Trade and Development; competition policy mainly has two major instruments:

> "*The first is a competition law which contains rules to restrict anti-competitive market conduct, as well as an enforcement mechanism, such as an authority. The second major instrument, particularly important in the interface with other economic policies, is competition advocacy*." [189]

The UN has emphasised on the policy goal of promoting economic development, and states in its report that developing countries view competition as having an important role in promoting development and economic growth. An economy may take help of various means to help them increase and develop their economic development, competition laws and the enforcement of such laws plays an important role.

The design of the competition policy and how the pre-reforms has led to such design is an important toll to weigh the development of competition laws and policies in any economy, especially in the developing economies. As apart from developing or designing such laws and reforms, what is more important is to implement it in a proper manner so the economy can be led to a better and faster economic development.[190]

The role of competition policies has been seen as a means of economic development by many economists and also by many jurists. Further, the international institutions which have been relatively developed in the field of trade, have felt the need to strengthen the competition policies in various economies and especially in developing and emerging economies.

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[189] United Nations Conference on Trade and Development: the role of competition policy in promoting economic development: the appropriate design and effectiveness of competition law and policy (8-12 November 2010)

[190] Marwa W. Gomaa, 'Competition and economic growth: an empirical analysis with special reference to MENA countries' [2014] Cairo University. pg. 200

3.1.2.1. Theoretical analysis of competition and development

Economists have been long interested in analysing the role of competition in innovation and economic growth. Competition creates an environment which enhances efficiency. The benefit secured from competition is not a spontaneous act but is a slow and steady act, which first involves the setting and implementing of appropriate competition policies by the State. Competition policies consists of various set of measures and instruments which are used by the government, to promote and to safeguard competition in the markets.

The experience in recent years has disclosed the importance of competition policies and their role towards the liberalization of markets. It is important to note that one of the key objectives of any economy is to attain economic growth and development, competition policies should be framed and executed in such a manner so that it attains the object of the economic growth in the market.

Many theoretical arguments as well as empirical studies have tried to explain the relationship between competition policies, economic growth and development. Schumpeterian[191] competition is a well-known concept in anti-competitive laws. His view of competition was a starting point for the concepts of dynamic competition, which attempted to analyse the process of innovation and imitation between competing firms.[192]

Classical economists such as Adam Smith, Ricardo, J.S. Mill and Marx, viewed competition as a mechanism involving a rivalrous equilibrating process and not as a state of affairs as portrayed in the neo-classical economics.

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[191]Joseph Aloïs Schumpeter was an Austrian political economist with his most influence in the 20th century. He popularized the term "creative destruction" in economics and also applied its effect to competition.

[192]Josef Drexl, Wolfgang Kerber and Rupprecht Podszun, competition policy and the economic approach: foundations and limitations (Edward Elgar 2012).

As Adam Smith; has pointed out, the rivalrous price cutting processes undertaken by firms are a constant pressure to innovate.

> "*Competition of producers who, in order to undersell one another, have recourse to new divisions of labour, and new improvements of art, which might never otherwise have been thought of.*"[193]

The above paragraph states that competition is one of the factors which leads to innovation, and thus helps in the process of economic development.

Further, Adam Smith points out that competition allows to allocate the resources available in a better and efficient manner. In a competitive market, the producers will determine the price of a product depending on the competition between the different suppliers. While, in an economy which is dominated by monopolistic firms or cartelized economy, it would lead to a dominant market position thus hampering the economy.[194]

In the Empirical literature, the impact of competition on innovation and economic growth has largely been explored at both micro and macro level. The early work on competition and growth in the empirical literature were noticed in the works of Scherer (1967) which was followed by many economists and the most recent being of Nickell (1996) and Blundell (1999).[195]

A study done by Dutz and Hayri (1999) mentioned that measures of effective competition policy are positively associated with economic growth. Further, Dutz and Hairy (1999) and Dutz and Vagliasindi (2000) use a cross-section of 52 countries and a small sample of transition economies respectively and find a positive effect of antitrust effectiveness on GDP growth. [196]

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[193] Adam Smith, *Wealth of Nations* (1776) pg. 706.

[194]Marwa W. Gomaa, 'competition and economic growth: an empirical analysis with special reference to MENA countries' [2014] Cairo University.pg. 195

[195]Marwa W. Gomaa, 'competition and economic growth: an empirical analysis with special reference to MENA countries' [2014] Cairo University.pg. 197

[196] Marwa W. Gomaa, 'competition and economic growth: an empirical analysis with special reference to MENA countries' [2014] Cairo University.pg.198

The empirical literature dealing with the competition has given a mixed response regarding the issue of competition law encourages competition. With regards to a study conducted by Vagliasindi (2001) concludes that enterprises were more likely to have competitors in countries where competition laws are stronger and better enforced.[197]

Further, Kee and Hoekman (2007) have taken evidence from the empirical literature and have conducted a cross country study on competition laws and how it encourages competition can be found in studies by Bresnahan and Reiss (1991), Djankov (2002) and Hoekman (20014). The study looks at various evidence put forth with the statistical reference made in regards to 42 developed and developing countries found that competition law has direct effect on prices.[198]

The impact on intensity of effective and enforceable competition policies was understood quite recently. The business environment can be benefited to a great deal by enforcing and implementing competition laws in developed and especially developing economies. However, it is crucial to understand that solely enforcing such laws would not affect the particular economy but implementing it. And, as already mentioned, different economies act different to the application of laws. The government concerned has to be careful and cautious as to the implementation of such laws.

The theoretical analysis of competition policies and laws of economic development has played an important role for the government and even industries or firms to understand the importance of competition policies in the overall development of an economies.

We can see that the theoretical analysis of the classical period and empirical economics have played an important role in establishing detailed research on the benefit of competition laws and economic development.

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[197]Maria Vagliasindi, 'Competition policy across transition economies' (2001) 6 revue d'économie financière (English Ed.) <Https://Www.Persee.Fr/Doc/Ecofi_1767-4603_2001_Hos_6_1_4560>.

[198]Hiau Looi Kee and Bernard Hoekman, 'imports, entry and competition law as market disciplines' (2007) 51 European Economic Review pg. 17

<Https://Www.Sciencedirect.Com/Science/Article/Pii/S0014292106000997>.

The findings of these school of thoughts have made it clear the importance of competition laws and to various economies. It is crucial to understand that, as the economies today are growing in an unimaginable speed, it can be difficult for the government of a particular country or economy to keep up with the pace of the impact on consumers, firms, overall economies in regards to the competition.

For the better understanding of the thesis, it is important to establish a correlation between trade and competition and their impact on economies. The thesis will further deal with this issue in detail. It will help in understanding the role and implementation of competition laws and its needs to be enforced in a proper manner. But before establishing a correlation we should also understand the role of international institutions and competition while keeping in mind its effect on development.

3.1.2.2. The role of International Institutions on competition policy and development.

As discussed earlier in relation to the role of trade in development there has recently been an increase in globalization. This has led to the need for States, not only to focus on national laws, but also to consider the international aspect of it.

The growth of globalization and liberalization has led to economies opening their markets for international players to enter and to compete in a healthy environment; thus, making it crucial for the governments to enforce and implement both international and national laws in such a manner that favours the smooth functioning of the economies. The requirement of laws and policies to meet the ever-growing increase of international trade and competition has increased over the past few decades.

As seen in the above section of theoretical analysis of competition and economic development, we can tell that the theoretical studies indicate that competition laws and policies are beneficial for the economies.

However, in regard to the international institutions which deal with competition laws, the theoretical and empirical views do not suggest directly towards the need to have these particular institutions for competition policies. But these views do place an emphasis on the fact that the global institutional framework must be strong to keep up with the pace of globalization. The role of international institutions has been essential in the study of politics and economies since the conclusion of World War II.

The 1970s marked an important movement in the empirical effects of international institutions. Research was stimulated by Ernst Haas´s which derived the ´neofunctional approach´. Neofunctional is a theory that deals with regional integration and its theoretical goal. This helps in establishing supranational institutions in certain sectors, with specific methods. [199] The outcome of the empirical research on the institutions states that Member States that participate in the international organizations generally exhibit attitude which is inclined towards usefulness and effectiveness.[200]

This empirical study is an example that scholars had understood from very early that international institution can be an effective tool to improve international politics and, laws, and may be used to harmonize and balance the situation of different Member States by reinforcing regional integration.

Currently there are more than 130 countries which have adopted national competition laws.[201] The fact that competition law is still on its way to be adopted in many countries, and that its proper enforcement likewise needs certain time and experience making it a bit difficult for the international institutions to make coherent international policy on competition involving all Member States.

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[199] Nikola Lj. Ilievski, 'The Concept of Political Integration: The perspectives of neo functionalist theory' (2015) Vol. 1, No. 1, 2015 Journal of Liberty and International Affairs <Http://E-Jlia.Com/Papers/34928593_Vol1_Num1_Pap4.Pdf>. pg. 2-3

[200] Lisa L. Martin and Beth A. Simmons, 'Theories and Empirical Studies of International Institutions' (1998) 52.

[201] 'Challenges of International Co-Operation in Competition Law Enforcement' (OECD, 2014) <Https://Www.Oecd.Org/Daf/Competition/Challenges-Competition-Internat-Coop-2014.Pdf>.

The institutional framework on international competition policies is not well developed in the same level as that of international trade.[202] There have been efforts to inculcate the demand of formulating international laws on competition with the positive involvement of Member States.

Some International Institutions such as the World Trade Organization (WTO), OECD, UNCTAD and ICN have dealt with issues constituting the competition policies. WTO is one of the international institutions that made an attempt to solve the issue on trade and competition policies. As a result of the Ministerial conference in Singapore (1996), the Working Group on the Interaction between Trade and Competition policy (WGTCP) was established to discuss various issues regarding the interaction between trade and competition policies with the participation of all the WTO members. [203] Under the Doha Ministerial Declaration (2001), the study work with the working group was focusing on the clarification of:

- Core principles, including transparency, non-discrimination and procedural fairness.
- Provisions on hard-core cartels.
- Modalities for voluntary cooperation; and
- Support for progressive reinforcement of competition institutions in developing countries through capacity building. [204]

[202] 'Competition Policy for Development: A Report on UNCTAD's Capacity Building and Technical Assistance Program' <Http://Unctad.Org/En/Docs/Ditcclp20042_En.Pdf>

[203]'WTO Interaction Between Trade and Competition Policy' (*Wto.Org*, 2018) <Https://Www.Wto.Org/English/Tratop_E/Comp_E/Comp_E.Htm#Introduction>

[204]'WTO Interaction Between Trade and Competition Policy' (*Wto.Org*, 2018) <Https://Www.Wto.Org/English/Tratop_E/Comp_E/Comp_E.Htm#Introduction>

The ministers from WTO member-country decided at the 1996 Singapore Ministerial conference to set up three working groups: on trade and investment, on competition policy and on transparency in government procurement, however, at the end only the working group on trade facilitation took off.

The main reason for which the international policies on competition didn't go through was related to the difficulties encountered while dealing with countries with different rate of development.[205] Further, in the developing nations the laws are not completely up to mark with the developed economies. These circumstances caused problems in the effort to integrate all the Member States laws into one international institution. The thesis will discuss in detail the efforts made by WTO through the WGTCP program to provide international framework for competition policies.

Though WTO has few provisions under the GATT, GATS and also on the agreements of intellectual property rights, these provisions are not sufficient to keep up with the changes taking place in trade and competition. What is required is to formulate new laws at the international level to help both the developing and developed economies.

Further, OECD consists of most of the developed and industrialized countries which form a cooperation regulation regarding international economic policy. As stated in the OECD home page, a well-designed competition law and its effective enforcement including the competition based economic reform, can promote growth of the economy and bring in employment. The OECD has actively encouraged governments to tackle those problems in regard to the anti-competitive practices to foster economic growth.[206]

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[205] Stephen Woolcock, 'The Singapore Issues in Cancún: A Failed Negotiation Ploy or A Litmus Test for Global Governance?' (2003) 38 Inter economics pg. 232 <Https://Link.Springer.Com/Article/10.1007%2fbf03031726>.

[206] 'Competition - OECD' (*Oecd.Org*, 2018) <Http://Www.Oecd.Org/Daf/Competition/>

OECD council adopted various non-binding recommendations on competition laws and policies from 1979 to 2014. These policies help governments develop further their laws and regulations to fight anti-competitive agreements and to better their overall competition regulations.[207] Few examples of such recommendations are as follows: [208]

- 2009: Recommendation on Competition Assessment
- 2011: Recommendation concerning Structural Separation in Regulated Industries
- 2012: Recommendations on Fighting Bid Rigging in Public Procurement
- 2014: Recommendation concerning international Co-operation on Competition Investigations and Proceedings.
- 2016: Recommendation concerning effective actions against hard core cartels.

Moving on to the United Nations Conference on Trade and Development (UNCTAD); the objective of UNCTAD us to work on competition and consumer policies so that it ensures that partner countries could enjoy the benefits of increased competition in various markets.

The Competition and consumer policies programme serves the Intergovernmental Group of Experts (IGE) on competition law and policy and the Intergovernmental Group of Experts in Consumer Protection Law and Policies. [209] The IGE is a specialized intergovernmental forum which is based on voluntary cooperation for the developing economies and their government to pursue the adoption of competition laws. [210]

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[207] 'Recommendations and Best Practices on Competition Law and Policy - OECD' (*Oecd.Org*, 2018) <Http://Www.Oecd.Org/Competition/Recommendations.Htm>

[208] 'Recommendations and Best Practices on Competition Law and Policy - OECD' (*Oecd.Org*, 2018) <Http://Www.Oecd.Org/Competition/Recommendations.Htm>

[209]'UNCTAD | Competition Law and Consumer Protection Policy' (*Unctad.Org*, 2018) <Http://Unctad.Org/En/Pages/Ditc/Competitionlaw/Competition-Law-And-Policy.Aspx>

[210]'UNCTAD | Intergovernmental Deliberations (*Unctad.Org*, 2018) <Httphttp://Unctad.Org/En/Pages/Ditc/Competitionlaw/Intergovernmental-Deliberations.Aspx>

Further, UNCTAD provides these intergovernmental groups Model laws to help them formulate their national laws on competition. As it believes that competition and consumer protection play a vital role in the development and economic growth by reducing poverty. It further states that competition plays an important factor by promoting a particular country as a business location which can be done by opening trade barriers, thus, attracting national and foreign investments.[211] The next section of the thesis would establish an interaction between trade and competition, so to understand that trade and competition is intertwined.

Thus, we can see that there are efforts been taken by various international institutions to promote competition laws and policies in both developed and developing economies. As there has recently been an increase in trade and globalization which has resulted into an increase of competition in the market. However, there is still a lot of work to be done on behalf of the international institutions and the respective governments to promote competition laws and policies to such a level that all the economies benefit from it.

3.2. Correlation and interplay between trade and competition laws

Globalization and recent trade liberalization, trade has affected every aspect of life. As the overall market is expanding and benefits both developed and developing nations; it is very important that the competition which comes with opening up of the market must be regulated and enforced in a proper manner, especially in the developing economies.

The increase of competition due to opening up of trade barriers has impacted the market in many ways. One of the key results is that the producers are becoming more self-sufficient and liberalization has led to an increase in the technical know-how.

[211] 'UNCTAD | Why Competition and Consumer Protection Matter (*Unctad.Org*, 2018) < Http://Unctad.Org/En/Pages/Ditc/Competitionlaw/Why-Competition-Matters.Aspx >

This has resulted into the manufacturers and the producers to take help of these technologies and implement it in a way which benefits both producers and the consumers.[212]

The general objective of trade policies can be explained in many ways. According to the WTO Report 2008, it is generally accepted that the main purpose of a state´s trade policy is to regulate international trade for the purpose of expanding and improving the economic interest of its own citizens.[213] The main purpose of such objective is to bring in free trade and market and trade liberalization.

Generally, competition laws are aimed at private behaviour that limits competition and hurts consumers. Competition laws are mainly focused on protecting the interest of consumers. In certain cases, two or more undertakings conspire to fix prices or reduce output of a given product at a given time and such undertakings also try to boycott other competitors, with regards to such cases competition laws provide the remedies to fix the above said behaviour. Competition laws are largely based on domestic legal principles, so as to maximize the given profit and the efficiencies. In contrast, trade laws are aimed at public behaviour. In which government creates tariff and non-tariff barriers, thus protecting both the consumers, the producers and especially the producers from foreign competitors.[214] Trade laws have international routes where in international bodies play an important role. And these international bodies negotiate trade solutions through various means; which may include dispute settlement resolutions, diplomatic approach, co-ordination with the member states etc.

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[212] Jonida Lamaj, 'The Impact of International Trade and Competition Market on Developing Countries:' (2017) <Http://Www.Toknowpress.Net/Isbn/978-961-6914-13-0/Papers/Ml15-306.Pdf>

[213] WTO Report (1998) Of the Working Group on Interaction Between Trade and Competition Policy to The General Council Wt/Wgtcp/2: Pg. 81-89. "Interaction Between Trade and Competition: Why A Multilateral Approach" By Seung Wha Chang' (*Scholarship.Law. Duke.Edu*, 2017) <Http://Scholarship.Law.Duke.Edu/Djcil/Vol14/Iss1/1>

[214] Julian Epstein, 'The Other Side of Harmony: Can Trade and Competition Laws Work Together in The International Marketplace?' [2002] American University International Law Review 17 <Https://Www.Wcl.American.Edu/Journal/Ilr/17/Epstein.Pdf>.

According to (Julian Epstein)[215]:

> *¨Trade laws unlike competition laws, are aimed at opening of markets to exporters of member countries, not at optimizing marketplace efficiencies and consumer benefits. In short, the two bodies of law involve fundamentally different actors with fundamentally different institutional perspectives, cultural, methods of dispute resolution, and legal principles. ¨*[216]

The fact that the competition laws and trade co-exist together does not make it simple to establish the correlation between them. Many international organizations such as WTO, OECD have focused on the study of the relationship between trade and competition and have come to the conclusion that the relationship between trade and competition is a complex relation. [217]

In this section, we aim to discuss in depth the relationship and analyse the co-relation between the two. For a better understanding of the subject matter, it is important to focus on different aspects of trade and how it affects and impacts the competition in the market. This section would first explain the concept of trade liberalisation, free trade, Free Trade Agreements (FTAs) and the trade barriers. Second part would attempt to emphasize how the market works and what is a relevant market which brings in trade and competition in different economies. It is necessary to understand and simplify the basic concepts to determine the co-relation between trade and competition.

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[215] Julian Epstein Is the Former Chief Democratic Counsel, House Judiciary Committee; Stanford Law School, Jsd (Abd); Georgetown University, Jd (Cum Laude); University of Michigan, Ab.

[216] Julian Epstein, 'The Other Side of Harmony: Can Trade and Competition Laws Work Together in The International Marketplace?' [2002] American University International Law Review 17 <Https://Www.Wcl.American.Edu/Journal/Ilr/17/Epstein.Pdf>.

[217] 'Issues For Trade and Competition In The Global Context' (2004) 5 OECD Journal: Competition Law And Policy <Http://Www.Oecd-Ilibrary.Org/Governance/Issues-For-Trade-And-Competition-In-The-Global-Context_Clp-V5-Art10-En>

3.2.1. Trade liberalization

Recent decades have seen a rapid growth of the world economy. International trade plays an important factor in the growth of economies. The increase and growth of trade is a joint effort of both technological development and concentrated efforts of states and international organizations to reduce trade barriers. Some developing countries have opened their economies to take full advantages of the economic development through trade and many of the developing countries are still in the process of doing so. According to ´International Monetary Fund´ IMF, in the past 20 years, the growth of world trade has increased by average 6 percent per year. [218]

Since 1947, when the General Agreements on Tariffs and Trade (GATT) was created, the world greatly benefited from eight rounds of multilateral trade liberalization, as well as in the forms of unilateral and regional liberalization. The setting up of World Trade Organization (WTO) has been an important step towards trade liberalization.

Trade liberalization has had a direct impact on the growth of the world economy and living standards. Most of the developing countries have benefited from the liberalization. And, recently, developing countries have become much more important in international trade, as they now account for one-third of world trade. Developing economies have increased their exports of manufactured goods and service-related products to about 80 percent in the world economy. Also, the trade between developing countries has grown rapidly to about 40 percent. Progress has been great in many countries in Asia and to a lesser extent in Latin America. And the growth has been rapid in Africa and few Middle East countries. [219]

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[218] 'Global trade liberalization and the developing countries -- An IMF Issues Brief' (*Imf.Org*, 2017) <Https://Www.Imf.Org/External/Np/Exr/Ib/2001/110801.Htm#I>

[219] Julian Epstein, 'The other side of harmony: can trade and competition laws work together in the international marketplace?' [2002] American University International Law Review 17 <Https://Www.Wcl.American.Edu/Journal/Ilr/17/Epstein.Pdf>.

According to the World Trade Statistical Review 2016, the value of merchandise trade[220] in commercial services in 2015 has nearly doubled since the year 2005. Further, the ratio of merchandise trade to GDP fell down sharply in the year 2009 following the economic crisis but it regained back quickly in the year 2010-2011. Since 2012 a gradual decline has been observed.

The share of developing economies in merchandise exports increased form 33 per cent in 2005 to 42 per cent in 2015. And the merchandise trade between developing economies has increased from 41 per cent to 52 per cent of its global trade in the last ten years. It can be seen that trade growth has followed a slow and a steady development throughout the years. The growth of world merchandise export and import has been steady in the year 2015 with an estimated 2.7 per cent. While according to the data's collected by the WTO in the year 2016 the estimated increase in world merchandise (both export and import) has been steady with 2.8 per cent. [221]

Many economic researchers such as Anderson and Peter Holmes are of the opinion that competition policies and the international trade liberalization share common goals and objectives, which relate to the promotion of economic efficiency and consumer welfare. Further, they also agree to the point where a lack of efficient competition polices may erode the benefits of trade liberalization.[222]

Under globalization and trade liberalization, competition policies are more complex because abuse of market power can occur unevenly across several markets and beyond the jurisdictions of a national authority. Also, the restrictive business practices may be carried out by the domestic producers on the foreign market or by a foreign producer in a domestic market.

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[220] Merchandise Trade (Definition by The OECD Glossary): goods which add or subtract from the stock of material resources of a country by entering (imports) or leaving (exports) its economic territory. goods simply being transported through a country (goods in transit) or temporarily admitted or withdrawn (except for goods for inward or outward processing) do not add to or subtract from the stock of material resources of a country and are not included in the international merchandise trade statistics.

[221] 'World trade statistical report 2016' (2016) <Https://Www.Wto.Org/English/Res_E/Statis_E/Wts2016_E/Wts2016_E.Pdf>

[222] Robert D Anderson and Peter Holmes, Competition policy and the future of the multilateral trading system (2002), Pp. 11 -14.

This would lead to the involvement of many competition agencies. One of the problems of trade liberalization with regards to the competition policy is that, at times, there are certain behaviours which may be seen as harmful by only one party or one country only.

These are the circumstances in which the role of multilateral trade agreements or the FTAs may come into scene and have an important play. Trade liberalization has resulted in the opening of markets and thus allowing more competition in the market. Competition laws provide a relatively new form of legislating and have evolved more rapidly in developed economies, like Europe and United States of America, than in developing economies. In the past few decades, many developing economies have adopted competition provisions and laws in their domestic level. As the laws are still evolving in developing economies, they still suffer from many regulatory gaps which allow the producers and international firms to use them to their advantage. Philippines adopted its competition law in July, 2015.[223]

The Philippines Competition Act came into force after being pending in the congress for almost 24 years. This primary competition policy of the Philippines ensures the protection of the competitive market and intends to promote the well-being of consumers and their proper protection in the market place. According to the Philippines government, '*the Act reflects the belief that competition: (i) promotes entrepreneur spirit,* (ii) *encourages private investment,* (iii) *facilitates technological development and transfer, and (iv) enhances resource productivity."* [224]

It is clear that competition facilitates trade and enhances trade liberalization and vice-versa. Trade liberalization has given immense economic growth, but trade does not only work by itself, it is co-dependent on many factors, and it is important for them to coexist in a harmonized way, so as to benefit all sectors and all economies.

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[223] 'The Philippine Competition Act and its implementing rules and regulations - Philippine Competition Commission' (Philippine Competition Commission, 2015) <Http://Phcc.Gov.Ph/Implementing-Rules-Regulations-Philippine-Competition-Act/>.

[224] 'The Philippine Competition Act and its implementing rules and regulations - Philippine Competition Commission' (*Philippine Competition Commission*, 2015) <Http://Phcc.Gov.Ph/Implementing-Rules-Regulations-Philippine-Competition-Act/>.

The lowering of trade barriers or reduction of transportation costs has resulted in the expansion of the markets; this has a direct consequence on the competition pressure which some firms face. [225] Currently, each individual State manages its own competition policies, but due to the recent liberalization of trade and economies, the need for countries to strengthen their competition laws and in particular laws with extraterritorial scope, there is a need to facilitate policies and regulations on international co-operation enforcement in competition laws.

The increase of competition in the market has also resulted into many anti-competitive practices and it can hinder the growth which has been rendered by trade liberalizations. Due to trade liberalization, the consequences of economies of scale and imperfect competition have been felt over the years. The welfare gains can be magnified if the liberalization has led to reduction in the monopolistic power of the domestic firms. Further, due to the entry and exit restrictions the overall welfare of a particular sector can be reduced, especially in sectors which rely heavily on economies of scale. To explain it clearly, we may take the example of firms in which the total cost exceeds the marginal costs. In the research done by Dani Rodrick, in ´The limit of trade policy reform in developing countries´ it can be seen from the analysis that the imperfect competition and unexploited scale economies are very much prevalent in the developing economies.

Developing countries have recently opened its trade barriers to include foreign investment. The Foreign Direct Investment (FDI) decisions are made on the basis of the efficiency considerations and interactions with the domestic producers and are more likely with potential technology spill overs, especially when trade is liberalized and competitions are enforced. [226]

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[225] 'The Impact the competition policy has on the liberalisation of international trade. case study: The Cartel' (2017) <Http://Steconomiceuoradea.Ro/Anale/Volume/2015/N1/002.Pdf>.

[226] 'The Interaction amongst trade, investment, and competition policies: OECD Trade Policy Working Paper No. 60' (2017) <Http://Www.Oecd.Org/Officialdocuments/Publicdisplaydocumentpdf/?Doclanguage=En&Cote=Tad/Tc/Wp(2007)2/Final>

One good example of opening up trade barriers and involving of FDIs in the country is Chile. In the year 1982, the General Law of Telecommunications opened its telecommunication industry to competition.

This led private investors in the telecommunication sector to enter the market. Before the year 1982 the local telecommunications were supplied exclusively by Compaeñía de Teléfonos Chile (CTC). After the telecommunication liberalization, the telecommunication law did not restrict the number of licences provided to grant the telecommunication services in Chile.[227] However, there were certain provisions that operators had to comply with on a mandatory basis. Since there was an increase in the competition in the market, the two main state entities were not interested to connect their networks and the already laid cables with the emerging competition in the market. To solve this issue few interconnection agreements were signed, and competition was limited until Chile introduced the dispute resolution system.

After 1994, once the suppliers were provided with affordable substantial opportunities to provide the telecommunication services. The number of fixed lines tripled from more than one million to more than three million between the period of 1992 to 2000. Competitors secured larger share markets in the Chiles´s urban region.[228] The prices in the rural areas were set closer or below the total cost while the prices in the urban areas were set substantially high. This was done to ensure that all the people of the country had access to basic affordable telephonic services. Also, a separate fund was established to provided subsidized services of the telecommunication. The jurisdiction where CTC had a strong jurisdiction and was a dominant supplier it was required to set a same price for basic services across the geographical regions, for providing the access of network cables.

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[227] 'The Interaction amongst trade, investment, and competition policies: OECD Trade Policy Working Paper No. 60' (2017) <Http://Www.Oecd.Org/Officialdocuments/Publicdisplaydocumentpdf/?Doclanguage=En&Cote=Tad/Tc/Wp(2007)2/Final>

[228] 'Regulation, Competition, And Liberalization' (Journal of Economic Literature Vol. Xliv (June 2006), pp. 325–366, 2006) <Http://Else.Econ.Ucl.Ac.Uk/Papers/Uploaded/177.Pdf>.

This helps competitors to set their network by renting the cables which is already been laid down in remote areas and also in the urban areas. And gives the competitors a strong presence in the market.

Chile is taken as a case study because it is one of the first countries to open fully its market to the world. This is a huge advantage as privatization has been a key element since 1982. And according to the report of the Global Economic Monitoring Unit which comes under the Development Policy & Analysis divisions of the United Nations (UN) Chile as a country comes under one of the high-income developing/ emerging nation and in the year 2014 shifted upwards in the Global National Income ranking. [229]

In the above paragraph, it can be seen that the opening of market and has led to many private competitors in the market of Chile. Telecommunication is not the only reason why Chile stands in the position it is today. But certainly, telecommunication has played an important aspect in the growth and involving more competitors in the market.

Trade liberalization leads to opening of markets, which allows the free flow of trade and this in turn results into formation of many trade agreements which help formulate economic relationship. This is done to favour free trade with the reduction of tariffs and trade barriers in the economies. For a better understanding, the next section will elaborate on the concept of free trade and Free Trade Agreements (FTAs) whose main purpose is to enhance economic growth and bring in competition in the economies.

[229]'Global Economic Monitoring Unit, Un' (2014) <Http://Www.Un.Org/En/Development/Desa/Policy/Wesp/Wesp_Current/2014wesp_Country_Classification.Pdf>

3.2.2. Free Trade, FTAs and competition provisions

Free trade is selling of goods and services between countries without tariffs [230] or with minimum tariffs or other restrictions, as well as in non-discriminatory conditions.[231] Free trade and free trade policies have created a level of competition in the market which provokes continuous innovation, leading to better products and it plays a key factor in reducing unemployment to a certain level. It is indeed a key factor in increasing the Gross Domestic Product (GDP) of economies.[232]

Free trade allows the reduction of trade barriers, thus allowing foreign competition into the domestic market. Trade liberalization generates higher gains when markets are competitive and allows free movement of goods and services.

In the past few years, many free trade agreements have been entered into by several countries, and these agreements have brought international competition in the domestic markets. However, the effort of incorporating competition policies in the multilateral trading system has not been a very successful affair. In the year 2004, the WTO General Council made an effort to include competition policies in the multilateral agreements but was not successful in doing so entirely. Since then, no work towards including this issue at a multilateral level has taken place.[233]

The above suggests that it is difficult to formulate competition policies in a multilateral agreement. This will be one of the key elements of my research, as it will help us to determine the co-relation between trade and competition policies.

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[230] Tariffs: according to the explanation of WTO custom duties on merchandises are called tariffs. tariffs give a price advantage to locally produced goods over similar goods which are imported, and they raise revenue for the governments.

[231] OECD Directorate, 'OECD glossary of statistical terms - free trade definition' (*Stats.Oecd. Org*, 2017) <Https://Stats.Oecd.Org/Glossary/Detail.Asp?Id=6265> Accessed 29 June 2017.

[232] 'Do Free Trade Agreements Encourage Economic Development in The U.S.?' (*Ncbfaa.Org*, 2017) <Http://Www.Ncbfaa.Org/Scripts/4disapi.Dll/4dcgi/Cms/Review.Html?Action=Cms_Document&Docid=17730&Menukey=Pubs> Accessed 29 June 2017.

[233] 'Competition Policy Within the Context of Free Trade Agreements' (2017) <Http://E15initiative.Org/Wp-Content/Uploads/2015/07/E15-Competition-Laprevote-Frisch-Can-Final.Pdf>

Due to the recent growing importance of bilateral and multilateral agreements in both developed and developing nations alike, the need to incorporate competition policies in international trade agreements has been felt. [234] There has been a dramatic rise in the number and importance of bilateral and multilateral free trade agreements over the years, this indeed has provided developed and emerging nations with an increasingly popular route for promoting competition in the area of international trade.

According to research done by the ´International Centre for Trade and Sustainable Development´ (ICTSD) it can be seen that there has been a gradual increase and shift towards more regional agreements which include negotiations in the Asia-Pacific Regions for a Trans-Pacific Partnership (TPP)[235] Agreement, the Regional Comprehensive Economic Partnership (RCEP)[236] which consists of the members of ASEAN[237] and six other WTO member states. These regional agreements may provide a wide geographical scope and also it will be an important step towards having multilateral competition laws and provisions.

Further, according to the data gathered by ICTSD which states that the various provision of FTAs, which may include market access, non-discrimination or import/export restrictions, may have a direct or indirect impact on competition policies. The inclusion of competition provisions in trade agreements is beneficial for both developed and developing countries; especially for developing countries, as these nations suffer disproportionately from cross-border anti-competitive practices.

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[234] 'Issues for trade and competition in the global context' (2004) 5 OECD Journal: Competition Law and Policy <Http://Www.Oecd-Ilibrary.Org/Governance/Issues-For-Trade-And-Competition-In-The-Global-Context_Clp-V5-Art10-En>

[235] Trans Pacific Partnership (TPP) Is A Trade Agreement Between Australia, Brunei, Darussalam, Canada, Chile, Japan, Mexico, New Zealand, Peru, Singapore, United States (Until 23rd January 2017) And Vietnam.

[236] Regional Comprehensive Economic Partnership RCEP Is an FTA between members of the association of Southeast Asian Nations (ASEAN) And With Six Partners Namely People's Republic Of China, Republic Of Korea, Japan, India, Australia And New Zealand.

[237] ASEAN Members Includes: Brunei, Cambodia, Indonesia, Lao, Malaysia, Myanmar, Philippines, Singapore, Thailand, Vietnam

The inclusion of competition laws and policies leads to a harmonized balance between the rights of producers and protection for consumers. A well-administered set of competition provisions would not only do good to a particular firm or groups of firms, it will also lead to the growth of the economies.[238]

FTAs play an important role in promoting competition, in the form of inclusion of provisions of competition, competition advocacy and anti-competitive provisions. From the number of FTAs studied and sampled by the ICTSD which has been taken with the help of the database provided by WTO, almost 21 per cent of the FTAs consist of provisions on competition, which mainly focus on the promotion of competition and economic growth one way or another. However, most of the provisions mentioned in these agreements are too broad and vague. For instance, the 2007 Chile and Japan FTA, the provisions in regard to the anti-competitive practices are vague and broad. Article 166 and 167 addresses ´General Provisions´ and ´Cooperation on Controlling Anti-Competitive Activities´ respectively. They state that the countries shall apply their respective laws to control anti-competitive practices.[239]

> *¨Article 167: Cooperation on Controlling Anti-competitive Activities*
>
> *The Parties shall, in accordance with their respective laws and regulations, cooperate in the field of controlling anti-competitive activities subject to their respective available resources.* ¨[240]

On reading the above article it can be seen that the content and the meaning is broad and at the same time can give advantage to one party over the other, as not necessarily the domestic competition laws of both the countries are the same. This is an issue of concern as during a cross-border competitive practices there may be difficulties faced by member states, and for the member state with a weaker domestic competition law and provisions the adoption of such measures will be at loss in a given agreement.

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[238] 'Competition Policy' (2017) <Http://Siteresources.Worldbank.Org/Intranettrade/.../C16.Pdf>.

[239] Agreement between Japan and the republic of Chile for a strategic economic partnership, 2007.

[240] Agreement between Japan and the republic of Chile for a strategic economic partnership, 2007.

According to detailed cross-country research done by Dutz and Hayri (1999), it was found that, in the long run, effective competition policies would be beneficial and will help to lift the economies. [241]

It is important to note that the anti-competitive practices and restrictive competitive behaviours may nullify the effects which have been achieved by trade liberalization over the years. Practitioners and academic literature [242] state that the benefits which FTAs provide, such as market access, import/export restrictions (as discussed in the above paragraph), can be severely restricted or nullified through dominant positions of firms in markets, anti-competitive agreements between market participants and even the cross-border mergers which have an anti-competitive effect. [243]

One of the main aims of FTAs is to create a true ¨economic partnership¨ between the parties, which also focuses on and intensifies the issues related to competition among the parties involved.[244] Due to increase in global trade/ cross-country trade the need for competition authorities to communicate with each other and exchange information is needed. The incorporations of many competition provisions in trade agreements are deeply felt due to the fact that there is a need to exchange many cross-border information amongst the authorities. This is done to make the working of the state and international competition authority in a smooth manner. Further, as discussed earlier, an increasing number of FTAs devote certain provisions or chapters to competition related matters.

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[241] Mark A. Dutz and Aydin Hayri, 'Does more intense competition lead to higher growth?' (*Ideas.Repec.Org*, 2000) <Https://Ideas.Repec.Org/P/Wbk/Wbrwps/2320.Html>

[242] Holmes/Papadopoulos/Kayali/Sydorak: Trade and Competition in RTAs: A Missed Opportunity? In: Brusik/Alvarez/Cernat (Eds.), Competition Provisions in Regional Trade Agreements: How to Assure Development Gains, 2005, pg. 67, 71

2. Anderson/Evenett, Incorporating Competition Elements in Regional Trade Agreements: Characterization and Empirical Analysis, Working Paper, 2006, Section 2.1; Desta/Barnes, Competition Law in Regional Trade Agreements: An Overview, In: Bartels/Ortino (Eds.), Regional Trade Agreements and The WTO Legal System, 2006, pg. 239 (242).

[243] Christoph Herrmann, European Yearbook of International Economic Law 2013 Pp. 43 - 44 (Springer 2015).

[244] Christoph Herrmann, European Yearbook of International Economic Law 2013 Pg. 44 (Springer 2015).

Despite the fact that most of the provisions are broad and vague, it is also important to note that most of these FTAs are amongst developed countries, but few of these agreements cater for developing or least developing countries.

Although competition has brought many positive effects on trade, one of the harmful effects on trade and growth of an economy are anti-competitive practices in cross-border competitive cases, which at times may involve both the economies of developed and developing countries. This may be a problem for many developing economies as competition laws in such emerging economies are still in an initial stage; also, there are many developing economies which still have not implemented competition laws. It is important for FTAs to have provisions which focus on competition policies so as to help the developing economies to cope with the changing market trends.

Examples of the harm that international anti-competitive practices can cause in international trade and market access are quite visible in many cases. One such case clarifies the need to have a strong domestic and international competition provisions: the Egyptian Cement Cartel case. Cartels are a form of anti-competitive practices that rely on agreements between a group of producers of goods or services to regulate supplies or to fix (or otherwise manipulate) prices, thus hampering the competition. Cartels and other anti-competitive practices will be dealt in detail further on in this thesis.

However, this particular example may give a clear picture of the need of having agreements which specifically provide for competition rules and competition advocacy, especially in cases where developed and developing economies are involved.

In the Egyptian cement market, there was only one private cement company that dominated the market till 1999, ´Suez Cements´, which was established in the year 1977. The year 1999 saw the liberalization in the cement market and an increase in private firms to play an important role in the cement industry; this increase was seen due to Egypt's commitment to the economic reforms. With the sale of ´Beni Suef Cement Company' to Lafarge of France in July 1999, the market was opened to foreign investments and foreign companies.

The main privatization transaction that followed the sale of Beni Suef were as follows:

1. Assuit Cement to CEMEX of Mexico (November 1999).
2. Alexandria Cement to Blue Circle of the UK (November 1999).
3. Ameriyah to Cimpor of Portugal (March 2000).

Further, Suez cement made a bid to buy out another state-owned cement industry Tourah Cement in early 2000´s this led to immense competition in the market, which resulted in closure of some of the smaller and newly established private cement producers, who were not able to compete in the market. Apart from 12 per cent stake of State-owned cement company called ´National Cement´ the majority of the market were dominated by foreign market and some domestic Egyptian cement companies such as ´Egyptian cement Company´. [245]

Due to this investment and merger process, three international firms in the cement market in Egypt became dominant. When the demand for the cement started to decrease in the domestic market, few of the domestic companies, especially the Egyptian Cement Companies started exporting to the Canary Islands (Spain) at a very competitive price. Due to this intrusion by the domestic firms in the market, the foreign suppliers in the Egyptian market reacted by lowering their product prices at a minimum level as a strategy to incur loss to the domestic companies. As a result, the Egyptian Cement Company had to lower its export to 75 per cent due to the local price war. After the price war was ended, the prices were agreed between almost all the cement companies through collusion and also the end result led to establishing a fixed market share for each company if they were not able to comply with the prices of the other companies.

As Frederic Jenny[246] has noted from the learnings of Egypt Cement Case in its research on ´ Competition Law and Policy: Global Governance Issues ´:

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[245] 'The Results and Impacts of Egypt's Privatization Program: Special Case Study 2002' (2002) <Http://Www1.Aucegypt.Edu/Src/Wsite1/Pdfs/Results%20and%20impacts%20of%20privatization%20in%20egypt.Pdf>.

[246] Frederick Jenny Is Chairman of The OECD Competition Committee (Since 1994), And Co-Director of The European Centre for Law and Economics of ESSEC (Since 2008).

i. Firstly, in spite of the desire of the governments to facilitate international trade through multilateral or bilateral trade agreements, the Egyptian Cement producers were prevented from exporting to the EU (Canary Islands) by big foreign companies that reacted in such a manner so as to defend their own interest in the market.

ii. Secondly, even though the EU has a domestic competition law which prohibits price fixing and market sharing or the erection of artificial barriers to entry and limit the competition in the territory, these provisions were proved to be useless because of the enforcement problems of the European competition regimes in foreign countries.

iii. Further, the absence of a competition law in Egypt directly played a role in hurting the consumers both in Egypt and in the EU (Canary Islands). Law No. 3 of 2005 on The Protection of Competition and the Prohibition of Monopolistic Practices was ratified in 2005, February. [247]

It can be noted that even though the FTAs provide competition provisions and help for the betterment of the economies, one can see that most of the free trade agreements do not provide specific binding rules but address more to the application of soft laws.

According to the findings by D. Sokol, most of the FTAs entered between Latin-American States do have competition policies in their agreements, but these provisions lack binding and dispute settlement for core antitrust issues such as cartels, merger, collusion etc. Likewise, the repetitive failure to implement hard laws on a multilateral level has resulted in the adoption of soft laws and its attempts to implement them in the best way possible. [248]

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[247] Frédéric Jenny, 'Competition law and policy: global governance issues', (2003), 26, World Competition, Issue 4, pp. 609-624 https://kluwerlawonline.com/journalarticle/World+Competition/26.4/WOCO2003031

[248] D. Daniel Sokol, 'Order Without (Enforceable) Law: Why countries enter into non-enforceable competition policy chapters in Free Trade Agreements' (*Papers.Ssrn.Com*, 2017) <Https://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=1005338> Accessed 3 July 2017.

To determine the relationship between trade and competition it is also necessary to look into the aspect of its international implications and its binding force and material effectiveness.

It is important to understand the role of FTAs in regard to competition provisions. We will discuss the FTAs and competition policy at length in the chapter of international organization and competition policies. To understand how competition and trade function in a given market, it is also important to understand the concept of market and relevant market. This is necessary because not every market is the same, and the competition will flourish differently in different markets, thus also affecting the various sectors in a given economy. Part III of the thesis discusses relevant market in depth.

3.3. Conclusions

From the above it is self-evident that trade and competition co-exist and the goal of both trade and competition are co-dependent on one another. Trade liberalization opens the market thus allowing entry of trade, the free trade flows allow more competitors in the market due to reduction of tariffs and trade barriers; while market plays a key role in binding both trade and competition in a unit. The unit of trade and competition affects both the consumers and the producers in two ways, positive and negative.

Competition and trade are directly proportional, i.e., with the increase of trade and opening of trade barriers in market, competition has increased. With the increase of competition in the market, there also are many restrictive trade practices in the market. Both competition and trade laws deal with market access.

The goals of both the areas are to open market and bring in healthy competition in the market to enhance economies. The common place where trade and competition laws intersect is when undertakings restrict trade thus harming competition in the market.

The barriers to trade have been eliminated through rigorous trade commitments and regulations in the frameworks of the multilateral trading system. However, there is still many barriers and restraints faced in the field of competition laws. The effect of anti-competitive practices nullifies the positive effect brought on by opening up of trade barriers and by liberalization, which in turn leads to a setback in the process of economic growth. Many developing economies have recently adopted competition law, and deal with regulatory gaps and uncertainties in the enforcement of such laws and policies.

Trade and competition have a complex relationship and the thesis will further discuss and establish this relationship. The thesis will further discuss the impact of anti-competitive practices on trade and the importance of international co-operation for competition enforcement.

4. ANTICOMPETITIVE PRACTICES AND DEVELOPING ECONOMIES

The increase in international trade has encouraged many countries to open their borders and provide market access to foreign competitors. This was possible as countries adopted laws to facilitate international trade. As discussed, trade is only one aspect of market liberalization, the other important aspect is competition. Trade and competition are two different branches that intersect together to act as one.

The economic characterises of developing economies can make it suspectable to anti-competitive practices. The market is most of the time small, concentrates, fragmented, it also faces many infrastructural challenges, they have heavy state presence, corruption can also be a very big challenge here. Many developing countries may have a small domestic market, so there is a limit as to how much competition they can handle at a given time. The minimum efficiency scale dictates how few selected firms within the domestic market can operate efficiently. [249] The poor quality of infrastructure further puts a lot of burden on these economies as it makes it difficult for domestic firms to expand to the export markets and high transportation prices can increase the export prices.[250] A good example in this case was provided by Frédéric Jenny, where he states that in Turkey, exporters rely heavily on maritime transports due to the lack of good land transportation. However, the country has seen an increase in the restrictive trade practice in the maritime sector, thus increasing the prices of export prices. This in turn has undermined the competitiveness of the Turkish exporters.[251]

The market structure of developing countries can magnify the effects of anticompetitive practices. Thus, it is important for such economies to strengthen their competition laws, and especially their enforcement mechanisms.

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[249] Thomas K. Cheng. (2020). Competition Law in Developing Countries. Pg 251-255

[250] Ibid 251 -255

[251] Frédéric Jenny, 'Cartels and collusion in developing countries: lessons from empirical evidence', (2006), 29, World Competition, Issue 1, pp. 109-137, https://kluwerlawonline.com/journalarticle/World+Competition/29.1/WOCO2006007

The focus of this chapter will be on in-depth research on how increasing globalization and trade liberalization is affecting trade and competition in developing economies. This chapter will throw light on how strong policy framework can help enhance economic growth of a given economy.

4.1. Extraterritorial scope of competition law

Transnational restrictive business practices have increased over the years and many jurisdictions across the world have adopted competition laws which have extraterritorial application.[252] Extraterritorial reach of competition laws refers to the extent to which jurisdictions are permitted to apply their domestic laws to conduct which occurs outside their jurisdiction.[253] The application can apply to foreign entities that are not present in the particular jurisdictions, but its conducts have caused harm to the local consumers and producers. [254]

As transnational trade has increased, many international institutions have addressed the issue to develop multilateral mechanism to curb the negative impact of transnational restrictive trade practices. There have been many developments in various branches of competition law, over the years international cartels have seen an increase in efforts to curb the effect on trade. From the year 1990-2016 international cartels alone caused overcharges exceeding $1.5 trillion, cartels can inflate prices of components and ingredients of the finished product that consumers purchase all over the world.[255]

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[252] Albania, Argentina, Belarus, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, Eswatini, EU, Honduras, India, Kenya, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russian Federation, Saudi Arabia, Serbia, South Africa, Turkey, Ukraine, United Republic of Tanzania, United States, Viet Nam, Zambia, Zimbabwe

[253] Korean Wong Ervin and Melanie Kiser, 'Extra-Territoriality' <www.concurrences.com>.

[254] 'Developing country experience with extraterritoriality in competition law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3' (United Nations 2021) <https://ssrn.com/abstract=3981818>.

[255] John M Connor, 'The Private International Cartels (PIC) Data Set: Guide and Summary Statistics, 1990-July 2016, 2nd ed.' (2016), at 24, available at <https://ssrn.com/abstract=2821254>.

In this part of the thesis, we will cover in depth the international hardcore cartels and export cartels in the chapter of international cartels.

The application and enforcement of extraterritorial scope of national competition law comes with its own set of challenges. Even though most competition agencies have the authority to investigate business they face several challenges. These challenges include, lack of enforcement capacities, the limitation on the enforcement of remedies on parties which are not physically present in the given jurisdiction. The other challenges include, lack of co-operation, barring of information sharing among competition authorities etc.[256] These are some challenges faced by most of the jurisdiction. It is important to note that many of the economies in transition are still developing and strengthening their competition regulations and authorities.

UNCTAD conducted a survey among 40 developing and transitioning economies[257] out of which 34 jurisdictions participating have domestic competition law which applies extraterritorially to foreign entities that are not present in the forum but whose conduct harm local consumers or producers. An exception to this is Chile, where the legislation provides an appropriate textual basis.[258]

In the report it is made clear that *"Extraterritorial jurisdiction is provided for by means of recognition of in-forum effects of foreign conduct as a sufficient nexus for the sake of jurisdictional assertions."*[259] Various jurisdictions with an extraterritorial scope in its national laws adopted effects doctrine under different names and in different forms. *"This*

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[256] Willard Mwemba, 'COMESA: Tug of War on Extraterritoriality and the Saving Grace of Regional Law' <globalcompetitionreview.com>.

[257] The 40 jurisdictions that participated in the Project were: Albania*, Argentina, Armenia*, Belarus*, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, El Salvador, Eswatini, Guyana, Honduras, India, Indonesia, Jamaica, Kenya, Malawi, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russian Federation*, Saudi Arabia, Serbia*, South Africa, Turkey, Ukraine*, United Republic of Tanzania, Viet Nam, Zambia, and Zimbabwe (* denotes transition economies using the United Nations terminology).

[258] 'Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3' (United Nations 2021) <https://ssrn.com/abstract=3981818>. Pg. 2

[259] 'Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3' (United Nations 2021) <https://ssrn.com/abstract=3981818>. Pg. 3

principle enables states to assert jurisdiction over foreign entities based on the in-forum economic effects of their anticompetitive conduct, regardless of the location of the culprits or the conduct itself." [260]

Effects doctrine lets the states to apply domestic law to foreign activities which has caused competitive harm in the domestic soil. It does not allow states to perform any acts outside the state i.e., this doctrine does not allow the state to perform any acts of authority on the foreign soil.[261]

Effects doctrine has been controversial based on the effects felt while asserting jurisdictions. The effects doctrine was adopted by the US Court in the United States v Aluminium Co of America (Alcoa), where all the acts in this case were committed outside the territory of the United States which included the defendant´s alleged inducement of the Costa Rican government to monopolize the banana trade.[262] This doctrine was further confirmed in the Hartford Fire Insurance case [263]where the Supreme Court stated that it can be established that the US antitrust laws apply to foreign conduct which has some substantial effect in the US.[264]

In the EU, the courts have avoided a similar approach in the context of competition law. They designed the principle around of principle of territoriality, where a two jurisdictional test emerged i.e., the implementation test and the effects test.[265]

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[260] Marek Martyniszyn, 'Competitive Harm Crossing Borders: Regulatory Gaps and A Way Forward' (2021) 17 (3), 692 <https://doi.org/10.1093/joclec/nhaa034>.

[261] Marek Martyniszyn, 'Competitive Harm Crossing Borders: Regulatory Gaps and A Way Forward' (2021) 17 (3), 686–707 <https://doi.org/10.1093/joclec/nhaa034>.

[262] *United States v Aluminium Co of America (Alcoa)* [1945] United States Court of Appeals for the Second Circuit, 148 F2d 416 (United States Court of Appeals for the Second Circuit).

[263] *Hartford Fire Insurance Co v California,* [1993] Supreme Court of the United States, 509 U.S. 764 (Supreme Court of the United States).

[264] European Commission, roundtable on cartel jurisdiction issues, including the effects doctrine, Working Party No. 3 on Co-operation and enforcement.

[265] Case C-413/14 P Intel v. Commission' (2017) Court of Justice of the European Union para 40–46.

The commissions jurisdiction under the public international law to find and punish a conduct adopted outside of the EU, can be established on the basis of the two tests.

The jurisdiction over foreign entity can be established if the conduct was implemented in the EU and based on the qualified effects of the investigation conducted.[266] In cases where these conducts have immediate, substantial and foreseeable effect within the EU, the test is satisfied. [267]

In India, the extra-territorial scope was not introduced until the Competition Act 2002 came into force. The Monopolies and Restrictive Trade Practices Act, 1969 [MRTP Act] repealed and is replaced by the Competition Act, 2002, with effect from the 1st of September 2009. [268] In 1999 the Raghavan Committee[269] was set up to recommend new competition laws and regulations, as the need was felt to draft competition laws to suit the new economic developments.[270] But before the law came into force, effects doctrine was used in two cases,[271] the Soda Ash case (This case will be discussed in detail in the chapter of export cartel). The second case Haridas Exports Case[272], a complaint was issued against the three Indonesian companies that they were manufacturing float glass and were selling it at predatory prices in India, and thus, were resorting to restrictive and unfair trade practices.

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[266] Marek Martyniszyn, 'Competitive harm crossing borders: regulatory gaps and a way forward' (2021) 17 (3), 692, 693 <https://doi.org/10.1093/joclec/nhaa034>.

[267] *Case T-102/96, Gencor Ltd v. Commission*, [1999] ECR II-753

[268] 'Ministry Of Corporate Affairs - Competition Commission of India' (*Mca.gov.in*, 2020) <http://www.mca.gov.in/MinistryV2/cci.html>

[269] 'Competition law and policy in India' (2008) <https://www.cci.gov.in/sites/default/files/presentation_document/OECDKoreaCentreIndianCompetitionLaw14Nov2008.pdf?download=1>

[270] 'Ministry Of Corporate Affairs - Competition Commission of India' (*Mca.gov.in*, 2020) <http://www.mca.gov.in/MinistryV2/cci.html>

[271] Alkali Manufacturers v. American Natural Soda Ash, (1998) 3 Comp LJ 152 MRTPC

Haridas Exports V/S All India Float Glass Mfrs. Association and Others. MANU/SC/0596/2002 111 Compcas617 (SC)

[272] Haridas Exports V/S All India Float Glass Mfrs. Association and Others. MANU/SC/0596/2002 111 Compcas617 (SC)

The imports from Indonesia also resulted in lowering the production of the Indian industry and would force the companies in India to shut, which in turn would have a direct impact on the employment in the industry. [273] In this case the result was similar to that of Soda Ash, were the lower court ordered injuction against the imports but once the parties appealed and took the matter to the Supreme Courts of India, the court set aside the injuctions on the grounds that under MRTP the commission lacked the jurisdiction as it had no extra-territorial operation.[274]

There has been a gradual increase of countries adopting extraterritoriality in competition law. Some countries that adopted these laws early on were Brazil, Costa Rica and Turkey in 1994. The latest country to adopt extraterritoriality in competition law are Nigeria and Viet Nam. The framing of extraterritoriality provisions of most of the jurisdictions are in line with the provisions of the EU, Japan and the USA. [275]

The lysine cartel involved five companies that had artificially fixed prices across several jurisdictions.[276] In 1996, for Mexico it was one of the first cases involving transnational anticompetitive conducts. It was also one of the first transnational anticompetitive cases in South America. In 1998, the Mexican authorities found two firms, a Mexican firm and Japanese firms were penalized with fine.[277]

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[273] 'Extraterritorial application of the competition act and its impact' (*Nishithdesai.com*, 2012) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Extraterritorial%20Application%20of%20the%20Competition%20Act%20and%20Its%20Impact.pdf>.

[274] 'Extraterritorial application of the competition act and its impact' (*Nishithdesai.com*, 2012) <http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Articles/Extraterritorial%20Application%20of%20the%20Competition%20Act%20and%20Its%20Impact.pdf>.

[275] Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3' (United Nations 2021) <https://ssrn.com/abstract=3981818>. Pg. 4,5

[276] US, France, Hungry, Indonesia, Italy, Japan, Korea, Mexico and Thailand.

[277] Communication from Mexico to the WTO Working Group on the Interaction between Trade and Competition Policy (14 August 2002), WT/WGTCP/W/196, 7-8.

An in-depth analysis of this case can be seen in the chapter of international cartel. Brazil initiated its first transnational anticompetitive case in 1990, and since then it has conducted various such cases successfully.[278]

There has been success and failure across jurisdiction in the enforcement on international competition laws. However, on a global regulatory front, there are still much work to be done. Further in the thesis a detailed analysis will be done on global competition rules and what are the current requirements for a proper enforcement of the competition rules on a transactional level. OECD, ICN and UNCTAD all provide with guidelines on co-operation. OECD and ICN have jointly focused on preparing reports on co-operation enforcement in 2021 which involved 62 members of both the institutions. [279] All the jurisdictions[280] in the report have agreed that for a proper enforcement of competition law transnationally, international co-operation among agencies play a very important role. And one of the main problems which has been encountered by most of the members is sharing and handling of confidential information.[281]

In the 2021 UNCTAD survey, many competition agencies identified the key hurdles between enforcement of competition law domestically and transnationally:

— *procedural rules, especially relating to service of process*

— *collection and sharing of evidence*

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[278] Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3' (United Nations 2021) <https://ssrn.com/abstract=3981818>. Pg. 8

[279]OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competitionenforcement-2021.htm

[280] OECD Members: Austria, Belgium, Canada, Denmark, France, Germany, Greece, Iceland, Ireland, Italy, Luxembourg, Netherlands, Norway, Portugal, Spain, Sweden, Switzerland, Turkey, United Kingdom, United States

ICN Members: Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia

[281] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in- competitionenforcement-2021.htm pg. 163

— *dealing with non-compliance/non-cooperation during investigations*

— *absence and/or insufficiency of existing international instruments regarding enforcement*

— *enforcement/execution of rendered decisions judgments (inclusive of collection of any imposed fines).”* [282]

Many competition agencies still face a range of challenges, CADE in 2017 reported that many of its investigations launched in cases including transnational scope are still pending, as their attempt to serve legal notice abroad fail most of the time. [283] In Turkey, there has been cases where the competition authority has requested for cooperation’s on down raids, notification, information exchange and collection of monetary penalties from competition authorities in other jurisdictions for several cases [284]via the help of Ministry of Foreign Affairs and the Ministry of Justice but its attempts have been unsuccessful.[285] Also, in case of the Colombian auto-part cartel, the court had to terminate the proceedings due to ineffective services of the investigation processes and due to various procedure errors.[286]

Purely internal matters such as the procedural rules can be amended internally, without the need for an international interference or negotiation.

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[282] Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3’ (United Nations 2021) <https://ssrn.com/abstract=3981818>. Pg. 8,9

[283] Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3’ (United Nations 2021) <https://ssrn.com/abstract=3981818>. Pg. 10

[284]In the cases of (Elektrik Turbini decision (04-43/538-133, 24.06.2004), Ithal Komur decision (06-55/712-202, 25.07.2006), Ithal Komur II decision (06-62/848-241, 11.09.2006), Cam Ambalaj decision (07-17/155-50, 28.02.2007) and Condor Flugdienst decision (11-54/1431-507, 27.10.2011)).

[285] Gönenç Gürkaynak and Ceren Özkanl Samlı, ‘The Legal 500 Country Guides: Turkey ’ 7, 7 <www.gurkaynak.av.tr>.

[286] Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3’ (United Nations 2021) <https://ssrn.com/abstract=3981818>. Pg. 10

For instance, to serve the notice of objection in a foreign country to an entity or person whose effects have harmed competition in the domestic market.[287] These changes are needed globally, though each country should take the initiative.

The economic harm of international restrictive practises which go unnoticed or could not be prosecuted because of the gaps in global competition rules has many negative impacts on the economies as a whole. This part of the thesis will shed light into the challenges faced by competition authorities and the impact on trade due to the restrictive competition practices.

4.2. Cross-border effects of anticompetitive practices

4.2.1. Introduction

Milton Friedman[288] in his speech on the series regarding ´Free to Choose´ made an interesting explanation regarding globalization and its affect in the world trade by giving a clear and simple example of a pencil and how it is made. He stated that *´There's not a single person in the world who could make this pencil´*. This sentence says a lot about the impact of global trade. In his speech he states:

> *"Look at this lead pencil. There's not a single person in the world who could make this pencil. Remarkable statement? Not at all. The wood from which it is made, for all I know, comes from a tree that was cut down in the state of Washington. To cut down that tree, it took a saw. To make the saw, it took steel. To make steel, it took iron ore…." Milton Friedman (1980)* [289]

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[287] In Geigy the European Court held that, even if contrary to the law of the other state, such service is legal so long as it is established that 'the addressee took cognisance of the objections held against him'. Case 52/69, Geigy AG v Commission [1972] ECR 787, 823-4.

[288] Milton Freidman (1912-2006) Was An American economist who received the 1976 nobel memorial prize in economic sciences for his research on consumption analysis, monetary history and theory and the complexity of stabilization policy.

[289] Milton Friedman (1980) his vision of how the free market might bring the world peace in a 10-hour pbs broadcast series called ´free to choose´ <Https://Www.Youtube.Com/Watch?V=R5gppi-O3a8>

The above example is a simple, but very important example, it sheds light on how international trade is interconnected. If any anticompetitive practices which hampers competition in a country which has trade relations with other countries, the other countries will also feel the effect of such practice.

In recent times many businesses operate and have managements in more than one country; many companies prefer to have their production system distributed throughout the world. Many undertakings[290] have their production line set up in developing countries, this is due to the abundance in workforce and resources. This leads to lowering of their production cost and as a result more profit for the companies. A good example for this scenario would be Apple iPhone[291] which are designed in California and the assemble process takes place in China.

When a MNC enters into a restrictive trade practice in developing economy, the impact of such practice can be immense; this is due to the regulatory gaps in the competition law and its enforcement mechanisms in many developing countries. These economies lack resources, proper implementation of laws and most importantly, multinational corporations can often be more powerful than national states and strategically get out of the implication of the anticompetitive practices conducted by it.[292]

International co-operation enforcement in competition laws is a key factor for competition agencies to help and strengthen competition laws. When the reach of an anti-competitive practices affects multiple jurisdictions, many factors are needed to be considered for a successful investigation and enforcement of laws by the countries involved. In this chapter we will discuss different anti-competitive practices and how they impact trade in developing economies.

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[290] Apple, Cummins, Coca-Cola, Enviro Board, IBM, M&S, Nike etc.

[291] Cristopher Baugh, 'iPhone Still Assembled in China, Not USA, Due to "Cluster Effect"' <https://www.iphoneincanada.ca/

[292] Competition Commission v Bank of America Merrill Lynch International Limited and Others (175/CAC/Jul19) [2020] ZACAC 1; 2020 (4) SA 105 (CAC) (28 February 2020) <http://www.saflii.org/za/cases/ZACAC/2020/1.html>

4.2.1. International cartels and impact on developing economies

Cartel has been previously explained in the chapter of types of anti-competitive agreements. Cartels are hugely secretive and difficult to detect, especially when parties involved are of different jurisdictions. In case of international cartel, the involvement of multiple parties and its reach in multiple jurisdictions can make it harder to detect. Members having international business may not only affect one country or economy but will certainly have a chain effect, while keeping in mind that the intensity of the reaction is different depending on the economy. Further, not all countries have the equal resources to detect cartels, as it is time consuming and is hard to detect.

International cartels are agreements which avoid some or all form of competition and consists of parties which are business enterprises domiciled under more than one government and are trading across national frontiers.[293] International cartels date back to the late nineteenth century in Europe. One of the earliest records of international cartel was established in the1880s in German-Swiss Dyestuffs cartel. [294]

Before the 1980s, international cartels operated in homogenous products involving few companies competing in a concentrated market with high barriers to entry and to block new competitors in the market. [295] With the increase of trade and globalization there is rise in the cases of international cartel ever year. A worldwide study on cumulative cartel discoveries within the period of 1989-2016 shows that there has been an immense increase in the number of international cases of cartels. In this research conducted by John M. Connor[296], there are available data on 1336 suspected or convicted cartels.

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[293] Corwin D. Edwards, 'International cartels as obstacles to international trade' [2019] The American Economic Review Vol. 34, No. 1, Part 2. pg. 330

[294] John M. Connor, 'Private International Cartels: Effectiveness, Welfare, And Anticartel Enforcement' [2003] Ssrn Electronic Journal <Https://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=611909>.

[295] John Sanghyun Lee, strategies to achieve a binding international agreement on regulating cartels (Springer 2016).

[296] John M. Connor is a Professor Emeritus at Purdue University and senior fellow of the American antitrust institute.

According to the report there are 7,200 companies that have been caught or punished for their involvement in cartel. [297]

Cartelists in case of international cartels, tend to be very careful at hiding and destroying evidences and agreements. Generally, price increases in products are not noticeable immediately due to the fact that the prices are increased at a slow and steady rate, so it does not alarm the customers, the business community or even the authorities. [298]

The involvement of more than one country in a cartel makes it difficult for the competition authorities of different jurisdictions involved to detect the ongoing collusion. Every country/ jurisdiction has their own competition laws and even though these jurisdictions have the basic concept of competition laws, there can be difference in enforcement mechanisms. In cases of cross-border enforcements, often there are differences between the leniency policies[299] and this may lead to reduce predictability for the applicants and the competition authorities.[300]

Even though there are many set guidelines on cartel investigation processes, international co-operation agreements, each jurisdiction has its own ways to conduct investigation and detect cartels. [301][302] To conduct a cartel investigation and to find a solid proof of the cartel, one requires experts in the field who invest their time and expertise in this field to conduct such cases.

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[297] John M. Connor, 'International Cartel Stats: A look at the last 26 years' [2016] SSRN Electronic Journal <Https://Papers.Ssrn.Com/Sol3/Papers.Cfm?Abstract_Id=2862135&Download=Yes>.

[298] John M. Connor, 'Cartel detection and duration worldwide John M.' [2011] Cpi Antitrust Chronicle P. 2 <Http://Ssrn.Com/Abstract=2229242>.

[299] The term leniency means a system of immunity and reduction of fines and sanctions (depending on the jurisdiction) that would otherwise be applicable to a cartel participant in exchange for reporting on illegal anticompetitive activities and supplying information or evidence. Leniency programmes cover both the narrower defined leniency policy (i.e., the written set of rules and conditions adopted by a competition agency) as well as other elements supplementing the policy in a wider environment. This guidance document covers leniency applications submitted both prior to and after initiation of a case by the competition agency. ('ICN Guidance on Enhancing Cross-Border Leniency Cooperation'. p.3)

[300] Cartel Working Group Subgroup 1, 'ICN guidance on enhancing cross-border leniency cooperation'.

[301]ICN_<https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/cooperation/>

[302] OECD_<https://www.oecd.org/competition/inventory-competition-agreements.htm>

As mentioned earlier, in cases involving transnational cartel investigations, resources are needed to collect evidence, the communication and coordinate between different jurisdictions can consume time to complete the bureaucratic formalities. During the on-going cartel, it is the consumers and competitors who suffer the loss.

For instance, in the truck cartel case[303] the European Union fined truck producers 2.93 billion euros for participating in cartels. These producers included MAN (German company), Volvo (Swedish company), Daimler (German Company), Iveco (Italian company) and DAF (Dutch). The collusion between these international truck producers took place for a span of 14 years. The secretive nature made it difficult for authorities to detect the cartel for such a long time; among the truck producers MAN was first to come forward in front of the Commission which revealed the existence of cartel. Under the leniency program it was not fined as it provided the Commissions with proof and documents of the related truck cartels. However, it is astonishing that despite EU having one of the strongest antitrust laws in the world and well-established competition authorities, it could not detect the cartel earlier on. Given that the cartel was conducted over a long duration, the consumers and other competitors, local businesses who used the services of these trucks were all at a disadvantage and suffered losses in some form or the other.

It is important to take note that despite these truck producer companies being situated in developed economy which has a strong competition authority, it took them fourteen years to detect the cartel. This in particular says a lot about how difficult is it to detect a cartel. Further, this also points to the fact that if it is difficult for these economies to detect collusion, then in cases of developing economies which have recently adopted competition laws and are still in the process of enforcing competition laws; it can be difficult and tedious to detect the cartels as these economies lack experience, resources.

Even though many developing economies have implemented competition policies and have competition authorities, this in itself is not sufficient. There are still remain many regulatory gaps; for instance, many countries in Africa have recently adopted modern

[303] Refer to the Commission Declaration Of 19.7.2016 relating to a proceeding under Article 101 TFEU And Article 53 Of EEA Agreement. Case At.39824-Trucks/C (2016)4673 Final.

competition laws, Nigeria adopted its competition law in 2019[304] while Uganda has not implemented competition laws as its competition bill draft is still pending. [305] The COMESA Competition Commission [306] [307] became operational in the year 2013, which includes 21 member states/countries of Africa and requires all the cross-border transactions to be notifies to the commission. Since its enforcement, the commission has decided over 100 merger cases, however it still has not decided any cartel cases. One of the most important drawbacks here is that the leniency policy is not yet in effect, they have the draft prepared. [308] One of the reasons for no cartel cases in the span of six years is that the implementation and drafting of laws has not been completed to its full extent.

The above example of competition laws and its current position in Africa sheds a light on the fact that many countries are not well equipped to deal and detect in international cartels. Also, the above-mentioned drawbacks and regulatory gaps invite international companies looking for a place to conduct business and take advantage of the gaps in the legal system.

International organizations and institutions on competition are making an effort to help economies by providing them with guidelines to help draft better competition laws and policies. International Competition Network (ICN) has established a working group in 2004 to drive global cooperation and convergence among cartel enforcement

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[304] On January 30th, 2019, the President, General Muhammadu Buhari, GCFR signed the Federal Competition and Consumer Protection Act (FCCPA) 2019 (the Act) which repealed the Consumer Protection Council Act. The FCCPA brought about a unified and codified set of rules that regulate competition law in Nigeria for the first time. Before the enactment, the laws governing competition and consumer protection were separate, fragmented and industry-specific.

[305] 'African Competition Law Developments In 2018 and the Outlook For 2019 | Lex Africa' (*Lex Africa*, 2019) <Https://Www.Lexafrica.Com/Competition-Law-Outlook-For-2019/>.

[306] COMESA Competition Commission (Based in Lilongwe, Malawi) Has Made Its Mark. COMESA Has 21 Member States (Burundi, Comoros, Drc, Djibouti, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Somalia, Sudan, Swaziland, Tunisia, Uganda, Zambia, And Zimbabwe)

[307] The commission's core mandate is to enforce the provisions of the regulations with regard to trade between member states and promote competition within the common market through monitoring and investigating anti-competitive practices of undertakings within the common market and mediating disputes between member states concerning anti-competitive conduct.

[308] 'African Competition Law Developments In 2018 And the Outlook For 2019 | Lex Africa' (*Lex Africa*, 2019) <Https://Www.Lexafrica.Com/Competition-Law-Outlook-For-2019/>.

authorities.[309] ICN has also published an ´Anti-Cartel Enforcement Manual´ this manual consists of different chapters which compiles the investigative approaches of ICN. It states that as enforcement system of different jurisdictions are different thus it only provides a comprehensive guideline for jurisdictions to help them evaluate and put a benchmark on their respective approaches. The manual consists of chapters on raids and inspections, implementing an effective leniency policy, cartel case initiation, international cooperation and information sharing etc.[310]

The above guidelines and manual are especially useful for economies that are currently drafting or are going to draft their competition laws, Uganda has its competition laws draft pending and it could take help of these guidelines to better the enforcement of its laws. OECD has recommendations and best practices on competition law and policy, this also works on the same lines by providing help and guideline to economies to draft and better their laws and policies on competition.[311]

4.2.1.1. Effects of international cartel on trade

As international cartels are spread across various jurisdictions, the impact of such collusion between manufacturers, companies, producers effect trade in a given economy to a certain extent. International cartel is designed in such a way that it aims at reducing competition and enhancing profits, thus, affecting the trade in the given economy.[312] To achieve this aim the cartelists use means such as price fixing, allocation of production, bid rigging, market sharing and output restriction.

This below section helps understand how hard-core cartel and export cartel work and how it impacts trade. International cartels can cause negative impact not only in the

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[309] 'International Competition Network: Cartel' (Old.Internationalcompetitionnetwork. Org, 2019) <Http://Old.Internationalcompetitionnetwork.Org/Working-Groups/Current/Cartel.Aspx>.

[310] 'Anti-Cartel Enforcement Manual: ICN' (Old.Internationalcompetitionnetwork. Org, 2019) <Http://Old.Internationalcompetitionnetwork.Org/Working-Groups/Current/Cartel/Manual.Aspx>.

[311] 'Recommendations And Best Practices on Competition Law and Policy - OECD' (*Oecd.Org*, 2019) <Https://Www.Oecd.Org/Daf/Competition/Recommendations.Htm>.

[312] Corwin D. Edwards, 'International Cartels as Obstacles to International Trade' (1944) Vol. 34, No. 1, Part 2 The American Economic Review <Https://Www.Jstor.Org/Stable/1818705?Seq=1#Page_Scan_Tab_Contents>.

economy where it is taking place but also have a multijurisdictional effect, given the global interdependence in the supply chain. While in situations of export cartels companies collude in a manner that prices are affected in the importing or foreign market. Export cartel has been always been a matter of debate among economists as they are both an exemption to the antitrust policy and also a loophole for exporters to acquire immunity from the antitrust laws as long as their conduct does not affect the domestic market but the international markets only. [313]

4.2.1.1.1. Hardcore cartels

Hard-core cartels are horizontal agreements which have been entered between the competitors. These are agreements by competitors to fix prices, restrict output, submit collusive tenders or dived and share the markets. These agreements have a very negative impact on the economy and cause a lot of monetary loss in the economy.[314] In markets where the sellers have set prices, it is difficult for consumers to avoid paying higher prices in many cases. Hardcore cartels have been treated as illegal since as early as 1897. [315]

In many jurisdictions hard-core cartel conducts are per se illegal, and it is known for its nature to divide markets by territory or by costumers among competitors. Per se rules[316] are those that are always or almost always inherently anticompetitive and damaging to the market. And such agreements leave no room for competition in the market, thus making it per se illegal. [317]

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[313] Sokol, D., 2008. What do we really know about export cartels and what is the appropriate solution? UF Law Scholarship Repository, [online] Available at: <http://scholarship.law.ufl.edu/facultypub/#>

[314] John Sanghyun Lee, Strategies to achieve a binding international agreement on regulating cartels (Springer 2016).

[315] United States V. Trans-Missouri Freight Association (1897), 166 U.S. 290 (1897).

[316] Refer to *U.S. V Socony-Vacuum Oil Co., 310 U.S 150 (1940); United States V. Sealy, Inc., 388 U.S. 350 (1967)*

[317] Study of Cartel Case Laws in Select Jurisdictions – Learnings for the Competition Commission of India (Competition Commission of India 2008) <Https://Www.Cci.Gov.In/Sites/Default/Files/Cartel_Report1_20080812115152.Pdf>.

It has been realized by almost all economies that hardcore cartels are harmful. Neelie Kroes former European Commissioner, in her speech at the economic club of Toronto 2009 mentioned that there is no doubt the cartels are harmful to the economic growth. And further stated that, they cause billions of dollars of direct harm the economy.[318] In cases of international cartels it is difficult for government officials, legislators and, members of the public to estimate as to how much harm has been caused by the such cartels.

Cartels which limit the supply are also known to limit the industrial capacity, as one of the incentives for industrialists to operate in a given country is having a fair and transparent competition laws with minimum risk of dealing with anti-competitive practices.

The OECD report on hard-core carte states that in the US alone according to data collected of 10 cartel cases, individuals and business have to borne additional hundreds of millions of dollars annually as they pay the prices for the price-fixing and competition restrain by the cartelists. It has further effects ten billion dollars in US commerce and has caused an economic loss which is estimated to be over one billion dollars. [319]

The graphite electrodes cartel is a case which sheds a light on how a global cartel can affect trade across the globe. Between the period of 1992 to 1998, SGL Carbon AG (SGL), UCAR International Inc (UCAR), VAW Aluminum AG (Germany), Showa Denko K.K.(SDK), Tokai Carbon Co. Ltd. (Japan), Nippon Carbon Co. Ltd (Japan), SEC Corporation (SEC), and the Carbide Graphite Group Inc. (USA) entered into an agreement to restrict production capacity of graphite electrodes. [320]

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[318] 'European Commission - Press Releases - Press Release – Neelie Kroes
European Commissioner for Competition Policy
Competition, The Crisis and The Road to Recovery
Address at Economic Club of Toronto
Toronto, 30Th March2009
' (*Europa. EU*, 2019) <Http://Europa.Eu/Rapid/Press-Release_Speech-09-152_En.Htm>.

[319] 'OECD Report on hard core cartels' [2000] The OECD Anti-Cartel Programme <Https://Www.Oecd.Org/Competition/Cartels/2752129.Pdf>.

[320] Graphite electrodes are ceramic-moulded columns of graphite used in the production of steel in electric arc furnaces through conducting electric current into a furnace accompanied with high temperature.

It is estimated that the above-mentioned companies dominated approximately 80 percent of the world´s market share. [321]

Their goal was to allocate sales volume in each of the participants country and to divide markets in such a manner that they would not need to provide any offers and rebates or discounts. Fixing of prices by these companies in both global and regional levels let to an immense increase in the prices of the graphite electrodes, the prices increased 48.9 per cent in South Korea, by 50 per cent in EU, 50-60 per cent in the US and around 100 percent in Canada. [322]

South Korea was hit hard by the graphite cartel. S. Korea during the period of the cartel was an emerging economy and currently is considered to be the 15th largest economy.[323] S. Korea does not have any graphite electrode producer and relies on imports, since 90 per cent of its demands depends on these imports from the cartel participants. During the period of the cartel, Korean companies imported an amount of 553 million USD and within the span of six years it is estimated that the electric mill firm's loss around 139 million USD. [324] Korea did not detect the on-going cartel on its own, it was informed by other older competition authorities. As the competition law of Korea[325] was not as experienced as the other developed economies, it received help through the international law and international cooperation.[326]

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[321] 'European Commission - PRESS RELEASES - Press Release - Commission Fines Eight Companies in Graphite Electrode Cartel' (*Europa.eu*, 2001) <http://europa.eu/rapid/press-release_IP-01-1010_en.htm?locale=en>.

[322] John Sanghyun Lee, strategies to achieve a binding international agreement on regulating cartels (Springer 2016) p. 55

[323] 'Overview' (*World Bank*, 2019) <https://www.worldbank.org/en/country/korea/overview>.

[324] 'KFTC 'S Experience in dealing with international cartels1' (*Jftc.go.jp*, 2004) <https://www.jftc.go.jp/eacpf/05/APECTrainingProgramMarch2004/KE.experience.Jand.pdf>.

[325] The Korea Fair Trade Commission (KFTC) is the regulatory authority for economic competition it was established in 1981. Which established the Monopoly Regulation and Fair-trade Act (MRFTA) law NO. 3320, December 31, 1980.

[326] John Sanghyun Lee, Strategies to achieve a binding international agreement on regulating cartels (Springer 2016) p. 56

The above-mentioned case is a perfect example how a cartel which takes place in one part of the world has an anticompetitive effect in another part of the world. Some economies are better equipped to handle these harmful practices while others not so much. In these scenarios, a great deal of help comes from international bodies dealing with international competition issues and also competition authorities of developed economies which have more experience in their enforcement of competition laws.

The global Lysine[327] cartel, sheds light on how dominant companies can take advantage of the market to fix prices worldwide. During this cartel, the prices of lysine doubled within three years. The cartel included five of the world's most important and significant lysine producers. With their production units spread across, US, France, Hungry, Indonesia, Italy, Japan, Korea, Mexico and Thailand. During the period of the on-going cartel, it raised prices on over US$1.4 billion in the global sale with an overcharge[328] of US$ 140 million.[329]

Until 1980s there were only two market players in the lysine industry, Ajinomoto and Kyowa Hakko of Japan. These two manufacturers started around the 1960s and during the 1970s global demand of these products increased which led these two manufacturers to spread and invest abroad. Ajinomoto established a joint venture in France while Kyowa established a joint venture in Mexico. As till 1980s the lysine industry was a duopoly which consisted of the two Japanese companies, in late 1980s it become a triopoly with entry of Miwon a S. Korean group.[330]

Ajinomoto´s two production units provided about 60 per cent of the global production. It was in dominant position throughout 1980s. And to further expand it opened a new plant in Thailand. The three Asian Lysine manufacturers participated in at least three price-

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[327] Lysine is one of the none essential amino acids in humans. Also is one of the components of the starch industry. The world starch industry produced approximately 33 million metric tonnes of starch products in1992. The manufacturing-level value of global production was roughly $14 billion, of which half originated in the United States.

[328] The overcharge is the value of the purchases of a cartelized product actually made, minus what the sales revenues would have been for the same volume of product absent the cartel.

[329] 'OECD Report on hard core cartels' [2000] The OECD Anti-Cartel Programme <Https://Www.Oecd.Org/Competition/Cartels/2752129.Pdf>.

[330] John M Connor, Global Price Fixing (2nd edn, Springer 2006). pg. 175-190

fixing cartels before 1991. They admitted to fix prices which began in Europe in 1975 and continued till 1992. Apart from price fixing, the two Japanese manufactures also admitted to divide the market for their benefit, Ajinomoto agreed not to export to Mexico (where Kyowa operated a plant) and in return Kyowa refrained to export to Thailand (where Ajinomoto had a plant). Further, the two manufactures also restricted entry of new firms in the lysine industry.

However, in June 1989, two other manufactures entered the market, Archer Daniels Midland Company (ADM), Decatur, Illinois set up a plant of manufacturing lysine. ADM established a joint venture production plant in Java, Indonesia called Cheil Samsung Astra (CSA) in mid-1989. And Sewon a South Korean company. [331]

In 1992, ADM suggested to form a ´amino-acid manufacturers association´ among the five global manufacturers. ADM, Ajinomoto and Kyowa were first three members of the Cartel. And later ADM asked Ajinomoto and Kyowa to coerce Sewon and Cheil to be a part of the cartel. By October 1992 all five manufactures formed a cartel and fixed prices for a span of three years until they were caught.

The Cartel took place in two phases first between November 1992 to March 1993 and second, from October 1993 to1995. In the beginning Cheil did not agree to be part of the cartel but in the second phase it agreed to be a part. The first phase of the cartel saw some difficulties as the members did not agree on the market share distribution. However, the second phase was more profitable as it was harmonized better than the first one. [332]

During their period of the cartel the manufacturers had twenty-five price-fixing meetings and they made agreements on prices involving thirteen currencies. The lysine cartel ended with FBI raid on the offices in June 1995. During this periods prices of lysine rose in all the economies where they dealt in business.

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[331] ibid 175 -190

[332] ibid 175-190

The OECD estimated that the cartel affected $5-7 billion dollars in sales world-wide. Further, it resulted in increase of prices approximately from $2000 per metric to $3,200-$3,500. [333]

Certain developing countries such as India, S. Korea and China were also hit by the impact of this cartel on trade. However, the data on how much and at what intensity they were affected is a bit ambiguous. The direct estimate regarding the impact was published by the Korean Fair-Trade Commission (KFTC), in March 2002. It affected more the developing economies than that of the developed. Mexico filed a complaint against the cartel.

Around 70% of international trade involves global value chain (GVCs), it consists of services raw material, parts and trading components across borders and once assembled, they are shipped across the world to different customers. Now, the impact of hardcore cartels, in such cases will be felt across borders as we have seen from cases above.

Developing countries need to focus on strengthening their cartels enforcement provisions, their market structure makes them more susceptible to collusive behaviour. As developing countries have high market concentration and high entry barriers, it makes it relatively easier for firms to conduct collusive practices, a new entrant especially SMEs often have high entry barriers, as they need to face hurdles such as limited finance, government registration, corruption etc. But a firm which is well-developed firms with high internal connections and finances can enter these economies which much more ease.[334]

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[333] 'Can Developing economies benefit from WTO negotiations on binding disciplines for hard core cartels?' (Unctad.Org, 2003) <Https://Unctad.Org/En/Docs/Ditcclp20033_En.Pdf>.

[334] Thomas K. Cheng. (2020). Competition Law in Developing Countries. Pg 321-326

4.2.1.1.2. Export cartels

Export cartel are agreements or arrangements between firms to charge a specific export price and/or divide export markets.[335] Export cartel has always been a subject of debate among economists as they are first, an exemption to the antitrust policy and second, a loophole for exporters to acquire immunity from the antitrust laws as long as their conduct does not affect their domestic market but only the international markets.[336] As seen from the above chapter of hardcore cartels it is clear that these cartels are illegal on the grounds that they fix prices and divide markets. While when we look at the end result of export cartel activities these cartels also lead to fixing prices in one way or the other. But export cartels are not considered illegal in the same way as hardcore cartels are treated, the main reason for such discrimination is that export nations implicitly or explicitly grant immunity against antitrust liabilities for these export cartels as the impact of this cartel is not felt on the domestic grounds. [337]

An export cartel is *"an arrangement of more than one exporting firm in the domestic oligopolistic market in which they explicitly agree to cooperate in order to regulate one or more certain aspects of their horizontal export market interaction."*[338]

In case of export cartels it is not necessary that undertakings which have large market share can only form such a cartel; in fact, these export cartels are generally made up of small and medium size industries. These kind of export cartels can have a deep impact on the market if they pool their resources, knowledge or resources to conduct business.

There can be many kinds of export cartel a `pure private export cartel´, `mixed private export cartel´, `sponsored export cartel´ and `international export cartel´. In case of pure export cartel, the producers collaborate to from an export cartel which solely affects foreign markets and do not have any impact on domestic market. While in case of mixed

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[335] Directorate, O., 2005. OECD Glossary of Statistical Terms - Export Cartel Definition. [online] Stats.oecd.org. Available at: <https://stats.oecd.org/glossary/detail.asp?ID=3213>.

[336] Sokol, D., 2008. What Do We really know about export cartels and what is the appropriate solution? UF Law Scholarship Repository, [online] Available at: <http://scholarship.law.ufl.edu/facultypub/#>

[337] Cristina Gonta, Export Cartel: A century of fumble attitudes (LAP LAMBERT Academic Publishing 2010).

[338] Peerapat Chokesuwattanaskul, 'Export Cartels and economic development' (PhD, Wolfson College 2018).pg 10

export cartel, the domestic producer has some effect at the domestic level. In the case of sponsored export cartel there are group of firms which are supported or sponsored by the government.[339] As mentioned, earlier export cartels are implicitly or explicitly granted immunity against antitrust liabilities. Further in case of international export cartels which consists of exporters from more than one country come together to conduct export. This kind of export cartel are mainly a form of mixed export cartel but having an international dimension to it. In this chapter we will be discussing mainly aspects of international export cartel such as the Potassium cartel which was conducted by USA and Russia, also for better understanding of the subject some of the cases would have a domestic aspect to it. [340]

The empirical evidence on export cartels is limited, scholars have argued whether export cartels fall under the purview of hardcore cartel or should be punished under the competition laws has been in debate since the empirical times.[341] Scholars rely mostly on governmental collected data, as many countries do not strictly require to register export associations the main analysis is from US export cartels. [342]

However in regards to the export cartels the arguments and research by scholars does not only end at the negatives of export cartel but that there are many positives of such an export cartel, which can have an increase in the efficiency effect on single country exports and also provide small and medium enterprises opportunity to pool in resources and enter international markets, which otherwise they could have not achieved.[343] To the defense of export cartels it is said that if it was not for such cartels

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[339] Simon J Evenett and Frederic Jenny, Trade, competition, and the pricing of commodities (Centre for Economic Policy Research 2012) (pg. 99)

[340] Simon J Evenett and Frederic Jenny, Trade, competition, and the pricing of commodities (Centre for Economic Policy Research 2012) (pg. 99-111)

[341] Aditya Bhattacharjea, EXPORT CARTELS: A developing country perspective (Centre for Development Economics 2004).

[342] Niklas Jensen-Eriksen, A potentially crucial advantage export cartels as a source of power for weak nations (Sciences Po University Press 2020) <https://www.jstor.org/stable/42772285>.

[343] D. Daniel Sokol, What do we really know about export cartels and what is the appropriate solution? (Journal of Competition Law and Economics, 2009).

many small and medium enterprises would have not been able to expand their business in foreign market.

Even through there is a mix reaction on export cartels, these cartels may increase or enhance the national income of the countries. But at the same time, it may lead to:

> *"a downward spiral or beggar-thy neighbor dynamic through reciprocal measures that in the long-run reduce both national and global welfare".*[344]

Beggar thy neighbor dynamic or policy is an economic policy under international trade that benefits the home country while harming that countries neighbor or other trading partner. It usually leads to some kind of trade barrier thus it effects competition in the market.[345] The dynamics of export cartels are very particular, as in most competition laws throughout the world if the effect of this cartel reaches the domestic market it is considered illegal, while if the impact is in foreign jurisdictions these cartels are tolerated on the fact that they are not covered by most competition law jurisdictions on a domestic level.[346]

This concept can be very harmful to countries which do not have strong competition laws, on an in-depth research by Andrew Dick of the export cartels registered in US, it was noted that export cartels can exercise market power, raise prices and it can lead to reduced exports as these export firms are acting together instead of competing with each other[347]. The impact on a market can be adverse if the competitor faces less competition as it can exercise more market power.

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[344] Paul Collins, M Trebilcock and Ralph A Winter, The Law and Economics of Canadian Competition Policy (University of Toronto Press Incorporated 2002 2002).

[345] 'Beggar-Thy-Neighbour Policy | Definition & Facts' (*Encyclopaedia Britannica*) <https://www.britannica.com/topic/beggar-thy-neighbor-policy>

[346] Marek Martyniszyn, Export Cartels: Is It Legal to Target Your Neighbour? Analysis in Light of Recent Case Law (2018) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>

[347] Andrew R. Dick, Are export cartels efficiency enhancing or monopoly -promoting? (University of California, Department of Economics Working Paper No 601, 1990 1989).

4.2.1.1.2.1. Potash cartel

The Potash cartel is a good example which brings a light on the fact that the export cartels can harm economies by setting an export quota and controlling the outflow of the product. This case will study the impact of the Potash cartel on developing countries such as Africa, China and India.

Potash is a key component of fertilizers and as it has limited ore deposits around the world, thus making it a valuable natural resource and especially for economies whose main economic activities are agriculture. Canada holds 52 per cent of worlds potash reserve, while Russian holds 21 per cent, Belarus owns 9 per cent and Germany 8.4 per cent.[348]

In Saskatchewan (Canada) there were many potash mines up until 1975, when the Potash Corporation of Saskatchewan (PCS) a crown corporation came into force, by the 1980s it was one of the largest mines. And in 1990s it was privatized for a better management and to generate more profits. Further, Mosaic and Agrium were the second and third largest potash producer in Canada, (they both are the members of export cartel Canpotex) having a world market of 35 per cent. [349] Canpotex is the export marketing and distributing company of Potash produced in Canada.

The Russian company Uralkali and Belaruskali (owned by Republic of Belarus) were jointly owned by Belarus Potash Company (BPC) and in total they had 35 per cent of worlds total market share. [350] The demand of Potash is high in many developing countries as they are more crop depended. India, Indonesia and Malaysia are large consumers of Potash.

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[348] Simon J Evenett and Frederic Jenny, Trade, competition, and the pricing of commodities (Centre for Economic Policy Research 2012) pg. 108

[349] Simon J Evenett and Frederic Jenny, Trade, competition, and the pricing of commodities (Centre for Economic Policy Research 2012) pg. 109

[350] Ibid 109

Together the North American and Russia combined controlled 70 per cent of the Potash world market. The prices of Potash have been significantly low for many years, but saw a high spike in the prices during the period of January 2008 to October 2009.

According to the OECD global forum on trade and competition report of 2012, during the period of 18 months the price of Potash increased more than 400 per cent.[351] This price change had a devastating effect on developing countries.

According to the Conference Board of Canada Report, Canada, Russia and Belarus had cut back the production during the 2008-09 period due to the high demand to raise prices artificially.[352]

The Potash cartel knew the need of its different customers and in case of India it knew that it is heavily dependent on potash imports and would not sustain much longer without Potash as it could harm the crops. India did cease its imports in 2009 and wanted to do so in 2010 but its heavy dependence on Potash could not have led to a long import ban. Further, the new amended Indian Competition Act which came into force on 2002 was not fully sufficient to handle an international export cartel.

The fluctuating prices of Potash had a hard toll on finances in India. According to F. Jenny if we assume that Indian will be paying as average of 6.5 million tons of potash per year between 2011 to 2020, the overcharge it pays on and average per year would be US $ 1.171 billion. In addition, if the government decides to pay the subsidies which would have totaled up to 1.5 billion USD.[353] The increase in price would have certainly affected on the quantity of purchase too.

In few developing countries the overall income of people is increasing which is leading to higher food consumption and as these countries are slowly shifting from agriculture-based countries to industrial countries, the lands for agriculture purposes are shrinking.

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[351] Frederic Jenny, 'Price instability and competition law: the case of the potash cartel' (OECD Global Forum on Trade and Competition 2012 2012).

[352] The Conference Board of Canada Report, 'Saskatchewan in the spotlight: acquisition of potash corporation of Saskatchewan Inc.— risks and opportunities' (2010) <http://www.thestarphoenix.com/pdf/potash-study-final-report.pdf> accessed 14 April 2020.

[353] Simon J Evenett and Frederic Jenny, Trade, competition, and the pricing of commodities (Centre for Economic Policy Research 2012).

Thus, the need to produce more requires more fertilizers and hence the need of Potash is important.

Even though there is a clear indication in this case that there has been price fixing and an effort to distort competition in the market. The Indian government did not take this particular case to court, even though it is clear that India´s heavily dependent on Potash for its agriculture use. It did not want to risk being enemies with the biggest exporters of Potash because India did not have alternative source of supply. On the other hand, in the case of Soda Ash cartel case which has been discussed below, India took this matter to the Supreme court [354]as in this particular case India was not totally dependent on one exporter.

From the above it can be seen that, when large market shares of primary or essential commodities are owned by few companies, this can be threatening to many economies who do not have the bargaining power in cases where such companies' deicide to get together and fix prices or artificially raise price by reducing production etc.

The Potash cartel had a different effect on China as compared to India. This was due to the fact that China has its own production of Potash. Even tough China imports 60 per cent of its need it also exports 80 per cent of potash which is extracted.

The Chinese officials were aware of the negative impact of the export cartel and Feng Mingwei the deputy general manager of Sinofert Holding Limited[355] quoted in an article "*Our dependence on imported potash fertilizer is a threat to our national food security"*[356] . Even though China was concerned about its food security and policies in regards to fertilizers. China had a leverage over the other export cartel countries as it has its own Phosphate rock reserves. Phosphorus is also a very important and necessary nutrient with only a handful of countries including China, the US and

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[354] (1998) 3 CompLJ 152 MRTPC

[355] Sinofert Holding Limited is the he largest fertilizer importer in China

[356] Cai, Muyuan. 'Fertilizer costs threaten China's food security,' Chinadaily.com.cn (25 July 2011).

Morocco controlling the phosphate rock reserve.[357] And that is also one of the reasons that China did not use its competition laws to directly attack Canada, Russia or Belarus.

In 2013, Uralkai (Russia) exited its partnership with BPC. This joint cartel along with North American trading group had controlled prices in the 20 billion $ market. Since Uralkai´s departure the prices of Potash fell by 25 per cent.[358] Since the fall of the potash cartel, India and China were the ones which benefited with the price cuts. India and China both gained immensely by the fallout.

The Potash cartel is a very good example as to how an international cartel whether it is a hardcore cartel or export cartel can cause a negative impact on economies. As seen in the above case, developing economies with no bargaining power have to cope with the fluctuating prices, India could not use its competition laws to compensate for damages as it had very limited option to get its source of potash.

While in China on the other hand, it did not use its competition laws against the cartel, first for the reason that it has its own potash reserve and also because it has a phosphate rock reserve which it used as a leverage against the other potash exporting countries.

4.2.1.1.2.2. Soda Ash Cartel

Soda ash is a white powdered or granular material and is an essential raw material which is used in manufacturing glass, detergent chemicals another industrial products. American Natural Soda Ash Corporation (ANSAC) was founded in 1984 and it is an ´Webb-Pomerene´ Association, a corporation set up in accordance with the provisions of the United States Export Trade Act 1918, commonly known as the Webb-Pomerene Act.

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[357] Simon J Evenett and Frederic Jenny, *Trade, competition, and the pricing of commodities* (Centre for Economic Policy Research 2012) pg. 117.

[358] MacDonald A, "How a potash cartel collapsed" (The Wall Street Journal December 14, 2015) <https://www.wsj.com/articles/how-the-belarusian-potash-company-re-gained-its-footing-1450098821>

The company comprised of six American producers that formed the export trading company under the Act and which was set up to conduct international sales, marketing and distribution cooperative. [359] Under the ANSAC agreement of 8 December 1983, the members agreed to export all their sales or by any of their subsidiaries would be done through ANSAC.[360]

ANSAC had its fair share of entry struggle in various markets. ANSAC even though a legitimate association was accused of artificially lowering prices to gain more market control and also was accused in some markets to fix prices. Our focus will be on the following markets EU, India, South Africa and Venezuela

For entering the EU market, ANSAC stated that because of the rigidity of the EEC soda-ash market, ANSAC would create a genuine competition and is the only entity which represents the whole of US natural soda-ash industry. Further it claimed that Article 81 EC (Article 101 TFEU) would not apply in its case as the whole basis of ANSAC is to be pro-competitive and cited the judgements of court of Justice in Metro[361] and Remia[362] were examples of a wider principle: *`if the end is good, the means (within limits) cannot be regarded as restrictive. ´*

ANSAC wanted to enter the market by making the EEC believe that the association will enhance competition and benefit the costumers in the market. And it was not a cartel.[363] Further, it also argued that exemption under Article 85 (3) of the treaty of Rome and now Article 101 (3) TFEU was justified on the grounds that first, natural soda-ash is environmentally superior as it has les chloride. Second, that it will be able to achieve economies of scale by avoiding the duplication of the high overhead costs which would

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[359] The Webb-Pomerene Act, designed to promote the American export trade through the legalization of export associations, became law on April 10, 1018. It´s aim was to grant small and medium size enterprises to come together and form an association for solely export basis. The purpose of that Act is to exclude the application of the Sherman Act to United States associations engaged solely in export trade and whose activities do not restrain trade within the United States.

[360] 'Commission Decision Of 19 December 1990 Relating to A Proceeding Under Article 85 (1) Of the EEC Treaty' (1991) (91 / 301 /EEC) Official Journal of the European Communities.

[361] Case 26/76: (1977) ECR 1875

[362] Case 42/84: (1985) ECR 2545

[363] 'Commission Decision Of 19 December 1990 Relating to A Proceeding Under Article 85 (1) Of the EEC Treaty' (1991) (91 / 301 /EEC) Official Journal of the European Communities.

be involved in setting up multiple distribution facilities in the EEC if single distributers were allowed. Third, it would benefit the consumers. [364]

ANSAC president also called an economic expert to demonstrate how the entry of the entity would lead to decrease in the soda-ash prices. The EU in its legal assessment made it clear that ANSAC is a joint sale organization and therefore should be seen as an instrument which can hinder or eliminate competition between the members. The EU in its decision made it clear that ANSAC would not be allowed to trade within EEC and an exemption under Article 85 (3) of the treaty could not be granted.

The U.S. producers eventually formed another Webb-Pomerene association, the American-European Soda Ash Shipping Association (AESSA), a non-stock, non-profit membership cooperation organized to engage solely in transportation, storage and other related logistics related to Soda Ash. Even though ANSAC was not allowed to trade within the EEC, AESSA could enter to market as the purpose was different than that of ANSAC.[365]

ANSAC producers as an associating could not enter the EU market on the grounds that they could hinder competition and collude to fix prices. In the case of export cartels, it is a formation of a joint venture or association or a cooperation which comprises of small, medium and even large companies which come together with the same motive i.e., to enter a new market and gain profit by trading in their goods. These entities even though legal in many jurisdictions have led to several incidences that instead of competing with each other collaborate to trade in the international market.

In the case of India and South Africa, competition law was applied keeping the extraterritorial aspect of the soda ash case. However, the outcomes in both the countries were very different. During 1996 Alkali Manufacturers Association of India (AMAI)[366] filed

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[364] 'Commission Decision Of 19 December 1990 Relating to A Proceeding Under Article 85 (1) Of the EEC Treaty' (1991) (91 / 301 /EEC) Official Journal of the European Communities.

[365] 'American-European Soda Ash Shipping Association, Inc.' (*Ftc.Gov*, 2014).

[366] AMAI was established in 1960 under the Companies Act 1956, AMAI represents the interests of the Chlor-Alkali, Soda Ash and Chloro-Vinyl industry in India. **AMAI** actively interfaces with the government and other agencies at the Centre and State levels. The Association also works closely with international professional bodies like World Chlorine Council, Euro Chlor, The Chlorine Institute, American Chemistry Council-Chlorine Division and is also represented in these organisations.

a complaint[367] and applied for temporary injunction i.e., to stop imports with the Indian antitrust authority against the ANSAC for number of infringements of the Monopoly and Restrictive Trade Practice Act of 1969 (MRTP Act). It was ANSACs first encounter with the Indian market, it was accused of predatory pricing i.e. selling below the actual cost and was alleged that it tried to sell products indirectly through the entity based in Singapore.[368] In the MRTP Act of 1969 predatory pricing was not especially mentioned, Section 2 (o), Section 33(1) and Section 33 (1)(j) covers the basics that if any trade practice which effects the competition, or prevents competition or distorts or restricts competition in any manner could be dealt with the MRTP Act.[369] The commission responded to the AMAI complaint with an ex parte interim injunction and ordered restraining ANSAC from exporting on the basis of prima facie view as six American soda ash producers were conducting restrictive trade practices.

The commission had jurisdiction to try the case under Section 14[370] as ANSAC was carrying out activities in India. Further, the commission also relied on the decision of EC against ANSAC, where the agreement was restricting competition.

In March 2000, commission upheld the interim injunction and dismissed the argument of ANSAC and stated that as the case concerns dumping the commission had no jurisdiction. [371] ANSAC further appealed to Supreme Court of India which came out with its verdict in 2002. ANSAC used the Sections 14 of MRTP wordings against the court stating that on interpreting the text MRTP had not extraterritorial jurisdiction. Under the textual interpretation which was adopted by the court jurisdiction could only exist after

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[367] Alkali Manufacturers v. American Natural Soda Ash, (1998) 3 Comp LJ 152 MRTPC

[368] Marek Martyniszyn, *Export Cartels: Is It Legal to Target Your Neighbour? Analysis in Light Of Recent Case Law* (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>

[369] 'The Monopolies and The Restrictive Trade Practices 1969' (2020) <https://www.mca.gov.in/Ministry/actsbills/pdf/The_Monopolies_and_Restrictive_Trade_Practices_Act_1969.pdf>

[370] Section 14 'Orders where party concerned does not carry on business in India: Where any practice substantially falls within [monopolistic, restrictive, or unfair, trade practice, relating to the production, storage, supply] distribution or control of goods of any description or the provision of any services and any party to such practice does not carry on business in India, an order may be made under this Act with respect to that part of the practices which is carried on in India.'

[371] Aditya Bhattacharjea, 'Predation, Protection and the 'Public Interest'', 35 Economic and Political Weekly 4327 (2000)

the goods are import and not the intention to import.[372] Due to the lack of Indian competition laws to handle matters of extra territorial jurisdiction, ANSAC won the appeal. MRTP Act was in the year 2002 which was replaced by Competition Act 2002, this particular Act provides for extraterritorial jurisdiction in competition cases. This case does not only show light on the weak competition law but also how these matters can also be influenced by political pressure.

Because after the import ban on ANSAC, it made an official complaint with the US Trade Representative (USTR). There was immense pressure by the US government on Indian government to lower the custom duties down to 20 percent, be removing a surcharge of 10 percent.[373] A statement made by U.S. Trade Representative Rebert B. Zoellick while welcoming the decision of the Indian Supreme court on July 29 on removing the injunction which barred the exports of US soda Ash to India.

> *"USTR has pressed hard for the Government of India to allow imports of our soda ash, and I raised the issue again when I was in Delhi last August. I am pleased that the Supreme Court decision opens the way for our exporters to ship soda ash to India. This action should resolve a six-year-old trade dispute between the United States and India,"* said Zoellick.[374]

These cases make it clear, that economies need strong competition laws, especially developing countries. Export cartels have always been in debate, given their complex nature. It can be difficult to deal because these kinds of cartels are legal in many jurisdictions, and the members of such cartel, especially in the Soda Ash case hold lot of monetary and political power.

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[372] Marek Martyniszyn, Export Cartels: Is It Legal to Target Your Neighbour? Analysis in Light Of Recent Case Law (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>

[373] 'International trade and the impact on the U.S. Soda Ash Industry' (2020) April 15, 2004 hearing before the subcommittee on international trade of the committee on finance united states senate one hundred eighth congress second session.

[374] 'Indian Supreme Court Opens Door for U.S. Soda Ash Exports' (2002) Soda Ash Export Office of the United States Trade Representative <https://ustr.gov/archive/Document_Library/Press_Releases/2002/August/Indian_Supreme_Court_Opens_Door_for_US_Soda_Ash_Exports.html>

The Soda Ash case in South Africa has been one of the longest running cases as it started in October 1999 and the verdict came into force by 2008. The ANSAC case in South Africa was different than that of India. Unlike India, ANSAC was present in the market and Botswana Ash (Pty) Ltd, (Botash) filed an application for interim relief with the South African Competition Commission.[375] The allegation was the ANSAC was fixing prices and sharing market. Once it was established that there were anti-competitive practices involved the matter was then referred to competition tribunal.

During the tribunal hearing ANSAC tried to justify and defend its conduct by stating that the agreement led to increase efficiency and is pro-competition based. These are the same argument which was also made by ANSAC in front of the EU commission as we have previously seen it. The Section 4 (1)(b)[376] of the Competition Act 1998 explicitly condemns price fixing and market sharing as illegal per se.

By the end of the case, it went on to be appealed in the Supreme court of South Africa and later the case went back to the tribunal. But before the tribunal could give its verdict, ANSAC reached them to discuss settlement agreement and it admitted that the membership agreement had eliminated competition between the members in the export sales to South Africa. ANSAC agreed to pay 9.7 million rand ($996,900) and agreed to withdraw from South African market.[377]

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[375] Aditya Bhattacharjea, *Export Cartels: A developing country perspective* (Centre for Development Economics 2004).

[376] Section 4 Of competition Act 1998: Restrictive horizontal practices prohibited. -

(1) An agreement between, or concerted practice by, firms, or a decision by an association of firms, is prohibited if it is between parties in a horizontal relationship and if-

(a) it has the effect of substantially preventing, or lessening, competition in a market, unless a party to the agreement, concerted practice, or decision can prove that any technological, efficiency or other procompetitive gain resulting from it outweighs that effect; or [Para. (a) substituted by s. 3 (b) of Act No. 39 of 2000.]

(b) it involves any of the following restrictive horizontal practices: (i) directly or indirectly fixing a purchase or selling price or any other trading condition; (ii) dividing markets by allocating customers, suppliers, territories, or specific types of goods or services; or (iii) collusive tendering

[377] Marek Martyniszyn, Export Cartels: is it legal to target your neighbour? analysis in light of recent case law (2012) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2012838>

This case of Soda ash is a very good example as to how the same export cartel could have very different affects in different economies. This show how competition laws are applied and enforced differently in different jurisdictions. In the case of EU, ANSAC could not enter the market because of its strict competition laws and enforcement. On the other hand, in India ANSAC had to struggle a bit to enter the market. The legal system in India did try hard to restrict the entry of this export cartel but had to give in as the competition laws did not have a strong interpretation of extraterritorial jurisdiction. While in the case of South Africa, ANSAC was already present in the market before a law suit was filed, it took a period of 9 years to determine that this export cartel was involved in price fixing and hampering competition in the market. It continued working in South African market for that long after the suit was filed because there was an interim injunction filed.

When it comes to international cartels and export cartels, not all the countries are prepared to handle it; as it can be seen from the above cases, in India the court could not apply the extraterritorial jurisdiction because ANSAC had not imported the goods to India but there was a clear intention that it will, and the judges and the court from the previous track record of this export cartel knew that this would harm the competition in the market. But due to lack of strong competition laws and jurisdictional issue it could not go forth with restricting the entry of ANSAC.

In detecting and enforcing judgements on international cartels, it is important that countries have strong competition laws with extra-territorial scope and have powers to investigate and enforce laws on parties which are involved in cross-border cartels. The developed competition authorities are relatively better equipped to handle the complex nature of international cartels, while younger competition authorities face challenges in this scenario. [378]

[378] '8th United Nations review conference on competition and consumer protection. combatting cartels 2020: empirical study prepared by the BRICS competition law and policy centre', p.5 <https://unctad.org/system/files/non-official-document/tdrbpconf9_d17_cont_BRICS.pdf>.

The BRICS Competition Law and Policy Centre conducted a study of the experiences of competition authorities from both developed and developing countries with regard to combatting cross-border cartels. This involves 37 jurisdictions[379] that have answered the questionnaire provided by BRICS.

The questions focus on four aspects, general legal aspects of international cartels, the enforcement practices, international co-operation in combatting cross-border cartels and the challenges faced by the competition authorities. [380]

There were concerns raised on the extra-territorial reach of competition laws, as 13 out of the 36[381] participants have not adopted extra-territorial scope in their competition laws. Among these 10 of the participants are developing nations. Further, the number of cases on international cartels dealt by participants were on an average between one and four annually. However, the number of cases dealt by developing economies were relatively low than the developed economies, which raised a concern among the panelist about the difficulties these economies face in combatting international

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[379] Albanian Competition Authority; Competition Council of Algeria; State Commission for the Protection of Economic Competition of Republic of Armenia (SCPEC RA); Australian Competition and Consumer Commission; Federal Competition Authority of Austria (Bundeswettbewerbsbehörde - BWB); Ministry of Economy of the Republic of Azerbaijan; Ministry of Antimonopoly Regulation and Trade of the Republic of Belarus; Belgian Competition Authority; Administrative Council for Economic Defence of Brazil (CADE); Commission on Protection of Competition of Bulgaria; Competition Authority of Egypt; Competition Agency of Georgia; Hungarian Competition Authority ('GVH'); Committee for protection and development of competition of the Republic of Kazakhstan; Competition Authority of Kenya; State Agency of Antimonopoly Regulation under the Government of the Kyrgyz Republic; Competition Commission of Mauritius; Competition Council of Moldova; Authority for Fair Competition and Consumer Protection of Mongolia; Commission for Protection of Competition of the North Macedonia; Authority for Consumer Protection and Competition Defence of Panama; The National Institute for the Defence of Free Competition and the Protection of Intellectual Property of Peru (INDECOPI); Philippine Competition Commission; Federal Antimonopoly Service of the Russian Federation (FAS Russia); Commission for Protection of Competition of the Republic of Serbia (CPC); Fair Trading Commission of Seychelles; Slovenian Competition Protection Agency (CPA); Competition Commission of South Africa; Korean Fair-Trade Commission (KFTC); National Commission of Markets and Competition of Spain (CNMC); Fair Competition Commission of Tanzania; Office of Trade Competition Commission of Thailand; Turkish Competition Authority; United States Department of Justice, Antitrust Division; Vietnam Competition and Consumer Authority Competition and Consumer Protection Commission of Zambia; Competition and Tariff Commission of Zimbabwe.

[380] '8th United Nations Review Conference on Competition and Consumer Protection. Combatting Cartels 2020: Empirical Study Prepared by the BRICS Competition Law and Policy Centre', p.6 <https://unctad.org/system/files/non-official-document/tdrbpconf9_d17_cont_BRICS.pdf>.

[381] Armenia, Belgium, Bulgaria, Kazakhstan, the Kyrgyz Republic, Mongolia, North Macedonia, Panama, the Seychelles, Slovenia, Thailand, Zambia and Zimbabwe.

cartels.[382] In the questionnaire, all the 37 competition authorities stated that they experienced some kind of difficulties investigating cases on cross-border cartels. Further, 10 out of 12[383]authorities stated that they had trouble gathering evidence from the US, Turkey, South Africa, South Korea and Australia.[384] The key issues face by the authorities were, requesting information, lack of time for investigating, legal restrictions and also faced difficulties in communication with foreign companies. The US DoJ reported they has difficulties securing the presence of defendants who were subject to investigation which were outside the territorial scope.[385] Even other jurisdictions such as Australia, Brazil and South Africa stated that they faced difficulty when it came to getting foreign companies appear in hearings. In 2019, the South African competition tribunal in the cartel case ` Competition Commission of South Africa v Bank of America Merrill Lynch International Limited and Others ´[386] which involved 23 banks both national and international, gave a sentence on a case stating that it did not have jurisdiction to issue order the foreign banks to pay the any administrative penalty as such order would not be effective.[387]

The 23 respondents in this case were classified in three categories, first, incolae (residents) of South Africa[388] i.e., the SA firms which have registered office and conduct business in SA, the second category of respondents corresponds to those which are

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[382] '8th United Nations review conference on competition and consumer protection. combatting cartels 2020: empirical study prepared by the BRICS competition law and policy centre', pg.10 <https://unctad.org/system/files/non-official-document/tdrbpconf9_d17_cont_BRICS.pdf>.

[383] Australia, Austria, Brazil, the Kyrgyz Republic, Russia, South Africa, South Korea, Spain, Turkey and the US.

[384] 8th United Nations review conference on competition and consumer protection. combatting cartels 2020: empirical study prepared by the BRICS competition law and policy centre', pg.12 <https://unctad.org/system/files/non-official-document/tdrbpconf9_d17_cont_BRICS.pdf>.

[385] [385] 8th United Nations review conference on competition and consumer protection. combatting cartels 2020: empirical study prepared by the BRICS competition law and policy centre', pp.12,13 <https://unctad.org/system/files/non-official-document/tdrbpconf9_d17_cont_BRICS.pdf>.

[386] (CR121Feb17) [2019] ZACT 50 (12 June 2019) <http://www.saflii.org/za/cases/ZACT/2019/50.html>

[387] (Competition Commission v Bank of America Merrill Lynch International Limited and Others (175/CAC/Jul19) [2020] ZACAC 1; 2020 (4) SA 105 (CAC) (28 February 2020) <http://www.saflii.org/za/cases/ZACAC/2020/1.html>

[388] Standard Bank of South Africa Limited and Investec

`pure peregrini´[389] i.e., foreign firms with no local presence or business activity in SA. And the third category were `local peregrini´[390] i.e., the firms which have a representative or branch office in SA. In this case the respondents argue that the tribunal has to establish the personal and subject matter jurisdiction over the parties for the trial.[391]

In 2019 the SA competition commission added 5 more banks[392] involvement in the case and the competition commission has named 38 traders from 28 banks to have participated in a conspiracy to fix prices and divide the market.

Two of the international traders[393] have also been involved in currency manipulation in the US, and have plead guilty for manipulating exchange rates from 2007 to 2013.[394] Banks such as JPMorgan, Barclays, the Royal Bank of Scotland RBS.L and a Citigroup unit pleaded guilty and overall, these banks had to pay fine more than US$10 billion for their involvement in US and European cases into the foreign exchange rates. [395] The SA currency rand is a very liquid currency, the traders from different banks are alleged of sharing information on their bids and offer with the intention to manipulate the market. They were also accused of sharing client information, this all resulted into artificially inflation of the prices. This manipulation has impacted the SA economy.[396]

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[389] Bank of America Merrill Lynch International Limited; JP Morgan Chase & Co; Australia and New Zealand Bank Limited; Standard New York Securities Inc; Nomura International PLC; Macquarie Bank Limited; HBUS; MLPFS and Credit Suisse USA.

[390] JP Morgan Chase Bank N.A; Standard Chartered Bank; Credit Suisse Group (11); Commerzbank AG; HSBC Bank PLC and BANA

[391] (CR121Feb17) [2019] ZACT 50 (12 June 2019) para 31 - 34 <http://www.saflii.org/za/cases/ZACT/2019/50.html>

[392] HSBC Bank USA, Merrill Lynch Pierce Fenner and Smith Inc, Bank of America, Investec Bank Limited and Credit Suisse Securities (USA) LLC.

[393] Two of the international traders named by the Competition Commission – Jason Katz (Barclays and BNP Paribas) and Christopher Cummins (Citigroup) – pleaded guilty to currency manipulation in 2017

[394] United States of America v. Christopher Cummins <https://www.justice.gov/atr/case-document/file/930946/download>

[395] Diane Bartz, 'Reuters Citi foreign exchange dealer pleads guilty to U.S. rate-fixing charge' <https://www.reuters.com/article/us-forex-manipulation-court-idUSKBN14W2Z8>.

[396] Kevin Davle, 'Explainer: how traders at big banks may have rigged the Rand for years' (11 June 2020) <https://www.businessinsider.co.za/explainer-rand-manipulation-2020-6>.

The main issue in this case was if the commission has the power to fine the respondents of mentioned earlier in the second and third category i.e., both pure and local peregrini. In this case, the tribunal stated that the laws are still developing and the section 3 (1) of the Competition Act deals with the jurisdictions and impliedly talks about subject matter jurisdiction. However, to adjudicate upon a dispute on parties having pure peregrini before the South African court, both personal and subject matter must be present.[397]

The tribunal members states that due to the lack of personal jurisdiction, they would have to exclude the provision on civil damages and penalties, but it could grant a traditional declaratory order should be issued, given that it is best for the public interest in fighting cartel as in this case it is important to pronounce that conduct of foreign firms which has harmed the SA consumers.[398]

The banks applied for an appeal to the competition appeal court of South Africa, on the grounds that the tribunal had no jurisdiction and thus could not pass any declaratory order. On 18th July 2019, the competition commission:

> *"The Competition Commission noted a cross appeal against the following findings of the Tribunal:*
>
> *1. that it had no personal jurisdiction over the pure peregrini banks;*
>
> *2. that to establish jurisdiction over a peregrinus the requirements of both personal jurisdiction and subject matter jurisdiction had to be met;*
>
> *3. the provisions of s 3 (1) of the Act could not be read to broaden the established approach to jurisdiction in competition matters; that is extend those principles imposed by the common law;*

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[397]Competition Commission of South Africa v Bank of America Merrill Lynch International Limited and Others (CR121Feb17) [2019] ZACT 50 (12 June 2019) para 48 and 53 <http://www.saflii.org/za/cases/ZACT/2019/50.html>

[398] Competition Commission of South Africa v Bank of America Merrill Lynch International Limited and Others (CR121Feb17) [2019] ZACT 50 (12 June 2019) para 59 and 62 <http://www.saflii.org/za/cases/ZACT/2019/50.html>

4. s 3 (1) required the application of the "qualified effects" test for the purposes of subject matter jurisdiction." [399]

The above case covers a very important aspect of jurisdictional issue, technology and trade are going in very rapid pace, the laws need to catch to them as soon as possible to avoid more harm to economies.

However, efforts are being made by international institutions to provide economies with recommendation and guidelines on enforcement of policy to combat international cartels.

Since the last decade international institutions such as OECD and ICN have released many recommendations and guidelines on hardcore cartels. The OECD has reports on best practices for the formal exchange of information between competition authorities in hardcore cartels, fighting hardcore cartels etc.[400] ICN also provides framework for sharing non-confidential information for cartel enforcements, manuals on anti-competitive enforcement and on leniency works.[401] Countries while adopting or amending their competition laws often use these guidelines to draft their laws. For instance, in Chile, when the competition regime was reformed in 2009 and 2016; the most recent reform to Chilean competition law, Decree-Law No. 211 (DL 211) which was introduced by Law No. 20945 in 2016. This amendment strengthened the competition authorities' powers to set local regulation with international standards and the authorities focused on improving the enforcement and increasing fines for cartels related infringement, it also introduced criminal sanctions up to 10 years. These reforms are in line with the recommendations made by OECD and ICN.[402]

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[399] (Competition Commission v Bank of America Merrill Lynch International Limited and Others (175/CAC/Jul19) [2020] ZACAC 1; 2020 (4) SA 105 (CAC) Para 30

(28 February 2020) <http://www.saflii.org/za/cases/ZACAC/2020/1.html>

[400] OECD recommendation concerning effective action against hard core cartels <https://www.oecd.org/competition/recommendationconcerningeffectiveactionagainsthardcorecartels.htm>

[401] ICN Cartels <https://www.internationalcompetitionnetwork.org/working-groups/cartel/>

[402] Umut Aydin and Nicolás Figueroa, 'the Chilean anti-cartel experience: accomplishments challenges' p. 2 <https://doi.org/10.1007/s11151-018-9633-0>.

Chile's leniency program to help detect cartels was established in 2009 by an amendment (Law 20.361). The Chilean competition reforms are a good example of how the authorities have learned from cases[403] to increase fines for cartel related case, which in turn have increased the deterrent effect. During the 2009 amendment, Fiscalía Nacional Económica (FNE) the national economic prosecutor's office was granted with special powers such as access to private or public premises, register and seize objects, documents useful for the case and ask company in question to handover documents etc. [404]

Besides the reform made in 2009, it was seen that the fines imposed for companies colluding were not adequate and the fines were further increased in the reform of the Chilean anti-cartel legislation. The new reforms gave the Defensa de la Libre Competencia, hereafter TDLC in order to calculate could either fine 30 per cent of sales or up to twice the economic benefit of the infringing conduct.[405]

The Chilean Supreme Court imposed a fine of US$15 million on each party involved in the cartel i.e., the local manufacturer CMPC and a division of Sweden´s SCA for colluding for a decade in tissues and toilet papers in the Chilean market. [406]Both CMPC and SCA controlled more than 90 per cent of the market, the companies benefited US$400 million annually.[407]

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[403] Collusion: CMPC Tissue & SCA Chile: República de Chile tribunal de defensa de la libre competencia Sentencia N" 160/2017

Cartel: Poultry Companies. Sentencia N° 139/2014. República de Chile tribunal de defensa de la libre competencia

[404] Claudio Lizana and Fabían Piedra, 'Overview of competition law in Chile' <https://www.mondaq.com/trade-regulation-practices/497510/overview-of-competition-law-in-chile>.

[405] Ignacio Cruz Roche, 'Evaluation of the impact of the performance of the national competition authorities participating in the COMPAL programme within their respective markets' <http://www.econis.eu/PPNSET?PPN=1743034547>.

[406] 'Corte Suprema Condena a CMPC y SCA por colusión en el mercado del papel tissue' <https://www.fne.gob.cl/corte-suprema-condena-a-cmpc-y-sca-por-colusion-en-el-mercado-del-papel-tissue/>.

[407] 'Corte Suprema Condena a CMPC y SCA por colusión en el mercado del papel tissue' <https://www.fne.gob.cl/corte-suprema-condena-a-cmpc-y-sca-por-colusion-en-el-mercado-del-papel-tissue/>.

In 2000, distribución y servicio D&S S.A. (Walmart acquired it in 2009), introduced its own brand of toilet paper called `Acuenta´ which led to a price war between the companies. The meeting to raise prices, maintain share prices began between the then SCA Chile S.A. (SCA or PISA) and CMPC. To maintain the prices, both the companies agreed market share prices. After the judgement of December 2017, where the court ruled and agreed that both the companies were involved in cartel, the TDLC imposed a fine for tax purposes on SCA Chile of 20 thousand Annual Taxable Units (ATU, the equivalent of US$ 18.3 million) while exempting CMPC from this fine for having been the first company to have accepted the conditions of the compensated leniency programme.[408]

In addition, the national consumer services reached an extrajudicial competition agreement with CMPC by which it had to pay back to consumers a total of US$150 million which is US$11 to every person of 18 years of age at the time of the agreement. This amount is equivalent to approximately 78% of the profits obtained during the years of collusion.[409]

Increase of fines for participation in anti-competitive practices can be deterring factor for parties taking part in such practices. Recently many jurisdictions have shown an increase in their fines especially in cases of cartels. The European commission is the leader when comes to application of fines, with USD 1.6 billion in 2019, followed by the US, Japan, Germany, Italy and France. While economies such as Brazil and South Korea have shown a drop down in the total fines enforced. [410] This case is a landmark case as it show that a strong reform of competition law can benefit trade, consumers and the government. Cartels are a threat to competition and economies are putting efforts to enforce competition laws which help curb such cartels.

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[408] República de Chile tribunal de defensa de la libre competencia SENTENCIA N" 160/2017 < https://www.fne.gob.cl/wp-content/uploads/2017/12/SENTENCIA-N160-2017-TDLC_2.pdf>

[409] Ignacio Cruz Roche, 'Evaluation of the impact of the performance of the national competition authorities participating in the COMPAL programme within their respective markets' <http://www.econis.eu/PPNSET?PPN=1743034547>.

[410] 'Global Cartel Report 2020 Allen & Overy' <https://www.allenovery.com/global/-/media/allenovery/2_documents/news_and_insights/campaigns/global_cartel_enforcement_control/global_cartel_enforcement_2020.pdf.>.

Competition law enforcement is very challenging especially for authorities in developing economies. Cartels is very damaging and the market structure of developing economies makes them much more susceptible to be harmed by collusive behaviour. The only way authorities can combat with such restrictive practices is by stretching their laws and they need assistance from other experienced economies.

The thesis further proposed a mentoring program which in such cases can be useful for the international co-operation on cartel cases and enforcement of these provisions.

4.2.2. Cross-border abuse of dominant position

As discussed in the previous chapter of abuse of dominant position, when a firm holds a large market share in the given jurisdiction, the firms hold a dominant position in the market. However, holding a dominant position in itself is not illegal but when these firms abuse their position in the market, it can lead to distorting of competition and hampering of trade. In this chapter we will see how the transnational abuse of dominant position effects the trade in developing economies and how do different national competition authorities deal with the abuse.

Before understanding why developing countries should prioritize enforcement against abuse of dominant position, we need to understand the economic characteristics of developing countries and why are they prone to such restraints more than developed economies.

4.2.2.1. Economic characteristics of developing economies in relation to abusive conducts.

Many developing countries have recently adopted competition laws; the nature of these countries makes them susceptible to abuse of dominance. The reason for this is that developing economies are small and most of the time fragmented, the markets have natural tendencies to be drawn towards high concentration in the industry with prominent economies of scale.[411] For instance, in the Sub-Saharan Africa the economies are still

[411] Thomas k Cheng, Competition law in developing countries (1st edn, Oxford University press 2020). Pp. 357-360

very concentrated with few handful people enjoying the economic privilege and monopoly position.[412] An analysis based on the IMF paper of 39 Sub-Saharan African countries between 2000-2017 shows that competition in this region remains quite low as compared to rest of the world.[413] A World Bank report of 2016[414] shows that only two-third of the Sub-African countries have regulations that allow for price controls and product market reforms. IMF in its report shows that there has been an increase in the number of Sub-Sharan Africa countries adopting competition laws i.e., since 2000 from 12 countries adopting competition laws the number has increased to 31 countries by 2019.[415] Many developing countries still have many SOEs or even government sanctioned monopolies, for instance the South African Airways, ArcelorMittal and Sasol, which can also restrict competition for small businesses. [416]

There are still many regulatory gaps to be filled in such economies because developing countries are fragmented, the ways to deal with abusive restrains among developing and developed economies are very different. As within developing economies there are many divisions or clusters, meaning, that there are developing economies where the markets are not functioning well, these are economies which have "command-and-control economy"[417]; in such economies, they are dominated by SOEs or have recently privatized their main sectors. The power is concentrated to a few powerful elites.

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[412] Mor Bakhoum, 'Interfacing the 'Local' With the 'Global': A Developing Country Perspective On 'Global Competition' [2013] Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 13-02 SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198924>. Pg. 12-13

[413] Reda Cherif and others, 'Competition, Competitiveness and Growth in Sub-Saharan Africa' (2020) Working Paper No. 20/30 IMF working paper <https://www.imf.org/en/Publications/WP/Issues/2020/02/14/Competition-Competitiveness-and-Growth-in-Sub-Saharan-Africa-49019> accessed 10 June 2020.

[414] '"Breaking Down Barriers: Unlocking Africa's Potential Through Vigorous Competition Policy"' [2016] The World Bank Group <http://documents.worldbank.org/curated/en/243171467232051787/pdf/106717-REVISED-PUBLIC-WBG-ACF-Report-Printers-Version-21092016.pdf>

[415] These statistics are based on an IMF desk survey of competition authorities in member countries in the region.

[416] David Lewis, Enforcing Competition Rules in South Africa: Thieves at The Dinner Table (Edward Elgar 2013). Pg. 49

[417] Eleanor M. Fox and Mor Bakhoum, making markets work for Africa: Markets, development, and competition law in Sub-Saharan Africa (1st edn, Oxford University Press 2019). Pg 161

Financial resources are scarce and there is lot of political pressure on government officials.

The competition authorities of these economies are very weak while the other cluster of developing economy face the same restraint as mentioned above but are trying to challenge such restraints and overcome them. [418]

Such restrains are mainly due to the dominance of state and local government as they squeeze the space for competition. These dominance leads to officials providing competitive bids, or recently privatized sectors in the hands of elites who favour them. [419]For instance, in case of South African Airways, ArcelorMittal, Sasol and most recently Eskom. These circumstances lead to much more presence of anticompetitive practices in the market. State funded entities or even MNEs, close off the valuable channels for indigenous firms and thus slowly and subtly tightening economic opportunities for outsiders.

However, some developing countries even though may have faced the same restraints in the past have overcome some of these challenges and have a relatively stronger competition authority, to curb the anticompetitive practices in the economy. Also, recently many regional common markets[420] have collaborated to offset the effect of such state acts and also to overcome the restrains imposed by MNEs. The competition authorities of countries such as, India, Kenya, Brazil, Malaysia, South Africa etc. have many times adopted EU approached in dealing with many competitions related cases. We will discuss some of these cases further in this section.

For the purpose of investigation, the types of abuse of dominant position dealt in detail would include, exclusionary abuse such as predatory pricing, refusal to supply and essential facility doctrine. And in exploitative abuse we will discuss excessive pricing. These types of abusive conducts are more prevalent in developing countries, given the weak market structure a dominance by state funded undertakings and MNEs.

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[418] Eleanor M. Fox and Mor Bakhoum, making markets work for Africa: Markets, development, and competition law in Sub-Saharan Africa (1st edn, Oxford University Press 2019). Pg 159-169

[419] ibid 159-169

[420] COMESA

The fragmented nature of market can lead to some complications of defining a market; below we will first analyse the market and the market share meaning and definition adopted by EU and USA and then will move to discuss how some developing countries define and assess market share, as it is an important tool to understands a dominant firm's market power. [421]

4.2.2.2. Market definition and market share

In the EU, under Article 102 TFEU it applies to undertaking with a dominant position in the relevant market. For the assessment of each case, a two-stage approach is to be completed; first, the relevant market must be established (this is done by defining the product, geographical and temporal markets). Second, the dominant position of the undertaking has to be investigated. [422] In the EU, more than 40 per cent market share must be held by a firm to hold a dominant position.[423]

However, solely market share threshold is not the only way of asserting if a company holds a dominant position. Apart from the market share the commission also takes into account other factors i.e. the ease with which other companies can enter the market, the existence of countervailing buyers' power; the overall size and strength of the company and its resources and the extent to which it is present at several levels of the supply chain (vertical integration).[424] The General Court of the European Union has mentioned in the Intel ruling that if there are allegations that an undertaking has restricted competition in the market, one needs to establish the extent of the undertakings dominant position in the market and the share of market which is covered by the contested practice.[425]

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[421] Thomas K Cheng, Competition law in developing countries (1st edn, Oxford University Press 2020). pg. 358-363

[422] Commission Notice on the definition of the relevant market for the purposes of Community competition law, OJ No. C 372 of 9 December 1997, pg. 5.

[423] European Commission, 'Procedures in Article 102 Investigations' <ttps://ec.europa.eu>.

[424] 'Competition: Antitrust Procedures in Abuse of Dominance Article 102 TFEU Cases' [2020] European Commission.

[425] General Court of the European Union PRESS RELEASE No, 16/22 'The General Court Annuls in Part the Commission Decision Imposing a Fine of € 1.06 Billion on Intel'.

The Supreme court of US in the Walker Process case found that it is essential to define the relevant market[426] both Sherman Act Section 2 and Clayton Act Section 7 define relevant market. To determine if a company possess monopoly powers in a relevant market, courts normally look at the market share of the firm. The requisite to the market share for a firm with a monopoly power was noted in the case Aluminium Co. of America (ALCOA) case[427] where Judge Hand stated that the market share must be 90 percent as before the court stated that *ALCOAs* market share to be above 33 per cent but later the Circuit court after redefining the relevant market came to the conclusion of 90 per cent. [428] But for the matter of practicality the Eleventh Circuit held that the market share at or less than 50 per cent would be not considered to have monopolistic powers. The US courts also take into consideration other facts such as barriers to entry and market structure and performance. [429]

Like the EU competition laws and the US antitrust laws the courts agree that holding a dominant position in itself is not illegal. In the US this has been explained by the US Supreme Court in Verizon´s case [430] as follows:

> "*The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only unlawful; it is an important element of the free-market system. The opportunity to charge monopoly prices--at least for a short period--is what attracts "business acumen" in the first place; it induces risk taking that produces innovation and economic growth. To safeguard the incentive to innovate, the possession of monopoly power will not*

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[426]Walker Process Equipment Inc. v. Food Machinery & Chemical Corp. 382 US 172 (1965).

[427] United States v. Aluminium Co. of America, 148 F.2d 416 (2d Cir. 1945).

[428] 'Competition and Monopoly: Single-Firm Conduct Under Section 2 Of the Sherman Act: Chapter 2' (*Justice.gov*, 2020) <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2#N_19_>.

[429] 'Competition and Monopoly: Single-Firm Conduct Under Section 2 Of the Sherman Act: Chapter 2' (*Justice.gov*, 2020) <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-2#N_19_>.

[430] Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004)

be found unlawful unless it is accompanied by an element of anticompetitive conduct".

In case of Argentina, the antitrust laws apply to acts and behaviours that occur in Argentine territory and also to certain acts or behaviours that take place in other countries and which has effects on the Argentine markets.[431] For the analysis of anti-competitive behaviour courts follow procedures to define the scope of relevant product and geographical market. And to determine the market share there is no particular threshold but in general it is necessary to have a high market share, however this in itself is not sufficient to establish the existence of market power.[432] According to the CNDC apart from examining the market share of the firm in question the authorities may also examine the market share of the closest competitors. This is to determine that if there is a small difference between the market share of the company in question and the rival company then there is a low probability the firm is capable of excessing that amount of market power. [433]

Section 6 of Act No. 27,442 specifies some additional criteria which includes low substitutability between products, regulatory constraints that limit access to other products to the market, and absence of countervailing power from competing firms.[434] Further, in Argentina the CNDC also calculated the market share based in the principles developed in the merger control guideline. Which states that in order to identify the immediate potential competitors in the market, this can be based on the level of sales, production or the production capacity which is allocated in the relevant market.[435]

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[431] Camila Corvalán, The Dominance and Monopolies Review _ Argentina, Abuse overview (7th edn, The law reviews 2020). Pg. 1-10

[432] ibid 1-10

[433] Comisión nacional de defensa de la competencia, 'Draft guidelines for the analysis of cases of abuse of dominance' (2018) <https://www.argentina.gob.ar/sites/default/files/traduccion_ingles_lineamientos_abuso_posicion_dominante.pdf> pg. 4

[434] Ley de defensa de la competencia Ley 27442 El Senado y Cámara de Diputados de la Nación Argentina reunidos en Congreso, etc. sancionan con fuerza de Ley: Ley de Defensa de la Competencia 2018.

[435] 'Argentine merger control guidelines' [2018] approved by Decision 208/2018 of the Secretary of Commerce CNDC <https://www.argentina.gob.ar/sites/default/files/english_version_guidelines.pdf>

In Malaysia, the Competition Act 2010 (CA 2010)[436] came into force in January 2012 with the aim to promote and protect the process of competition and consumer interest. The CA 2010 applies to commercial activities within Malaysia and even outside when the commercial activity has an effect on the competition in the market within the territory. Section 10 of the CA 2010 prohibits any entity from abusing its position in the market either individually or collectively.[437] The drawback of this act is that it does not provide for merger control powers. This has led to absence of the direct influence of the enforcement agencies and the governments over the change in market structure which may lead to adverse impact on the competition.[438]

The Minister of Domestic Trade and Consumer Affairs (MDTCA) Saifuddin Nasution Ismail cited three factors in assessing monopolies: whether policies allowing these monopolies are still relevant; their investment size; and the economic impact of possibly dismantling them.[439] The competition commission considers a company with a market share of 60 per cent or above to be hold a dominant position. [440]

In China the relevant market definition related to abuse of dominant position is same to that of EU laws Article 102 and Section 2 of the Sherman Act. The market share threshold for one company to hold dominant position is one-half of the relevant market. For two companies holding a collective dominance is two third of the aggregated market share in the relevant market and three quarters for three companies holing a collective dominance in the relevant market. [441] During investigation if any one of the companies

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[436]'The Competition Act 2010' (*Mycc.gov.my*, 2010) <https://www.mycc.gov.my/sites/default/files/PDF%20Files/Legislation/CA2010.pdf> accessed 12 June 2020.

[437] Shanthi Kandiah, The Dominance and Monopolies Review _Malaysia (7th edn, The law reviews 2020). Pg. 304

[438] Shanthi Kandiah, The Dominance and Monopolies Review _Malaysia (7th edn, The law reviews 2020). Pg. 304

[439] CodeBlue, 'Cabinet Committee Probing Pharmaniaga Monopoly' (2019) <https://codeblue.galencentre.org/2019/04/03/cabinet-committee-probing-pharmaniaga-monopoly/>

[440] Malaysia Competition Commission, 'MyCC Guidelines on Chapter 2 Prohibition: Abuse of Dominant Position ' <https://www.mycc.gov.my/sites/default/files/pdf/newsroom/MYCC%204%20Guidelines%20Booklet%20BOOK2-6%20FA%20copy.pdf>.

[441] Zhan Hao, Song Ying and Stephanie Wu, The dominance and monopolies review _China (7th edn, The law reviews 2020). Pg. 128 -129

has less than 10 per cent of market share, that company does not fall in the dominant position criteria. Also, if the company having a high market share shows lack of market power this can be reason for authorities to let the company rebuttal by giving the proof.[442]

In case of Vietnam, a firm which holds either 30 per cent of the relevant market or holds a significant amount of market power holds a dominant position. The threshold for a collective dominance in the relevant market is at least 50 percent market share or with three firms with at least 65 per cent of the market share. With four firms 75 per cent and five firms 8 per cent. In case a firm holds a 100 per cent monopoly in the relevant market in those cases a special provision is applicable.[443] On April 2008, many of JetStar Pacific Airlines (JPA) flight were cancelled and delayed, as Vietnam Air Petrol Company Limited (VINAPCO) had refused to supply fuel due to the dispute over fuel services fees. Jetstar Pacific Airlines is a low-cost airline mainly government owned with 18 per cent share of the Qantas Australian group. VINAPCO is a subsidiary of Vietnam Airlines and operates into-plane fuelling services at a number of Vietnamese airports.[444]

JPA contracted VINAPCO the only supplier of aviation fuel in Vietnam civil airports, VINAPCO suddenly increased the price of the fuel on the grounds of global price fluctuations to which JPA refused to pay as it stated that VINAPCO is not applying the same prices to its parent company i.e., Vietnam Airlines. Thus, on 2008 when the flights were cancelled, the Ministry of Transport ordered VINAPCO to go ahead with its fuel supply. The Vietnamese competition commission on looking into this matter found out that VINAPCOs conduct of abuse of its monopolistic position which was in breach of Article 14 of the 2004 law on competition.[445] It was fined with 145 million USD which only amounts to 0.05 per cent of the total turnover of VINAPCO in 2007, while the penalty for abuse of dominant position in Vietnam is 10 per cent of the total turnover. To this the

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[442] ibid 128-129

[443] Zhan Hao, Song Ying and Stephanie Wu, The dominance and monopolies review _China (7th edn, The law reviews 2020).

[444] 'VINAPCO Supplier Profile | CAPA' (Centreforaviation.com, 2020) <https://centreforaviation.com/data/profiles/suppliers/vinapco> accessed 12 June 2020.

[445] Socialist Republic of Vietnam Law on Competition 2004.

commission stated that it was a warning to the company for not engaging in such harmful practices in future. [446]

COMESA, in its article 18(2)(a)[447] states that the market strength of the undertaking must be assessed within the context of relevant market. It has taken the same approach as EU and has assessed relevant market in two dimensions i.e., the relevant product market, the relevant geographic market.[448]

From the above examples of various jurisdiction, it can be seen that many developing countries have applied a clear definition of relevant market and also market share. Most of these countries have different application of market share and market power. Also, some of the economies such as China and Vietnam are very clear in respect to the market share in cases where there is a collective/joint abuse of dominant position.

There are various types of abuse of dominance such as predatory pricing, excessive pricing, etc. in the following chapters we will discuss each of these types and how these abuses effect various jurisdiction and how these jurisdictions handle cases which have extraterritorial effect.

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[446] 'Vietnam competition law key changes in 2019' (*Mayerbrown.com*, 2019) <https://www.mayerbrown.com/-/media/files/perspectives-events/publications/2019/02/vietnam_competition_law_key_changes_in_2019.pdf> Pg. 37

[447] The common market for eastern and Southern Africa COMESA `COMESA guideline on abuse of dominance´ (2019) < www.comesacompetition.org>

[448] The **relevant product market**, which determines which relevant goods or services are included in the market. A relevant product market comprises all those products and/or services which are regarded as interchangeable or substitutable by the consumer, by reason of the products' characteristics, their prices and their intended use.

b) The **relevant geographic market**, which determines the geographic scope of the market. The relevant geographic market comprises the area in which the undertakings concerned are involved in the supply and demand of products or services, in which the conditions of competition are sufficiently homogeneous and which can be distinguished from neighbouring areas because the conditions of competition are appreciably different in those areas.

4.2.2.3. Predatory Pricing

Predatory pricing is a market strategy where a dominant firm sets the price of a particular product so low for a certain period of time that the competitors dealing in the same product and the same market may be forced to leave the market.[449] Low prices are beneficial to customers, but to determine if the lowering of price is restrictive in nature, the courts must observe under what circumstances has the firm lowered the prices.[450]Predation can cause serious harm in developing economies due to major information fragmentation.[451]

In the US the burden to prove lies on the plaintiff and he must prove that the defendant's prices are below cost. Predatory price is a very old concept, which was seen back in 1906 in the case of Standard oil co. of *New Jersey vs. United States*. Since then, lot of cases has developed the meaning and the application of predatory pricing by firms. In the year 1986, there were two very significant decisions first, *Matsushita Electric Industrial Co. v. Zenith Radio Corp*.[452] and *Cargill*[453] which focus on the relationship between price, cost and the central role of recoupment which plays an important role in predation strategy.

The court in the above case took help from theory developed by professor Areeda and Turner, they published a landmark article formulating the workable test for distinguishing between predatory and competitive pricing by examining the relationship between price and costs.[454] This was further clarified in the Brooke Group case in 1993, it was held that:

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[449] In China Section 17 Prohibits for a firm to apply low prices without a proper reason.

[450] Moritz Lorenz, An introduction to EU Competition Law (Cambridge University Press 2013) 230

[451] Thomas K Cheng, Competition law in developing countries (1st edn, Oxford University Press 2020). Pg. 381

[452] 475 U.S. 574 (1986)

[453] 479 U.S. 104 (1986).

[454] The United States Department of Justice, 'Predatory pricing: strategic theory and legal policy' <https://www.justice.gov/atr/predatory-pricing-strategic-theory-and-legal-policy>.

"To prevail on a predatory-pricing claim, plaintiff must prove that (1) the prices were below an appropriate measure of defendant's costs in the short term, and (2) defendant had a dangerous probability of recouping its investment in below-cost prices."[455]

In the EU the scientific theory of Areeda and Turner were applied in the case on predatory pricing in the EU-AKZO Chemie BV[456] as well as in the Tetra Pak cases[457]. The EU in the later cases recognizes the intent of the dominant undertaking is an important element in predation cases, while in the US, intent of the firm is not important as primary evidence of predatory pricing. Further, the Court of Justice in recognize that to prove predation it is not necessary to establish that the undertaking may recoup losses. In the France Telecom SA case, the general court decided that it is not necessary to prove recoupment in predation.[458] The Court taking reference from previous court decisions[459] stated that it is sufficient to prove prices of the undertaking were smaller than average variable costs and the undertaking aimed to abuse dominance.[460] It is still debated that the EU courts should not pay too much importance to only intent to predate but attention to be paid to the evidence that the dominant undertaking may recoup losses. [461]

In a recent case of Qualcomm, the world's number one chipmaker was fined 242 million euros in 2019 for abusing its market dominance in 3G baseband chipset and blocking rival (Icera) from the market. It was accused of selling below cost between 2009 and 2011. In May 2011, Icera was acquired by US tech company Nvidia, and in 2015 the company decided to wind up the chipset business due to the incurred loss as a result of

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[455] The United States Department of Justice, 'Competition and monopoly: single-firm conduct under section 2 of the Sherman Act: Chapter 4' <https://www.justice.gov/atr/competition-and-monopoly-single-firm-conduct-under-section-2-sherman-act-chapter-4#N_34_>.

[456] Case C – 62/86 [1991]

[457] Case C –333/94 [1996]

[458] 'France Télécom SA v Commission of the European Communities.' II II–181, Para 221 <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62003TJ0340>.

[459] AKZO v Commission, cited in paragraph 100 above, paragraphs 71 and 72; Case T-83/91 Tetra Pak v Commission [1994] ECR II-755, paragraphs 148 and 149, upheld by the Court of Justice in Case C-333/94 P Tetra Pak v Commission [1996] ECR I-5951, paragraph 41 (together, 'the Tetra Pak cases').

[460] 'France Télécom SA v Commission of the European Communities.' II–157, Para 130 <https://eur-lex.europa.eu/legal-content/GA/TXT/?uri=CELEX:62003TJ0340>.

[461] Raimundas Moisejevas, 'Predatory Pricing: a framework for analysis' (2017) 10 124, 124–155 <http://www.degruyter.com/doi/10.1515/bjlp-2017-0005>.

the below cost priced by Qualcomm. [462] The commission's decision of the Qualcomm case states that, the rival company increased its market transaction and Qualcomm with the intent to prevent Icera to trade and compete, it took advantage of its market position and strategically lowered the price and provided concessions to its two important customers i.e., Huawei and ZTE. And it was made clear in the decision that for Icera to establish its business it had to enter into a relationship with either of the one company named above.[463] The European commission as of June 2020 is investigating Qualcomm for another anti-competitive behaviour where it leveraged its market position in 5G modem chip in radio frequency chip market. [464]

Low prices benefit consumers, but consumers can be harmed in the long run if the below-cost pricing allows a dominant firm to eliminate rivals out of the market.[465] Consumer welfare is a very important aspect in competition law, and it is equally important to safeguard the competition in the market, especially for SMEs. Predation can help establish a reputation of an undertaking entering a developing economy and especially in an economy which has just opened its market to privatization as this may help to deter market entry or discourage rivals from competing aggressively with price cutting.[466] We have seen this in the case of Egypt cement cartel.

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[462] European Commission-Press release, 'Antitrust: commission fines US chipmaker Qualcomm €242 Million for engaging in predatory pricing' (2019) <https://ec.europa.eu/commission/presscorner/detail/en/ip_19_4350>.

[463] Case AT 3971—Qualcomm (predation) and (2019/C 375/07), 'Summary of Commission Decision of 18 July 2019 to a Proceeding under Article 102 of the Treaty on the Functioning of the European Union and Article 54 of the EEA Agreement' <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:OJ.C_.2019.375.01.0025.01.ENG&toc=OJ:C:2019:375:TOC>.

[464] Jon Fingas, 'EU investigates Qualcomm for alleged anti-competitive tactics' (New York, 6 February 2020) <https://search.proquest.com/docview/2352199955>.

[465] Federal trade commission, 'Predatory or Below-Cost Pricing' <https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/single-firm-conduct/predatory-or-below-cost-pricing>.

[466] Thomas K Cheng, Competition Law In Developing Countries (1st edn, Oxford University Press 2020). Pg. 382

In most of the developing and least developing nations that have opened their markets to foreign investments which has helped many economies to increase trade but it must be noted that MNCs and enterprises with dominant position have huge resources, technological, managerial, financial expertise. They are capable of harming competition in the market by eliminating SMEs, they can adopt several ways of eliminating competition and one of them is predatory pricing. To safeguard small enterprises, it is crucial that developing economies have strong competition laws and enforcement mechanisms. Below, we will discuss with the help of case laws, how various developing jurisdictions deal with cases related to predatory pricing against dominant firms.

In India, an Indian radio taxi service business named Meru Cab Company Pvt. Ltd. And V-Link Automotive Services Pvt. Ltd. Both subsidiaries provided radio taxi services under the name `Meru´, `Meru Genie´ and `Meru Flexi´ in 21 major cities across India including the capital Delhi. For the purpose of the case Meru Cab Company Pvt Ltd will henceforth be called as ´Meru´. Meru started its business in India in 2007 and in Delhi in 2009. Uber group started in India in 2009 and entered the Indian radio taxi service market in Delhi 2013, where it offered three different brands namely, Uber Black, Uber X and Uber Go'.[467]

Meru claimed in the court that Uber has been involved in anti-competitive practices such as predatory pricing to gain dominant position in different markets and to eliminate its competitors from the market. It also stated that the before the launch of Uber, market price of radio taxies operating in Delhi (National Capital Region NCR) was about Rs. 23 per km. [468]

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[467] 'Meru Travel Solutions Private Limited (MTSPL) vs Uber India Systems Pvt. Ltd. and Other Case No. 96 of 2015'. Para 2

[468] 'Meru Travel Solutions Private Limited (MTSPL) vs Uber India Systems Pvt. Ltd. and Other Case No. 96 of 2015'. Para 1

	Uber Black	Uber X	Uber Go
November 2013	Rs. 20/km	Not launched	Not launched
June 2014	Rs. 18/km	Rs. 15/km	Not launched
November 2014	Rs. 18/km	Rs. 15/km	Rs. 12/km
February 2015	Rs. 12/km	Rs. 9/km	Rs. 7/km

It was alleged that because of such discounts an incentives Uber was losing 204 per trip. [469] Meru also submitted a report conducted by *New Age TechSci Research Pvt. Ltd.* in September 2015 (hereinafter, the *TechSci*) stating that Uber had a dominant position in the Delhi NCR region. The CCI observed that the report was not reliable and stated that Ola and Uber were stiff competitors in radio taxi services, the commission further observed that Uber was not holding a dominant position in the market. In this case the Commission held Delhi as the relevant market and not Delhi NCR as requested by the informant (Meru) on the grounds that the regulatory framework in relation to taxi services and use of CNG in public transport were different in both the regions.

The competition commission in this regard closed the case on the grounds that there was no prima facie evidence under section 26(2) of the Competition Act 2002. [470]

Meru further filed an appeal against the order of the commission in the Competition Appellate Tribunal (COMPAT), one of the main issues in the previous case was that Commission did not find a prima facie case in order to investigate.

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[469]'Meru Travel Solutions Private Limited (MTSPL) vs Uber India Systems Pvt. Ltd. and Other Case No. 96 of 2015'. Para 5

[470] 'Meru Travel Solutions Private Limited (MTSPL) vs Uber India Systems Pvt. Ltd. and Other Case No. 96 of 2015' 31,39,

The COMPAT after listing to both parties and looking at all the evidence stated that abuse of dominance has to be examined based on the benchmark of Section 4 read with Section 19(4) in order to form a prima facie view in accordance with Section 26(1) of the Act. [471] Section 4 talks about abuse of dominant position in detail, Section 19 clarifies regarding the inquiry into certain agreements and dominant position of enterprise, which states that

> *"Inquiry into certain agreements and dominant position of enterprise*
>
> *19. (1) The Commission may inquire into any alleged contravention of the provisions contained in subsection (1) of section 3 or sub-section (1) of section 4 either on its own motion or on—*
>
> *(a) receipt of any information, in such manner and] accompanied by such fee as may be determined by regulations, from any person, consumer or their association or trade association; or*
>
> *(b) a reference made to it by the Central Government or a State Government or a statutory authority"* [472]

The Section 4 sub-section 1 states that no enterprises or group shall abuse its dominant position. Further the COMPAT focused on Section 19 sub section 4 which explains in detail the factors to be taken into consideration when determining the existence of dominance: [473]

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[471]Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016 para 6,7, 9

[472] [472] "The Competition Act 2002", The Competition Commission of India, 2020. [Online]. Available: https://www.cci.gov.in/competition-act.

[473] Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016 para 7, 8

"Section 19 (4) The Commission shall, while inquiring whether an enterprise enjoys a dominant position or not under section 4, have due regard to all or any of the following factors, namely: —

(a) market share of the enterprise;

(b) size and resources of the enterprise;

(c) size and importance of the competitors;

(d) economic power of the enterprise including commercial

advantages over competitors;

(e) vertical integration of the enterprises or sale or service

network of such enterprises;

(f) dependence of consumers on the enterprise;

(g) monopoly or dominant position whether acquired as a result of any statute or by virtue of being a government company or a public sector undertaking or otherwise;

(h) entry barriers including barriers such as regulatory barriers, financial risk, high capital cost of entry, marketing entry barriers, technical entry barriers, economies of scale, high cost of substitutable goods or service for consumers;

(i) countervailing buying power;

(j) market structure and size of market;

(k) social obligations and social costs;

(l) relative advantage, by way of the contribution to the economic development, by the enterprise enjoying a dominant position having or likely to have an appreciable adverse effect on competition;

(m) any other factor which the Commission may consider relevant for the inquiry."[474]

The above sub-section clearly states that the sole indicator of determining the dominance of a firm is not only market share but other factors also play an important role. The Court in this matter stated that, when there are allegations of abuse of dominance, the most important part is to form an opinion about the dominance is the relevant market.[475] And to form an opinion it is important to determine a relevant market. In this case the relevant market was not clearly defined. The COMPAT stated that the radio taxis are subject to the State Transport authorities and as Meru insists on the relevant market to be Delhi NCR and Commission considers it to be Delhi, after a detailed analysis the COMPAT declared that the geographical relevant market on a prima facie basis should be Delhi NCR. [476]

The other issue in this case was to determine the dominance of Uber in the relevant market. The court made a deep emphasis on other factors to be considered while determining dominance:

"The information made available by the informant/appellant should be seen in the context of overall picture as it exists in the radio taxi service market in terms of status of funding, global developments, statements made by leaders in the business, the fact that aggregator-based radio taxi service is essentially a function of network expansion and there was adequate indication from the respondent that network expansion was one of the primary purpose of its business operation." [477]

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[474] "The Competition Act 2002", *The Competition Commission of India*, 2020. [Online]. Available: https://www.cci.gov.in/competition-act.

[475] Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016 para 10

[476] Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016 para 10,11,12

[477] Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016 para 16

Referring to the statistical report by *TechSci* the court states that the figures of various parameter are close to 50 per cent, the market has other small radio taxi services which may also be affected by dominance of Uber as it has more advantage in terms of investments and the market can very heavily impacted if any of the big players adopts any anti-competitive practices. Thus, establishing that the case had prima facie evidence in accordance with section 26 of the competition Act 2002, the COMPAT found a valid reason to instigate an investigation on this matter by the Director General (DG). The appeal was accepted, and an investigation report was to be given within 60 days. [478]

Uber filed an appeal before the Hon´ble Supreme Court of India in 2019 against the order of COMPAT. The SC dismissed the appeal on the bases that there was no need for Uber to interfere with the investigation as there are prima facie evidence. A heavy reliance was placed on the face that Uber was losing Rs. 204 per trip and it did not make any economic sense. The case is still pending to be heard.[479]

This case is very unique as the first prima facie evidence is not based on whether the company is dominant or not, but court observed the behaviour relating to pricing; the dominance of the company was determined on the basis of the ability of the enterprise to offer discounts, rebates rather than only considering market structure or other factors as well. [480]

MNCs have much more resources to establish in a relevant market, they can invest in promoting and establishing its business in a developing country. While there are many small competitors in the market who needs protection from such massive competition, as these small competitors do not have adequate resources to promote their businesses at the same level as multinationals. In the Uber case, even though Uber was suffering

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[478] Meru Travels Solutions Private Limited v Competition Commission of India, Appeal No. 31 of 2016 para 20

[479] Chandola Basu, 'Supreme Court of India Upholds Investigation against Uber' <http://competitionlawblog.kluwercompetitionlaw.com/2019/09/18/supreme-court-of-india-upholds-investigation-against-uber/?doing_wp_cron=1592329274.3315010070800781250000>.

[480] Chandola Basu, 'Supreme Court of India Upholds Investigation against Uber' <http://competitionlawblog.kluwercompetitionlaw.com/2019/09/18/supreme-court-of-india-upholds-investigation-against-uber/?doing_wp_cron=1592329274.3315010070800781250000>.

losses it had enough resources that it could still establish in the market despite of the loss incurred.

In 2019, the Competition Commission of India announced that it would investigate two large foreign e-commerce firms i.e., Flipkart (owned by Walmart) and Amazon for engaging in anti-competitive practices. The complaint was brought forward by Delhi Vyapar Mahasangh (DVM) and the Confederation of All India Traders (CAIT), they urged the government to audit the business model of all the e-commerce firm and especially the foreign owned firms such as Flipkart and Amazon. The reason being that these e-commerce flatform are not allowed by laws to own products and sell them, as they are only a platform helping sellers to connect with potential buyers. Mr. Piyush Goyal commerce and industry minister of India in his statement stated that:

> *"E-commerce companies have no right to offer discounts or adopt predatory prices. Selling products cheaper and resulting the retail sector to incur losses is not allowed,"*[481]

The officials of department for promotion of the industry and international trade (DPIIT) met with the leaders of Flipkart and Amazon on October 2019 to discuss the discounts provided to customers. The competition commission has ordered an investigation on January 2020 to look into the anti-competitive practices conducted. Amazon on 10 February 2020 filed a writ petition in the Bengaluru High Court, demanding a stay on the investigation ordered by CCI.[482]

Based on the judgement of Amazon/Flipkart v. CCI, the CCI under Article 226 of the Constitution should follow a minimal intervention approach while reviewing the Section 26(1) order of the CCI, this particular judgement was a very welcoming decision among the traders as it paved way for investigation in the anti-competitive conduct of online

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[481] 'Probing "predatory" Pricing by Flipkart, Amazon: Piyush Goyal' <https://economictimes.indiatimes.com/news/economy/policy/probing-predatory-pricing-by-flipkart-amazon-piyush-goyal/articleshow/71638881.cms?from=mdr>.

[482] Lohchab Himanshi, 'Amazon Moves Bengaluru HC, Seeks Stay on CCI's Probe Order' (10 February 2020) <https://economictimes.indiatimes.com/small-biz/startups/newsbuzz/amazon-moves-bengaluru-hc-seeks-stay-on-ccis-probe-order/articleshow/74063198.cms?from=mdr>.

market places such as Amazon and Flipkart for practices like, preferential listing and lack of platform neutrality.[483]

This particular case has created a lot of tension among small traders, CCI and Amazon and Flipkart, one of the reasons being that there had been a three-year delay since the complaint was filed by CAIT and DMV, further these institutes believe that there has been many delay tactics used by Amazon and Flipkart. On early January 2022, the CCI transferred the investigating officer on the case of Amazon and Flipkart, this particular move by CCI caused dismay among the 70 million traders represented by CAIT. [484] It was felt that CCI was being pressured by these international enterprises. However, on April 2022, CCI carried out search-and-seizure operations at multiple premises linked to two sellers of Amazon.com, Inc, in connection with an investigation launched against e-commerce players. This search was seen as a positive reinforcement for the members of CAIT and DMV. The results of this search have still not made public yet. [485]

From the two very recent cases, it can be seen that as these giant entities when enter the market, have more access to resources to help promote their products and their company by offering additional discounts and selling their products and services lower than the market price thus leading to small competitors unable to compete thus effecting trade and competition in the market.

In Brazil, Brazilian pharmaceutical companies EMS and Germed, filed a complaint to CADE in 2009 against Genzyme an American firm. [486]The complaint was against Genzyme using many anti-competitive tactics to keep EMS and Germed out of the market and sold its product lower than the market prices thus incurring losses to its competitors. Genzyme manufactures Renagel (which regulates phosphorus levels in the blood of

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[483] Competition Commission of India Case No 40 of 2019, 'Delhi Vyapar Mahasangh v. Flipkart and Amazon'.

[484] Peerzada Abrar, 'CAIT Seeks Meeting with CCI Head for Early Probe on Amazon, Flipkart' <https://www.business-standard.com/article/companies/cait-seeks-meeting-with-cci-head-for-early-probe-on-amazon-flipkart-122012300678_1.html>.

[485] Peerzada Abrar and Shrimi Choudhary, 'Preferential Treatment Case: CCI Raids Sellers of Amazon, Flipkart' <https://www.business-standard.com/article/companies/preferential-treatment-case-cci-raids-sellers-of-amazon-flipkart-122042801470_1.html>.

[486] Nota Técnica Nº 10/2019/CGAA1/SGA1/SG/CADE EMS_ Processo Administrativo Nº 08012.007147/2009-40 S.A e Germed Farmacêutica Ltda v Genzyme do Brasil Ltda. e Genzyme Corporation

patients undergoing dialysis) the company enjoyed monopoly from 2002 until 2009. EMS and Germed said that Genzyme participated in predatory pricing when it submitted bids to supply the Ministry of Health with drugs based on sevelamer hydrochloride. The price offered was below market prices to which the other companies could not compete.[487]

CADEs response to the allegation against Genzyme was that they did not find any proof of sham litigation, defamation or predatory pricings. [488] CADE predatory pricing behaviour is logical only if the charged with abuse can exclude the competitors from the markets and earn monopoly profits in a stable and durable manner. This is so that the company recovers at least the costs incurred by the deliberately pricing its product below the market price. And as in this given case both EMS and Germed continue to operate in the market and they themselves have offered lower prices than Genzyme. Further, in 2009 bid between Genzyme and Germed, Germed had won the bid. The authorities after looking into all the evidence dismissed the claim.[489]

The explanation of predatory pricing was not seen well by many, Bruno de Luca Grago a partner at a Brazilian law firm stated that the CADEs jurisprudence regarding predatory pricing was quite poor as the government to determine if there is an abuse directly compared the prices of the drugs available in the market and did not take into consider may other factors. [490]

The Indonesian government in 2020, lowered the import duty threshold for cross-border transactions,[491] the reason for this move was due to the concerns that foreign producers are setting predatory prices on e-commerce platforms, which is far below the actual production cost, thus resulting in hampering competition by driving domestic businesses

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[487] Connor Charley, 'CADE Clarifies Predatory Pricing Criteria' <https://globalcompetitionreview.com/article/1193735/cade-clarifies-predatory-pricing-criteria>.

[488] Case nº 08012.007147/2009-40 – EMS and Germed Farmacêutica Ltda. Genzyme do Brasil Ltda. and Genzime Corporation. – Sham Litigation

[489] Connor Charley, 'CADE Clarifies Predatory Pricing Criteria' <https://globalcompetitionreview.com/article/1193735/cade-clarifies-predatory-pricing-criteria>.

[490] Connor Charley, 'CADE Clarifies Predatory Pricing Criteria' <https://globalcompetitionreview.com/article/1193735/cade-clarifies-predatory-pricing-criteria>.

[491] 'Import duties in Indonesia: The Latest Update (2022)' (Cekindo.com, 2022) <https://www.cekindo.com/blog/import-duty-indonesia>

out of the market. [492] This particular move by the government has had some mix reviews by the business community and economist, as the Indonesian government could not provide evidence that predatory pricing is taking place in the e-commerce area. The center of Indonesian policy study points out that is an undertaking has gained large market share and because of high productivity or smart cost management is able to reduce costs, labelling them as predators can set a dangerous precedent.[493]

There is a thin line between reducing costs of production by efficiencies and for the purpose of eliminating competition.

> *"In principle, predatory pricing must meet three conditions: that the predatory firms charge below-cost prices, that they push out competitors to gain market dominance and that they charge excessive prices afterwards to recoup their losses. The absence of these elements makes slapping on a predatory pricing label unjustified."*

The other factor which can help determine if the pricing strategy has predatory purpose or no is to access if the scheme used by the company is to potentially eliminate the competitors or if the scheme is to strategically design its model to compete in an efficient manner in a certain market.[494] In a judgment passed by the Argentina court, it stated that it is important to analyse the duration for which the price is lowered, if it is seen that the product is very limited and the policy by the undertaking has been imposed for a relatively short time, generally in such cases it would not lead to predatory pricing. [495]

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[492] Thomas Dewaranu, 'Opinion | E-Commerce Predatory Pricing Myth Hurts Everyone' (*Center for Indonesian Policy Studies*, 2021) <https://www.cips-indonesia.org/post/opinion-e-commerce-predatory-pricing-myth-hurts-everyone>

[493] Thomas Dewaranu, 'Opinion | E-Commerce Predatory Pricing Myth Hurts Everyone' (*Center for Indonesian Policy Studies*, 2021) <https://www.cips-indonesia.org/post/opinion-e-commerce-predatory-pricing-myth-hurts-everyone>

[494] Comisión Nacional de Defensa de la Competencia, 'Guidelines for the análisis of cases of exclusionary abuse of dominance' <https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf>.

[495] "Cámara Argentina de Papelerías y Librerías c/Supermercados Makro", Decision 810/1997, Secretary of Industry, Commerce and Mining.

In cases of developing economies with weak market structure, regulatory gaps, corruptions encounter with undertaking holding a large market share, such undertakings can influence the officials and law enforcements and use it for their advantage. In 1999, with the merger of UK based undertaking British American Tobacco (BAT) and South Africa´s Rothmans, BAT has had highest market share in the economy with nearly 72% share for almost two decades. BAT has heavy presence in many countries within Africa and it has been involved with law enforcements to combat against illicit tobacco trade (ITT).

Its intention was not clear as it was accused of regularly taking part illicit tabaco trade[496] and also disrupting competition for its smaller competitors However, it has denied its involvement in the illicit trade. In the case of disrupting competition, in Zimbabwe it was accused of predating prices to cut corners for the entry of products launched by a company called Cuts Rag as it was threatened by the entry of the new player in the market.[497]

BAT also has a huge market share of 95% in Bangladesh tobacco industry since 100 years, in 2021 Japan Tobacco International (JTI) filed a complaint against British American Tobacco Bangladesh (BATB) which is being investigated by the Bangladesh Competition Commission (BCC) for the abuse of its position.[498] There has been a lot written on BAT´s illicit large scale tobacco smuggle, its involvement on tobacco control legislations and human rights abuse of tobacco farmers.[499] But not much has been done about it. This is because it has a huge market share and is heavily integrated with law enforcement officials. Developing countries face many challenges, we have discussed

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[496] BBC Panorama documentary and the Bureau of Investigative Journalism Smoke Screen podcast, BAT publicly stated that the company had "long been committed to fighting the global criminal trade in illicit tobacco." The statement went on to note that, "As part of those efforts, BAT has sought to assist national law enforcement agencies in providing support and, in the past, intelligence on suspected illicit operators." Available at https://podcasts.apple.com/gb/podcast/smoke-screen/id1585444419

[497] Hassan Qaqaya and GEORGE LIPIMILE, 'The Effects Of Anti-Competitive Business Practices On Developing Countries And Their Development Prospects | UNCTAD' (Unctad.org, 2008) <https://unctad.org/webflyer/effects-anti-competitive-business-practices-developing-countries-and-their-development> pg. 104-105

[498] Tobacco Journal International. BATB accused of anti-competitive practices (24 Jan 2022)

[499] Gilmore, A. B., McKee, M., & Collin, J. (2007). The invisible hand: how British American Tobacco precluded competition in Uzbekistan. Tobacco control, 16(4), 239–247. https://doi.org/10.1136/tc.2006.017129

throughout the thesis and will discuss in depth in the coming sections too. A strong competition authority is not the only solution to such problems but can certainly play a significant role in combating such problems.

There is no doubt that predatory pricing can impact competition in the market and harm the consumers and domestic SMEs, but the laws and regulation should be strong and clear to hold a company accountable for setting up predatory pricing. From the cases discussed, it can be seen that as these MNCs when enter the market, have more access to resources to help promote their products or company by offering additional discounts, selling their products and services lower than the market prices.

4.2.2.4. Refusal to Supply and Essential facility doctrine

Developing countries, the markets are highly concentrated and thus new entry of competition in these markets are highly appreciated. The main concern in regards to refusal to deal and essential facility doctrines in developing economies is that many economies still have heavy presence of former and current SOEs. The drawback of such SOEs is generally immune from changes in the market and former SOEs may not enjoy the same government protection as its predecessor but will certainly hold a dominant position in the market.[500]

Sellers have the right to choose their business partners. Refusal to supply or to deal with any firm is lawful for firms, even undertakings in dominant position can refuse to sell; [501] however, in certain circumstances, refusal to supply by a dominant company may be considered restrictive behaviour if they harm the competition in the relevant market. [502]

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[500] Cheng, T. K. (2020). Competition law in developing countries. Oxford University Press. Abuse of Dominance pg. 357-391

[501] 'Refusal to Supply: Federal Trade Commission' <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/dealings-supply-chain/refusal-supply>.

[502] Mondaq, 'Turkey: Competition and antitrust: refusal to supply' <https://www.mondaq.com/advicecentre/content/1594/Refusal-to-Supply>.

Thus, when the refusal to sell is carried out by a dominant firm, this in turn implies that the customer wishing to buy the particular product may not have options to buy from another seller. This may lead to an exclusion from the market and can harm the general economic interest. [503]

Refusal to supply or deal is not per se illegal as undertakings have the freedom to choose their economic partners In USA and EU, under the Section 2 of Sherman Act and article 102 TFEU, impose a duty on undertaking with dominant position to deal with competitors or consumers to preserve competition on the market, to maintain a healthy competition[504].

To establish if a refusal to supply would constitute as exclusionary abuse of dominant position, many competitions commission evaluate the following factors, first, the refusal refers to goods or services that are essential for the effective competition in the downstream market.[505]

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[503] Comisión Nacional de Defensa de la Competencia, 'Guidelines for The Analysis of Cases of Exclusionary Abuse of Dominance' <https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf>.

[504] OECD, "Luis Diez Canseco Núñez" (ConcurrencesDecember 7, 2017) & https://www.concurrences.com/en/dictionary/refusal-to-deal&gt.

[505]

i. Argentina: Comisión Nacional de Defensa de la Competencia, 'Guidelines for the analysis of cases of exclusionary abuse of dominance'
ii. Alegria: Baker McKenzie, 'An overview of competition antitrust regulations and developments in Africa: 2021'
iii. Botswana: Competition Act 4 of 2018
iv. Brazil: IBRAC Conducts enforcement in Brazil frequently asked questions
v. EU 'Communication from the Commission — Guidance on the Commission's Enforcement Priorities in applying Article 82 of the EC Treaty to Abusive Exclusionary Conduct by Dominant Undertakings'
vi. India: Competition commission of India
vii. Tunisia: Baker McKenzie, 'An overview of competition antitrust regulations and developments in Africa: 2021'
viii. USA: Sherman Act 2 and Aspen Skiing case.

The refusal to deal may lead to create a market foreclosure by eliminating competition in the market. [506] The refusal to deal will harm consumers and economic interests.[507] And if for the refusal to supply there is no justified reason.[508]

As mentioned earlier, companies have right to do business with anyone they seem fit, but if a company refuses to cooperate with rivals can constitute anticompetitive conduct as it violates section 2 of Sherman Act and Article 102 of TFEU. The above applies to criteria's where company breached its unilateral duty to deal [509] and in cases where a company refuses to share an essential facility with its competitors. First, we will be discussing few cases on unilateral refusal to deal and then will discuss in detail essential facilities and refusal to deal.

In the US, the criteria of classification are evolved though decisions by the federal and the supreme court over time, the United States v. Colgate & Co.[510] the court emphasised on the need to have clear intent or purpose to seize, control price or exert monopoly and exclude competition to refusal to deal. In the Aspen Skiing[511] case, there were four major downhill skiing facilities, out of which the defendant owned three. In this case defendant in the past had been cooperating to sell joint tickets which would be provide access to customers of all the four facilities, the defendant later terminated this cooperation with the smaller rival which led to a deliberate effort to discourage customers from doing business with the small rival.[512]

The court in these cases stated that firms with monopoly have no general duty to enter into a joint marketing program, however, in this case the defendant did not merely reject an offer to cooperate with the competitors but made changes to the pattern of distribution

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[506] ibid.

[507] ibid.

[508] Consumo e Comércio Internaciona Instituto Brasileiro de Estudos de Concorrência and FC Guilherme Ribas, IBRAC Conducts Enforcement in Brazil : Frequently Asked Questions (2021).

[509] Jonathan M Justl, 'Proving Refusal to Deal Liability: Three Emerging Alternatives to Aspen Skiing' 15 no. <http://awa2018.concurrences.com/IMG/pdf/proving_refusal_to_deal_liability_1_.pdf>.

[510] United States v. Colgate & Co. (2019) 250 U.S. 300

[511] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985)

[512] 'Aspen skiing company, petitioner v. Aspen highlands skiing corporation.' <https://www.law.cornell.edu/supremecourt/text/472/585>.

of all-Aspen tickets which originated in the competitive market, and this system had been in use for several years now.[513]

In 2004, in Trinko case[514], Justice Scalia made it clear that refusal to deal will be violating Article 2 of Sherman Act if the party in question is in a dominant position and it has clearly abused its position. The profit-sacrifice test was established in the Trinko case, this test asks whether the conduct in question is more profitable in the short run or is there an option by which the firm could have engaged in another conduct which did not have the same (or greater) exclusionary effects. If it is found that the conduct is not profitable in the short run then the firm might have been involved in exclusionary abuse of dominant position.[515]

In the EU, the courts have clarified and explained the application of Article 102 of TFEU in landmark cases, such as Commercial Solvents v Commission (1974)[516], in this case it was not a mere fact of refusal to supply but because of such refusal it was a threat to eliminate competition in the common market. In the United Brands[517] case, the commission decided that the UB has no objective justification for refusal to deal.

The Indian competition commission has considered objective justification and effect on markets while examining abuse of dominance allegations. In the case of Kansan News[518] the Supreme court of India overturned the decision of competition appellate tribunal (COMPAT), which had overturned the decision of CCI against Fast Way Transmissions Private limited (`fast way´). In this case, a news channel entered into a channel placement agreement for a year with multi system operators (MSO) (had 85 per cent market share of all subscriber share) which was a part of Fast way group, however, an unjustified notice of termination was served to the broadcaster, which was seen as an act of abuse of

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[513] Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585 (1985) pg. 600-605

[514] Verizon Communications Inc. v Law Offices of Curtis V. Trinko 540 U.S. 398 (2004)

[515] The United States Department of Justice, 'Competition and monopoly: single-firm conduct under section 2 of the Sherman Act: Chapter 3 general standards for exclusionary conduct'.

[516] Commercial Solvents Corporation v Commission [1974] ECR 223

[517] United Brands v Commission Case 27/76

[518] Competition Commission of India vs M/S Fast way transmission Pvt. Ltd. & others Civil Appeal NO.7215 OF 2014. Judgement delivered on January 24, 2018.

dominant position by denial market access. The tribunal in its ruling stated that as MSO and the broadcasters are not competitors and denial to market access occurs between competitors.[519]

The Supreme Court quashed the COMPC decision and stated that once dominance is established of an undertaking, it is not relevant if the parties are competitors or not. The Supreme Court observed that Section 4(2)(c) of the Competition Act would be applicable for the reason that the Broadcasters were denied market access due to an unlawful termination of the agreement between the Broadcasters and MSOs. The SC made it very clear, that the undertakings with dominant position cannot restraint competition in the market. [520]

It is clear that the criteria to determine whether a dominant undertaking by refusing to deal with its competitors or suppliers it is conducting an exclusionary abuse of dominant position, is on the same lines for many jurisdictions such as EU, US, Argentina, Brazil, Botswana, Algeria, India, Malaysia.

The concept of essential facility doctrine (EFD) has developed over the years in various jurisdictions, the doctrine specifies when the owners of an essential or bottle neck facility is mandated to provide access to the facility at a reasonable price to the small competitors in the market. [521] In the US, this doctrine has been traced back to the case of United States v. Terminal railroad association[522] this case concerned an association set up by fourteen companies out of the twenty-four companies which operated in the St. Louise Railway station, in this case Supreme court held that exclusive control to the bridge connecting the railroads to few concentrated players could create rationalization

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[519] Competition Commission of India vs M/S Fast way transmission Pvt. Ltd. & others Civil Appeal NO.7215 OF 2014. Judgement delivered on January 24, 2018. Para 3.

[520] Competition Commission of India vs M/S Fast way transmission Pvt. Ltd. & others Civil Appeal NO.7215 OF 2014. Judgement delivered on January 24, 2018. Para 11.

[521] OECD, 'OECD Policy Round Table: The Essential Facilities Concept' (2009) <https://www.oecd.org/competition/abuse/1920021.pdf>.

[522] United States v. Terminal R.R. Association, 224 U.S. 383

and restraint of trade, the court ordered the fourteen companies to provide access to the facility as the other ten companies could not do its business without the facility. [523]

This doctrine is to be applied with caution as it is to be applied in certain exceptional circumstance, as it deviates from the general rule that even a monopolist may choose with whom they can deal with. In MCI Communication case[524], the Seventh Circuit stated that a plaintiff must prove four elements to establish liability and defendant's obligation to provide access:

> *"(1) control of the essential facility by a monopolist;*
>
> *(2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility."* [525]

In the EU, the first case in which the commission expressly applied the essential facilities doctrine[526] was in B&I/Sealink[527] which concerned the use of port of Holyhead. In this case the Commission held that the owner of the essential facility was subject to a special duty of non-discrimination, as they cannot treat less favourable its competitors and then what it is granting itself in case of essential facility.[528]

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[523] Vassilis Hatzopoulos, 'The EU Essential Facilities Doctrine. Research Papers in Law, 6/2006' (August 2006) <http://aei.pitt.edu/44287>.

[524] MCI Communications Corp. v. AT&T Co., 708 F.2d 1081 (7th Cir. 1983)

[525] MCI Communications, 708 F.2d at 1132-33

[526] Vassilis Hatzopoulos, 'The EU essential facilities doctrine. Research Papers in Law, 6/2006' (August 2006) <http://aei.pitt.edu/44287>.

[527] B&I/Sealink, Decision (interim measures) of 11 June 1992, EC Bull. 6-1992

[528] Vassilis Hatzopoulos, 'The EU essential facilities doctrine. Research Papers in Law, 6/2006' (August 2006) <http://aei.pitt.edu/44287>.

In one of the most recent and relevant judgment by CJEU in Slovak Telekom[529], in this case CJEU has clarified the case of `constructive' or `implicit´ refusal to supply to a competitor of an infrastructure, facility or services or various inputs.[530]

In case of indispensability if inputs, the input should be indispensable to such an extent that there are no substitutes of it at all. The reason for this is, asking an undertaking to form a contract with another party is contrary to freedom of contract and right to property. In case of Oscar Bronner[531] the CJEU decided that a refusal to grant access to an input would amount to abuse of dominant position if:

> *"In order to plea the existence of an abuse within the meaning of Article 86 of the Treaty in a situation such as that which forms the subject-matter of the first question,, not only that the refusal of the service comprised in home delivery be likely to eliminate all competition in the daily newspaper market on the part of the person requesting the service and that such refusal be incapable of being objectively justified, but also that the service in itself be indispensable to carrying on that person's business, inasmuch as there is no actual or potential substitute in existence for that home-delivery scheme."* [532]

The economic rationale behind the above ruling is to make sure that if inputs were provided easily to competitors in the markets, the dominant firm would not have enough incentives to invest in the formation of the facilities. Thus, the CJEU held that the decision to oblige the undertaking cannot be justified at a competition policy level unless the dominant firm has a genuinely tight grip on the market concerned. [533]

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[529] Slovak Telekom, a.s. v European Commission Case C-165/19 P. Judgment of 25 March 2021.

[530] Jose Rivas, 'How Indispensable Is the Indispensability Criterion in Cases of Refusal to Supply Competitors by Dominant Companies? (Slovak Telekom, C-165/19 P)' (1 April 2021) <http://competitionlawblog.kluwercompetitionlaw.com >

[531] Judgment of 26 November 1998, Case C-7/97.

[532] Judgment of 26 November 1998, Case C-7/97 para 41.

[533] Slovak Telekom, a.s. v European Commission Case C-165/19 P. Judgment of 25 March 2021 para 48,49.

As developing countries still have high presence of former and current SOEs, compelling such undertakings to provide the facility can be seen from a scenario where the facility was created by the government and after privatization it solely goes in the hands of an undertaking, this is a cause of concern and thus compelling the dominant firm to share this facility with rival can be justified. Special attention should be made to specific sectors, telecom and electricity, as greater competition in these areas can improve the overall industry and help the economy to grow. [534]

In Argentina, the first case of EFD was reported in 1982 in A.Savant vs. Matadero Vera, were the only slaughterhouse in the small city was found to be guilty of abuse of dominant position by refusal to give access to other cattle raisers.[535]

In the guidelines provided by CNDC on the analysis of exclusionary abuse of dominant position, it is made clear that characteristics of `essential facility´ is not static and due to the rapid change of technology and rising infrastructure, certain infrastructure stop being considered essential facilities, however new facilities may arise that may be considered essential. [536]

The Republic of South Africa, in its competition act defines what is essential facility,

> "*Essential facility" means an infrastructure or resource that cannot reasonably be duplicated, and without access to which competitors cannot reasonably provide goods or services to their customers*" [537]

From an economic standpoint, developing economies will benefit from competition as most of the times the markets are concentrated., given they are highly concentrated.

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[534] Cheng, T. K. (2020). Competition law in developing countries. Oxford University Press. Abuse of Dominance pg. 357-391

[535] German Coloma, 'The Argentine Competition Law and Its Enforcement' no 342 <http://www.econis.eu/PPNSET?PPN=178156325X>.

[536] Comisión Nacional de Defensa de la Competencia, 'Guidelines for The Analysis of Cases of Exclusionary Abuse of Dominance' <https://www.argentina.gob.ar/sites/default/files/guias_abuso_posicion_dominante_ev.pdf>.

[537] Republic of South Africa Competition Act No. 89 of 1998. Section 1 (1)(xi).

Authorities need to make sure that private undertakings do not use these facilities to their advantage and hamper competition. Talking from a financial standpoint, to replicate an essential facility in developing economies by competitors will prove to be burden. As the CNDC in the A.Savant vs. Matadero Vera case pointed out that the doctrine of essential facility is not static, given the market changes at a rapid speed.

However, in a cluster of economy which is highly depended on SOEs and state funded undertakings, restricting use of essential facilities can be fatal.

Any restrictions put on essential facilities can be harmful for the consumers, competitors and the economy. Especially during the ongoing pandemic, many jurisdictions have introduced new regulations which together with the existing regulations on matters related to pricing and supply of essential products prohibits unjustified price hikes and facilitates collaboration of essential service providers in a regulated and supervised manner.[538]

Refusal to supply and restriction on essential facilities by a dominant firm will have many economic implications and such conditions can have a substantial anticompetitive effect.[539] Developing countries have reformed their laws to limit such effects.

4.2.2.5. Excessive Pricing

Excessive pricing is a type of abusive behaviour that occurs when prices are set significantly above the competitive level as a result of monopoly or market power.[540] It is very difficult to establish a threshold for the excess prices above which the price may be

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[538] Baker McKenzie, 'An Overview of Competition Antitrust Regulations and

Developments in Africa: 2021'

<https://www.bakermckenzie.com/en/insight/publications/2021/03/africa-overview-competition-antitrust-regulations>.

[539] Lizél Blignaut, Louise du Plessis and Judd Lurie, 'Vertical Integration and the Refusal to Supply Scarce Goods – a Legal and Economic Framework for analysis of Prohibited Practices' <http://www.compcom.co.za/wp-content/uploads/2014/09/Vertical-integration-and-refusal-to-supply-scarce-goods-LB-LdP-JL-final.pdf>.

[540] Vedia Jerez Horacio, 'Competition Law Enforcement & Compliance across the World: Systems, Institutions and Proceedings' (2014).

considered to be excessive or unreasonable. The excessive pricing is considered unlawful in many countries when imposed by a dominant firm. It is still a controversial topic as there is no specific guideline in regard to assessing whether the price in a particular case is excessive or not. [541]

Once the competition commission or the authorities have determined that the dominant firm may have abused its position by applying excessive pricing then the first step is to make sure the threshold of the competitive price in the relevant market. It is also important to determine the geographical area where the excessive pricing has been applied, as seen from Meru radio taxi service vs Uber in the predatory pricing discussed before.[542] Secondly it needs to be established that the price charged by the firm is excessive to the market threshold. And the third step is to hear the efficiency defence for the allegedly excessive price. As there can be many numbers of reasons for increasing the prices such has investment in R&D or new technology etc. [543]This three-step analysis can also be seen in a Spanish Supreme Court judgement in the Explosivos case.[544]

To consider that the prices applied by a dominant undertaking is purely exploitative, the aim of such excessive price should be to harm the customer by maximizing profits and not suffering temporary loss in the process.[545] However, in cases of developing countries one of the main issues is to determine if the dominant firm are applying excessive pricing which is purely exploitative in nature. Further, we will discuss in depth approaches taken by different jurisdictions in determining the threshold for excessive pricing.

All the OECD countries prohibit excessive pricing provisions for the abuse by firms in dominant position but with the exception of five countries, i.e., the USA, Canada, Mexico,

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[541] Gilo David, Excessive Pricing and Competition Law: A Coherent Approach to the Antitrust of Excessive Pricing by Dominant Firms in Yannis Katsoulacos and Fédéric Jenny, Excessive Pricing and Competition Law Enforcement (Springer International Publishing AG 2018) (2018) in pg. 107–108.

[542] Please refer to page 149 in this thesis.

[543] Gilo David, Excessive Pricing and Competition Law: A Coherent Approach to the Antitrust of Excessive Pricing by Dominant Firms in Yannis Katsoulacos and Fédéric Jenny, Excessive Pricing and Competition Law Enforcement (Springer International Publishing AG 2018) (2018) in pg. 107–108.

[544] '626/07: Canarias de Explosivos' <https://www.cnmc.es/expedientes/62607>.

[545] Antonio Robles Martín-Laborda, ` Exploitative prices in European competition law´ in Fabiana Di Porto (eds), Abusive Practices in Competition Law (1st edn, ASCOLA Competition Law series 2018).pg 2

Australia and New Zeeland. [546] In the USA, Sherman Act allows lawful monopolists to set their prices as high as they choose. This concept of the US antitrust law is well supported by court decisions such as Berkey Photo, Inc. v. Eastman Kodak Co. [547]

> *¨pristine monopolist…may charge as high a rate as the market will bear ¨ [548]*

> *"[a] natural monopolist that acquired and maintained its monopoly without excluding competitors by improper means is not guilty of 'monopolizing' in violation of the Sherman Act…and can therefore charge any price that it wants,… for the antitrust laws are not a price-control statute or a public utility or common-carrier rate-regulation statute."[549]*

In the Trinko decision the Judge Learned Hand stated the successful competitors have the urge to compete and one must not diminish its incentive to compete in the market. [550] The FTC has also made it clear that the possession of monopoly power will not be found unlawful unless it is accompanied by the element of anticompetitive conduct. For instance, if the FTC finds that a proposed merger may harm competition and lead to an increase of price, this may allow the commission to block a merger. In 2016 in the proposed merger between Staple and Office Depot,[551] the US Federal judges agreed with the FTC and issued a preliminary injunction prohibiting the merger on the grounds that this merger may lead to a higher prices of office supplies, particularly for large

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[546] 'OECD Policy Roundtable Excessive Prices 2011' <https://www.oecd.org/competition/abuse/49604207.pdf>. pg. 196, 271, 298

[547] 'Berkey Photo, Inc. V. Eastman Kodak Company' 603 F.2d 263

[548] 'Berkey Photo, Inc. V. Eastman Kodak Company' 603 F.2d 263 para 161

[549] Blue Cross and Blue Shield United of Wisconsin v. Marshfield Clinic, 65 F.3d 1406, 1413 (7th Cir. 1995), citing National Reporting Co. v. Alderson Reporting Co., 763 F.2d 1020, 1023-24 (8th Cir. 1985); U.S. v. Aluminium Co. of America, 148 F.2d 416, 430 (2d Cir. 1945); Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d at 1325, 1339 (7th Cir. 1986); Berkey Photo, 603 F.2d at 296-98.

[550] Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004).

[551] Staples, Inc and Office Depot, Inc 2016 Docket No. 9367

businesses. Staple had announced its plan to acquire the Office Depot in February 2015.[552]

In the EU, the EU Commission offers three reasons to justify that there has been a violation of EU competition laws by the application of excessive pricing.[553] First, Article 102 (a) very clearly states that an abuse may consist in "directly or indirectly imposing unfair purchase or selling prices or other unfair trading conditions". The second reason focuses on two types of intervention one, indirect intervention on exclusionary practices which allows a firm to enjoy a monopolistic position or direct intervention on the price. The third reason being that Article 102 does not prohibit the acquisition of dominance while the US Sherman act does prohibit monopolization or act to monopolize.[554] [555]

In the United Brands case the ECJ states that price is deemed to be too high when the dominant company permits "to reap trading benefits which it would not have reaped if there had been normal and sufficiently effective competition" [556] Even though the court established when the price is deemed too high, which is interpretated as the prohibition for charging a price which exceeds the marginal costs, the proof of excessive profit margin is still necessary but is not the only condition to be met for the application of Article 102 TFEU. The price must be further be investigated to determine if it is unfair pricing.[557]

In South Africa, application of excessive pricing by a dominant firm is illegal. The laws on excessive pricing have had many important changes and especially during the past few years. An important step was taking by the Competition Appeal Court in determining the

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[552] Michael J de la Merced, 'Office Depot and staples call off merger after Judge blocks it' <https://www.nytimes.com/2016/05/11/business/dealbook/staples-office-depot-merger.html>.

[553] 'European Union 102 And Excessive Prices OECD Excessive Prices' 309, <www.oecd.org>.

[554] 'European Union 102 And Excessive Prices OECD Excessive Prices' 309, <www.oecd.org>.

[555] Frederic Jenny, Excessive Pricing and Competition Law: Abuse of Dominance by Firms Charging Excessive or Unfair Prices: An Assessment (2018) pg. 8–9.

[556] 'In Case 27/76 United Brands v Commission´ Pg.301, para 249

<https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61976CJ0027&from=EN>.

[557] Fabiana Di Porto, Rupprecht Podszun and Antonio Robles Martín-Laborda, Abusive Practices in Competition Law, Chapter 5 Exploitative Prices in European Competition Law (Edward Elgar Publishing 2018).

four distinct enquiries are necessary to determine if the company alleged with excessive pricing is detrimental to the consumers.[558] These four points were made by the court in the Mittal Steel South Africa Ltd case.[559] This is one of the two excessive price cases in South Africa, the other case was on Competition Commission v Sasol Chemical Industries Ltd. [560][561]

The South African competition laws on excessive pricing follows the position adopted in Europe. The competition appeal court (CAC) of south Africa noted in the Mittal case that the definition of 'excessive price' was borrowed from United Brands but also observed that this borrowing 'in no way requires us to adopt uncritically all elements of a European approach to excessive pricing. Further adding to this the court states

> *'[We] eschew the role of price regulator, and so the vast quantum of the evidence and much of the argument submitted to us is simply irrelevant (…)*
>
> *The standard approaches and instruments of competition enforcement comprise interventions in the structure of the affected markets and in the conduct of its participants so as to produce outcomes that are, as far as possible, unsullied by the possession or, rather, the abuse, of market power. As already noted, there are compelling conceptual and practical reasons why competition authority should eschew a price regulation role and if it is possible ... to prove and remedy excessive pricing without resort to the methodologies of price regulation, then this is the approach that must be favoured.'* [562]

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[558] Liberty Mncube and Mfundo Ngobese, Excessive Pricing and Competition Law: Working Out the Standards for Excessive Pricing in South Africa (2018) pg. 160-161

[559] 'Mittal Steel South Africa Limited vs Harmony Gold Mining Company Limited'. Case No: 70/CAC/Apr07

[560] Sasol Chemical Industries Limited v Competition Commission [2015], Case NO. 131/CAC/Jun14

[561] Liberty Mncube and Mfundo Ngobese, Excessive Pricing and Competition Law: Working Out the Standards for Excessive Pricing in South Africa (2018) pg. 160-161

[562] 'Mittal Steel South Africa Limited vs Harmony Gold Mining Company Limited'. Case No: 70/CAC/Apr07 para 47

In this case the Courts went by a case on case-based approach. Mittal Steels was owned and controlled by the state since it established in 1928 until it was privatized in 1989 under the name ISCOR.

However, the company took the name of Mittal Steel South Africa Ltd in March 2005. Mittal steels has had a monopolist position in the market for a long time and the tribunal tested excessive pricing by stating that where the price seems to have no explanation other than pure monopolistic power then then the price is not realistic in relation to the economic value. [563]

Before the case went on to trial to the competition appeal court, the tribunal found the Mittal Steel had priced its flat steel products to the South African market in reference to import parity pricing and it held that import pricing was not a competitive way of pricing. The CAC revised the Tribunals decision and asked the tribunal to further determine the case as the tribunal did not use the specific language and interpretation of law as mentioned in the Competition Act. Further, the Tribunal states that the tribunal made a mistake as it did not consider the cost, pricing structure or comparative price analysis.[564]

The judgement by CAC was a very important step in defining excessive pricing as it asked to (1) the determination of the actual price charged; (2) the reasonable economic value of the good or service must be ascertained; (3) if the actual price exceeds the economic value, it must be determined whether the difference between them is unreasonable; and (4) if so, it must be determined if the charging of the excessive price is to the detriment of consumers.[565] After focusing on the four points to determine if the alleged company is at fault, the CAC reverted the case back to tribunal and the case was later settled out of court. [566]

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[563] Liberty Mncube and Mfundo Ngobese, Excessive Pricing and Competition Law: Working Out the Standards for Excessive Pricing in South Africa (2018) pg. 162

[564] Mittal Steel South Africa Limited vs Harmony Gold Mining Company Limited'. Case No: 70/CAC/Apr07

[565] Mittal Steel South Africa Limited vs Harmony Gold Mining Company Limited'. Case No: 70/CAC/Apr07 para 32, 33

[566] Liberty Mncube and Mfundo Ngobese, Excessive Pricing and Competition Law: Working Out the Standards for Excessive Pricing in South Africa (2018) pg. 162

This case played a very important role in determining the key concepts while dealing with a case of a dominant firm applying excessive pricing in the relevant market. It was also important to see that a developing economy which has transposed laws on excessive pricing from the EU, went and took different approach that could be applied in a different scenario while determining the threshold.

In the Sasol case, it was established by the tribunal that it was dominant in position. Sasol was previously a state-owned company and was privatized.[567]The decision of CAC in this case confirmed the two central disputes between the parties i.e., first, to determine the economic value of propylene and polypropylene. The second dispute was about whether there was a reasonable relationship between Sasol prices and economic values. After determining all the facts, CAC held that the amount was significantly less than 20 per cent and could not be justified to be detrimental to the consumers and there was reasonable relationship to the economic value. [568]

After both these cases, there were lot of talks for the need to amend the competition laws, as it was felt that the interpretation and the language used in regard to the excessive pricing were not adequate and was always a cause of confusion. The new Competition Act amendment bill made its way since 1 December 2017 and came into force on 13 February 2019. [569]The act had amended many provisions of the competition act including the excessive pricing. This Act made way for companies to prove their innocence by asserting that there is no prima facie evidence against them. Also, this act on consideration with Mittal and Sasol case specified a test which could be used to determine if there is an excessive priced charged by the firm.[570]

Even though anti-trust authorities around the world have tried to include concepts, definition and have explained the ways to determine excessive pricing charged by a company in dominant position, there are still some backlogs in dealing with such issues.

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[567] Liberty Mncube and Mfundo Ngobese, Excessive Pricing and Competition Law: Working Out the Standards for Excessive Pricing in South Africa (2018) pg. 168

[568] Sasol Chemical Industries Limited v Competition Commission [2015], para 160, 186.

[569] Competition Tribunal South Africa. The Competition Act. <https://www.comptrib.co.za/legislation-and-forms/competition-act>

[570] Spheshile Nxumalo Lerisha Naidu, 'South Africa: Certain Provisions of the Competition Amendment Act Come into Force' (25 July 2019).

For instance, during a recent pharmaceutical case in India between *Biocon Ltd. v. F. Hoffmann-La Roche AG* (2017) [571]where Commission decided to investigate Roche and its two group firms, multinational pharmaceutical company, for alleged anti-competitive conduct with respect to its biological cancer drugs which was made and produced by Roche, Trastuzumab. It was alleged by Biocon and Mylan that Roche's products were excessively prices as compared to its biosimilars.[572] It was also alleged that Roche used some small tactics to avoid the competitors to enter the market in this particular area of drugs. In this case the drug trastuzumab was seen similar to the other biosimilar products for the same intended use. With regards to this, the court sided with Roche on the grounds that it had invested a lot in R&D and the initial high price can be justified in this case. The other issues in this case were denial of market access, in this ground, the commission ordered an investigation by director general within 60 days but refused to move further in regard to the application of excessive pricing by Roche. [573] Further justifying its decision, the commission states:

> *"We are dealing with a case which involves a highly sensitive sector, where the safety of the patient is of paramount importance. Thus, creating any iota of doubt in the minds of doctors can adversely affect the market for biosimilars, which is prescription induced, beyond repair. Such disparagement may also have ripple effects within the medical community. In this scenario, those biosimilar manufacturers who do not have strong marketing channels amongst doctors may be forced out of the market because of abusive denigration by a dominant player."* [574]

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[571] 'Biocon Limited & Others vs F. Hoffmann-La Roche Ag & Others on 21 April 2017'. Competition Commission of India Case No. 68 of 2016

[572] Biological products are any virus, therapeutic serum, toxin, antitoxin, vaccine, blood component or derivative, allergenic product, protein (except any chemically synthesised polypeptide) or analogous product applicable to the prevention, treatment or cure of diseases or injuries of man. Indian guidelines define a similar biologic product as that which is similar in terms of quality, safety and efficacy to an approved Reference Biological product-based on comparability.

[573] 'Biocon Limited and Mylan Pharmaceuticals Private Limited and F. Hoffmann-La Roche AG & Others. Analysis of Competition Cases in India'.

[574] 'Biocon Limited & Others vs F. Hoffmann-La Roche Ag & Others on 21 April, 2017'. Competition Commission of India Case No. 68 of 2016 para 66

Excessive pricing has been for long a controversial topic in cases relating to abuse of dominant position, as we have seen in the above cases the courts have had some or the other kind of difficulties establishing the case based on prima facie evidence. The establishment of whether the pricing is excess or not has been difficult to determine not only in developed economies but also in developing economies.

Further the approach of determining such prices is different in US and EU, developing economies are inclined towards the European approach but cases like the Mittal case in South Africa has also shown that developing economies are also taking more appropriate approaches in determine excessive pricing and the *prima facie* evidence.

However, even though developing countries are strengthening their competition laws and enforcement mechanisms, there is still a very persistent issues of SOEs and monopolies in such economies. As discussed before, in many Sub-Saharan African countries the economies are still very concentrated with few handful people enjoying the economic privilege and monopoly position.[575] The food commodity price index has increased up to 15% in previous month (March-April 2022), which is 80% higher than in 2020. Many consumers in Africa spend a huge amount of their household income on food, by a data compiled by World Economic Forum Nigeria is at top of the list, with a 56.4% of household income in 2015 spent on food, then followed by Kenya (46.7%), Cameroon (45.6%), and Algeria (42.5%). [576]In comparison with the consumers in the United States spend the least globally (8.6%),[577] far less than people in emerging economies like Malaysia (24%)[578] and Pakistan (40.1%)[579]. One of the reasons for such differences in the food related income among jurisdictions is that the absence of strong

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[575] Mor Bakhoum, 'Interfacing the 'Local' With the 'Global': A developing country perspective on 'global competition' [2013] Max Planck Institute for Intellectual Property & Competition Law Research Paper No. 13-02 SSRN Electronic Journal <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2198924>. Pg. 12-13

[576] World Economic Forum 2016 'This map shows how much each country spends on food' <https://www.weforum.org/agenda/2016/12/this-map-shows-how-much-each-country-spends-on-food>

[577] U.S. Department of Agriculture, Economic Research service, 'Food Prices and Spending' (2022). <www.ers.usda.gov>

[578] Department of Statistics Malaysia official portal, Household expenditure survey report 2019. <www.dosm.gov.my>

[579] World Economic Forum 2016 'This Map Shows How Much Each Country Spends on Food' <https://www.weforum.org/agenda/2016/12/this-map-shows-how-much-each-country-spends-on-food>

competition laws which when combined with weak consumer protection has limited the bargaining power of the customers and SMEs. In many of the African countries, there are two or three major players in the market which produce the basic staple such as salt, sugar, milk, oil, flour, rice etc. The Food and Agriculture Organization of the United Nations (FAO) has stated that the fair pricing and food security depends on markets which are free from monopolistic tendencies[580].

Excessive pricing of commodity hurts the consumers, the problems related to excessive pricing of products are much more persistent in developing economies rather than in developed economies. There are many factors which attribute to such problem, some of them being the political scenario, the foreign investment policies, protection of local and small producers, competition and consumer laws etc. Overall, we can see from the above cases, that many developing economies are trying to strengthen their laws and help from experienced competition authorities would certainly speed up the process. We will discuss this further in the mentoring program.

Trade restrictive practices by an undertaking in a position of dominance in developing countries can have a chain reaction which may not only affect the country where it is taking place, but on its trading partners too. As we have seen the market structure of developing countries susceptible to much more abuse restraints than developed.

[580] Ndidi Nwuneli, 'The high cost of food monopolies In Africa | By Ndidi Okonkwo Nwuneli - Project Syndicate' (Project Syndicate, 2018) <https://www.project-syndicate.org/commentary/africa-monopoly-food-prices-by-ndidi-okonkwo-nwuneli-2018-08>

4.2.3. Mergers and Acquisitions

Mergers and acquisitions represent an important mechanism for the reorganization and restructuring of a market economy. Before the 1990s most of the mergers were between industrialized developed nations. Recently, many foreign direct investments are made by the developed economies in the developing economies, but instead of going for green field investments,[581] the undertakings are acquiring already existing enterprises. [582]

This composition of investment saw a heavy flow of FDI from zero per cent investment in late 1980s to almost 50 per cent in late 1990s, Latin America saw a sharp rise in FDIs in 2001-02.[583]

This sudden boom in the FDI flows did raise concern, as developing economies did not have strong policies to control and regulate the strong flow of FDIs. Even now many such economies are lagging behind to regulate and control mergers and acquisitions in their countries. A strong merger control regime can certainly help economies. For example, US and EU both have very strong merger control regimes and there have been occasions where they have stopped international merger from taking place on the ground that such merger may hamper competition.[584] This power to stop a merger as a threat to competition in the market cannot be seen in developing economies.

As of 2019, 135 jurisdictions have mergers regulations in place. There is substantial difference between the implementation of these regulations between jurisdictions. [585]With the increasing digitalization and globalization, companies can expand their domestic businesses to international market, as it has become relatively less burdensome.

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[581] A green-field investment is a type of foreign direct investment in which parent company creates a subsidiary in a different country. It builds its operation from the grounds up. It leads to building of new construction facilities and can also include building of new distribution hubs and living quarters.

[582] Ajit Singh and Rahul Dhumale, 'The global merger wave:' (*Globalpolicy.org*, 1999) <https://www.globalpolicy.org/global-taxes/47146.html#P232_18300>

[583] César Calderón, Norman Loayza, Luis Servén, `Greenfield foreign direct investment and mergers and acquisitions: feedback and macroeconomic effects´ The World Bank

[584] The EU commission prohibits GE´s acquisition of Honeywell in 2001. <https://ec.europa.eu/commission/presscorner/detail/en/IP_01_939>

[585] OECD (2021), OECD Competition Trends 2021, Volume II, Global Merger Control, http://www.oecd.org/competition/oecd-competition-trends.htm

However, as there is an increase in the competition in the market, one of the ways to enter a new territory is by way of M&A, this gives them a direct access to a new market, a new customer base. .[586] Mergers can increase market power of the company, it is important how different jurisdiction determine the threshold, as an increase in the market power of the undertaking can raise competition concerns.

For instance, in the EU, commission can raise competition concerns when a merger and acquisition lead to an increase in market power of the undertaking involved to an extent that it can cause adverse effect for consumers and in cases where the merger leads to strengthening of dominant position of the firm. [587]

The EU commission and the US Department of Justice, use the market share percentage or the Herfindahl-Hirschmann Index (HHI)[588] to establish if a merger results in market concentration level.[589][590] In this chapter we will discuss in detail how different economies have different notification thresholds. Companies are evaluated based on the jurisdictional threshold; it helps capture the concentrations which may have a significant impact on competition. The EU commission, in its evaluation results and follow up measures on jurisdictional and procedural aspects of EU merger control states that:

> *"the jurisdictional thresholds, the evaluation results showed that at this stage, the turnover-based jurisdictional thresholds, complemented with the referral mechanisms, have generally*

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[586] Cristina Pérez-Pérez, Diana Benito-Osorio and Susana María García Moreno, 'Mergers and acquisitions within the sharing economy: placing all the players on the board' (2021) 13 743, 743 <https://doi.org/10.3390/su13020743>.

[587] 'Guidelines on the assessment of horizontal mergers under the council regulation on the control of concentrations between undertakings (2004/C 31/03) (European Commission) 2004/C 31/03, [2004] OJ C 31/5' (2004) <eur-lex.europa.eu>.

[588] **Herfindahl-Hirschmann Index (HHI):** the index, which is calculated on the basis of the market shares of all the firms in the market, gives proportionately greater weight to the market shares of larger firms. While the absolute level of the HHI can give an initial indication of the competitive pressure in the market post-merger, it is, above all, the change in the HHI that is a useful indicator for the change in concentration directly brought about by the merger.

[589] 'Guidelines on the assessment of horizontal mergers under the council regulation on the control of concentrations between undertakings (2004/C 31/03) (European Commission) 2004/C 31/03, [2004] OJ C 31/5' (2004) <eur-lex.europa.eu>.

[590] The United States Department of Justice, 'Herfindahl-Hirschman Index' <www.justice.gov>.

proved effective in capturing significant transactions in the EU internal market." [591]

Countries should have a clear established notification thresholds as these thresholds are starting point for authorities to identify potential competition concerns.[592]

4.2.3.1. Definition of cross-border mergers and acquisitions

Cross-border merger and acquisitions or international M&As consists of the consolidation of companies or assets by way of many financial transactions. When two different entities having their presence in two or more countries join their assets and liabilities to create a single new entity, this is considered an international merger. In case of international acquisition, a company has its presence abroad and acquires an already existing firm. Even though the 1990s saw an increase in mergers across the world, there have been six mergers waves which started in the 1893.

These waves were mainly characterized by horizontal mergers which created mining, steel, rail industries etc. The second wave of cross border mergers in 1919-1929 introduced vertical integration, the third merger wave was during the 1955s which saw the concept of conglomerate[593] developed. The fourth and the fifth mergers saw an increase in international mergers due to the increase in globalization.[594]

The increase in the number of cross-border M&As is due to the fact that they are beneficial to both the entities involved and also the consumers. It is a tactic by entities to quickly enter new markets globally.

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[591] European Commission-Press release, 'Mergers: commission announces evaluation results and follow-up measures on jurisdictional and procedural aspects of EU Merger Control' (26 March 2021) <ec.europa.eu>.

[592] Working group comments original comments (September 2002) amended (may 2017), 'ICN recommended practices for merger notification and review procedures.

[593] Conglomerate mergers: These are union between companies that operate in different industries and are involved in distinct and unrelated business activities.

[594] Andrey Golubov, Dimitris Petmezas and Nickolaos G. Travlos, 'Empirical Mergers and Acquisitions Research: A review of methods, evidence and managerial implications' (*Uel.edu.vn*, 2012).

According to OECD there has been a rise in the cross-border M&A transactions which were up by twenty per cent in 2016.[595] One of the main reasons why companies expand is to widen their range of consumers. M&A are very beneficial to consumers as they bring in new products in the market, they can bring new technical know-how and can be beneficial to the producers of like goods and also create employment in the country. However, these M&As need to be regulated well and countries should have strong competition laws to regulate and supervise the companies and its behaviour in the market towards its consumers and competitors. One another challenges countries face due to the entry of big these firms are the effect on small and medium size industries or business.

4.2.3.2. Merger control regime and challenges faced by developing countries

With the increase in international business where more and more companies are looking to expand their market and increase their customer base, mergers and acquisitions are a great help, especially when such companies are not looking to make a greenfield investment. Due to the increase in merger transactions, countries are trying to strengthen their merger control regime. The reason to implement a strong merger control regime is because these types of interjurisdictional merger do not only affect the companies but also the economies involved.

Having a new firm enter the market can lead to a huge economic impact on the country. Thus, competition law on merger control is important as it regulates the mergers, sees to it that they do not hamper competition and do not affect the trade and economy of the country in a negative manner. Merger control is a key aspect in competition laws as its aim is to preserve the competition structure of the market despite mergers or takeover operations. [596]

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[595] Nate Need, 'Cross Border M&A: risks and opportunities - Investmentbank.Com' (*InvestmentBank.com*, 2020) <https://investmentbank.com/cross-border-mergers-and-acquisitions/> accessed 24 April 2020.

[596] 'Challenges in the design of a merger control regime for young and small competition authorities' [2017] United Nations Conference on Trade and Development.

Merger transactions are explained and defined by many international organizations such as OECD, UNCTAD and ICN.

> *¨Jurisdictions should consider carefully the types of transactions that are included within the scope of their merger laws and seek to include in the scope of their merger laws only transactions that result in a durable combination of previously independent entities or assets and are likely to materially change market structure. ¨*[597]

ICN further explains that it is important for jurisdictions to identify the transactions which fall under the scope of their merger laws.

> *¨Jurisdictions should use clear definitions to identify transactions that fall within the scope of their merger laws. Such definitions may refer to categories of transactions, such as share acquisitions and acquisitions of assets, and/or to broader concepts, such as the acquisition of "control" or of a "competitively significant influence," as defined by the reviewing jurisdiction. ¨*[598]

Mostly all economies have provisions and policies on competition laws, although there may be some difference in the way they have formulated the laws. Further in the thesis we will be discussing in the chapter of drafting of competition laws for developing economies and how important it is that every jurisdiction should design its competition law in a manner that suits it best i.e., giving due consideration to whether if it wishes to transpose competition law from another country or adopt a mix of existing systems.

Young and small jurisdiction should maintain a balance between the benefits and limitation of adopting a model of law to their advantage; attention should be paid to the structural and behavioural factors, procedural arrangements, compulsory notifications

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[597] ICN Recommended practices for merger notification and review procedures. Definition of a Merger Transaction. ICN. *Working group_2017*

[598] ICN Recommended practices for merger notification and review procedures. definition of a merger transaction. ICN. *Working group_2017*

for mergers of firms, remedies and sanctions. All the above aspects are just some of the points which needs to be analysed.[599] Most economies are strengthening[600] their merger regulations and for this purpose there is a clear need to have a proper definition of merger, a notification procedure and to care for the details regarding how the review process should be conducted ex ante or ex post.

However, there are some concerns with establishing these thresholds and abiding by them, a thorough merger control requires resources and experts to invest time on the review, and this can lead to additional burden on some competition authorities.[601] In such cases, help of regional competition authorities can certainly be useful, we will be discussing this in depth.

4.2.3.2.1. Definition of merger

While drafting a merger control regime it is very important for jurisdictions to clearly mention the meaning of merger or definition of merger, this is to prevent any kind of confusion while investigating any merger transaction.

Albania defines a concentration of undertakings in Article 10 definition of concentration, Chapter III on Control of concentrations governed manly by Law No. 9121 on Competition Protection of 28 July 2003 as (i) the merger of two or more undertakings or parts of undertakings hitherto independent of each other; (b) any transaction when one or more undertakings acquire, directly or indirectly, a controlling interest in all or parts of one or more other undertakings; (c) joint ventures exercising all the functions of an autonomous economic entity".[602]

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[599] 'Challenges in The Design of a Merger Control Regime for Young and Small Competition Authorities' [2017] United Nations Conference on Trade and Development.

[600] The Competition Amendment Act No. 18 of 2018 in Africa came into effect end of 2019 and 2020. It provides for changes in merger regulations, this is discussed further in this chapter. The Philippine Competition Act (Republic Act No 10667) came into force in 2015 and have since strengthened their merger control regime.

[601] Thomas K. Cheng. Competition law in developing countries. Pg 399

[602] 'Republic of Albania Assembly Law No. 9121, Date 28.07. 2003 "On Competition Protection"' (*Wipo.int*, 2003) <https://www.wipo.int/edocs/lexdocs/laws/en/al/al067en.pdf>

Botswana in its Competition Act 2009, Part X on Control of merger defines Merger, Acquisition and gives detail regarding a person who controls an enterprise in the following situations: (a) when one or more enterprises directly or indirectly acquires or establishes direct or indirect control over the whole or part of the business of another enterprise, (b) Acquisition of control over the whole or part of another enterprise may be achieved in any manner, including the purchase or lease of shares, an interest, or assets of the other enterprise in question; or (c) amalgamation or other combination with that enterprise.[603]

In case of Philippines, the Competition Act has defined merger in a simple statement but later has given in detail the provisions regarding notification and review of mergers and acquisitions. According to the Philippines Competition Act a '*Merger refers to the joining of two (2) or more entities into an existing entity or to form a new entity*'[604]

From the above we can see that, even though there are some variations as to how economies have chosen to include the definition of mergers in their competition laws, the basis of what mergers are, is still the same.

Many developing economies have recently adopted competition law. In case of mergers the international market and trade has a huge impact on such small economies. While drafting merger control regime, such economies must keep in mind that the impact an international market share can have both positive or negative impact. Positive impact can lead to creating of jobs, more taxes for the government etc.

While a negative impact can lead to hampering competition in the market, especially for small and medium size enterprises. It is very important for economies to draft the merger control regime in a manner which works for their economy.

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[603] '(Botswana) Competition Act 2009' (*Wipo.int*, 2020) <https://www.wipo.int/edocs/lexdocs/laws/en/bw/bw009en.pdf> accessed 27 April 2020.

[604] 'Philippine Competition Law (R.A. 10667)' (*Phcc.gov.ph*, 2020) <https://phcc.gov.ph/wp-content/uploads/2019/02/Philippine-Competition-Act-PCA-1.pdf>

4.2.3.2.2. Notification of a merger

For adopting a merger control regime, it is very important that regulation of any jurisdiction makes the notification threshold absolutely clear. As the ICC mentions on its recommendations on pre-merger notification, since the last two decades two main trends have impacted the way companies deal with merger control regimes.

First, increasing number of countries have adopted merger control regime, and second, due to globalization more and more countries are being impacted by mergers and acquisition of companies.[605]

A threshold determines which mergers and acquisitions cases should be evaluated by the respective competition commissions of a given country. It should also clarify the amount or turnover of assets or sales of the merging companies to which national review would be done.[606] Many jurisdictions, apart from turnover thresholds also use the market hresholds[607] [608] and transactional value thresholds.[609]

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[605] *ICC Recommendations on Pre-Merger Notification Regimes* (International Chamber of Commerce. The World Business Organization 2015) <https://iccwbo.org/content/uploads/sites/3/2017/06/ICC-Recommendations-on-Pre-Merger-Notification-Regimes.pdf>

[606] 'Challenges in the design of a merger control regime for young and small competition authorities' [2017] united nations conference on trade and development.

[607] SPAIN: Article 8(1), Law no. 15/2007, of 3 July (BOE of 4 July 2007) (Spanish Competition Act) provides two alternative criteria: as a result of the concentration, a market shares equal to or greater than 30% of the relevant product or service market is acquired or increased at the national level or in a defined geographic market within the country, except if the overall turnover in Spain of the acquired company or of the assets acquired in the last period does not exceed the amount of €10 million, provided that the participants do not have an individual or joint share equal to or greater than 50% in any of the affected markets; or the aggregate turnover in Spain of all the participants exceeds €240 million in the last financial year, provided that at least two of the parties have an individual turnover in Spain of more than €60 million.

[608] PORTUGAL: Article 37(1) of the Portuguese Competition Act provides three alternative criteria, two of them including market shares: the transaction leads to the acquisition, creation or reinforcement of a market share equal to or greater than 50% in the national market of a specific product or service, or in a substantial part of it (market share criterion); the transaction leads to the acquisition, creation or reinforcement of a share equal to or greater than 30% but smaller than 50%, provided that the turnover individually achieved in Portugal, by at least two of the companies concerned, is higher than €5 million (mixed criterion); or the involved undertakings have an aggregate turnover in Portugal of more than €100 million, provided that the turnover achieved individually in Portugal by at least two of those undertakings is higher than €5 million (turnover criterion).

[609] German and Austrian Guidance on Transaction Value Thresholds for Mandatory Pre-merger Notification, available at :

Further jurisdictions such as Namibia, South Africa, Zimbabwe use a combined annual turnover or asset in or from Zimbabwe.[610]

In the EU, Commission must be notified of any merger with an EU dimension[611] prior to its implementation. If the merger reaches above the mentioned threshold, the commission investigate the merger to rule out any competition threats. If an in-depth analysis of the merger raised competition concern, the commission opens a Phase II investigation in which it checks the effect on competition, analyses claimed efficiencies which companies can achieve if merged together and if the commission concludes that the merger would likely harm competition it sends a statement of objection (SO). The commission tries to align its investigation with other authorities worldwide. For its final decision the commission can either clear the merger unconditionally or approve the merger subject to some remedies or prohibits the merger if no adequate remedy is proposed to avoid the distortion of competition. [612]

The threshold is a key element, especially for young and small agencies as it determines the operations to be notified and resources to be used. However, thresholds in different jurisdiction can be burdensome on companies wanting to merger. As this can cause serious delay in mergers and also cause a financial strain on the companies.

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https://www.bundeskartellamt.de/SharedDocs/Publikation/EN/Leitfaden/Leitfaden_Transaktionsschwelle.pdf?__blob=publicationFile&v=2.

[610](Bowmanslaw.com,2022) <https://www.bowmanslaw.com/wpcontent/uploads/2021/07/Competition_Digital.pdf>. pg. 196

[611] There are two alternative ways to reach turnover thresholds for EU dimension.

- The first alternative requires: (i) A combined worldwide turnover of all the merging firms over €5 000 million, and (ii) An EU-wide turnover for each of at least two of the firms over €250 million.
- The second alternative requires: (i) A worldwide turnover of all the merging firms over €2 500 million, and (ii) combined turnover of all the merging firms over € 100 million in each of at least three Member States, (iii) a turnover of over €25 million for each of at least two of the firms in each of the three Member States included under ii, and (iv)EU-wide turnover of each of at least two firms of more than €100 million. In both alternatives, an EU dimension is not met if each of the firms archives more than two thirds of its EU-wide turnover within one and the same Member State.

[612] European Commission and s Council Regulation (EC) No 139/2004, 'Competition: Merger Control Procedures' <ec.europa.eu>.

For instance, Kenya and Zimbabwe before 2002 did not have a provision on mandatory notification, and this led the competition commission to have no or very little knowledge in regards to many cross-border mergers which had a harmful effect. The competition rules in Kenya until 2018 did not have provisions on a specific merger threshold but required compulsory notification and assessment of all mergers until 2002. This in particular incurred both the parties and the competition agencies resources and delays in mergers. [613] In November 2019, Kenya saw a major change in the competition rules 2019 (Competition Act No 12 of 2010) by introducing a merger threshold. [614]

The Kenya Competition Act 2019, Under Section 41(2) the Act provides examples of the various types of acquisitions over which control may be acquired.

i. *Undertakings which have a minimum combined turnover or assets of one billion shillings and the turnover of the target undertaking is above one hundred million shillings.*

ii. *In the health-care sector, where the undertakings which have a minimum combined turnover or assets of five hundred million shillings and the turnover of the target undertaking is above fifty million shillings.*

iii. *In the carbon-based mineral sector, if the value of the reserves, the rights and the associated exploration assets to be held as a result of the merger exceeds four billion shillings.*

iv. *In the oil sector, where the merger involves pipelines and pipeline systems which receive oil and gas from processing fields belonging to and passing through the meters of, the target undertaking, even where the value of the reserves is below four billion shillings*'[615]

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[613] 'Cross-Border Merger Control: challenges for developing and emerging economies' [2011] Global Forum on Competition OECD.

[614] 'Government Gazette Republic of South Africa Act No. 18 of 2018: Competition Amendment Act, 2018'<https://www.gov.za/sites/default/files/gcis_document/201902/competitionamendment-act18of2018.pdf>.

[615] 'Competition authority of Kenya consolidated guidelines on the substantive assessment of mergers under The Competition Ac' (*Cak.go.ke*, 2019).

The Egyptian competition law No. 3 of 2005 on the other hand states that the entities shall notify the Egyptian Competition Authority upon their acquisition of assets, shares, mergers or incorporation of joint venture. Undertakings with an annual turnover in the last balance sheet which exceeds 100 million Egyptian Pound shall notify within thirty days after the merger or acquisition has been concluded.[616]

The Competition Act, 2002 of India in regards to its pre-merger notification and threshold states that 'the acquisition of one or more enterprises by one or more persons or merger or amalgamation of enterprises shall be a combination of such enterprises and persons or enterprises, if any acquisition where the parties to the acquisition, being the acquirer and the enterprise, whose control, shares, voting rights or assets have been acquired or are being acquired jointly have:

— *either, in India, the assets of the value of more than rupees* one *thousand crores or turnover more than rupees three thousand crores;*

— *[in India or* outside *India, in aggregate, the assets of the value of more than five hundred million US dollars, including at least rupees five hundred crores in India, or turnover more than fifteen hundred million US dollars, including at least rupees fifteen hundred crores in India; or]* ¨

From the example of Kenya, Egypt and India it can be seen that the notification threshold is very different from one country to another. This in particular causes delay for firms involved, as now with lot of entities wanting to have footing in many countries at the same time, this poses to be a challenge to a smooth merger. And as these economies are still in transitions, especially Kenya and Egypt have adapted many important provisions quite recently, this has also had a huge impact as to how mergers are affecting their economies.

Further, as there is no unified way of assessing the merger among jurisdictions, this leads to loss of lot of resources of countries when conducting a due diligence of the merging companies.

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[616] `Lex Mundi Publication´ pre-merger Notification Guide Egypt, Shalakany Law Office

An effective co-operation mechanism in competition law enforcement can help jurisdictions align their notification regulations which can benefit economies in many ways.

4.2.3.2.3. Ex-ante and ex-post merger control

Mergers create efficiencies, but some mergers can harm competition and competition authorities can monitor these threats by way of imposing structural or behavioural remedies and implement strong ex-ante and ex-post-merger control.[617] Ex Ante control, which is the review of mergers before the actual merger has taken place and ex post control is a process that takes place after the merger has taken place.

Most of the economies show a and preference to conduct a merger review before the merger has taken place, but the option of allowing a post-merger review would be also ideal in cases of large mergers, particularly where the companies, in the post-merger phase show signs of getting involved in practices which may distort competition in the market.

Further, there is another option for review which is a mix of ex ante and ex post control, in my opinion this would be a better option as once a company has merged, their amalgamation can cause many changes in the market structure and how the companies jointly operate. For understanding this clearly, we will take *infra* an example of Facebook acquiring WhatsApp and the European competition commission.

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[617] OECD (2021), OECD Competition Trends 2021, Volume II, Global Merger, Control<http://www.oecd.org/competition/oecd-competition-trends.htm>.

In the United States the Hart-Scott-Rodino (HSR) Antitrust Improvement Act of 1976[618] provides the pre-merger notification program to review large mergers and also allows to block the merger if is potentially harmful to competition. The HSR after ex ante review and giving a heads up to the companies to merge can still allow Federal Trade Commission (FTC) to conduct an ex-post review in some exceptional cases. [619]

In the US since 2009, the FTC has challenged many consummated mergers on the grounds of hampering competition. The HSR also allows FTC to review consummated mergers which did not fall under the threshold of pre-merger review.

In the case of Ovation Pharmaceutical Inc.´s (Now Lundbeck Inc.), it acquired patent right to Indocin[620] from Merck & co. in 2005 and after acquiring, ovation increased the prices of the drug in the market. Shortly, Ovation acquired patent right to NeoProfen[621] from Abbott Laboratories Inc. in 2006; and as the transaction fell under the threshold of the HSR act, it escaped the pre-merger review. But by the end of 2008 Ovation had nearly increased prices of Indocin to 1300 per cent i.e., from 36$ to 500 $ per vial. The FTC challenged the acquisition in the Federal district court.[622] The FTC lost its challenge as the Federal District Court in Minnesota decided that Lundbeck did not violate any federal

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[618] The Hart-Scott-Rodino (HSR) Antitrust Improvement Act of 1976, Federal Trade Commission.

This Act, amending the Clayton Act, requires companies to file premerger notifications with the Federal Trade Commission and the Antitrust Division of the Justice Department for certain acquisitions. The Act establishes waiting periods that must elapse before such acquisitions may be consummated and authorizes the enforcement agencies to stay those periods until the companies provide certain additional information about the likelihood that the proposed transaction would substantially lessen competition in violation of Section 7 of the Clayton Act. The Act also requires a filing fee. The fees are evenly divided between and credited to the appropriations of the FTC and the Antitrust Division. The amount of the fee is based on the size of the transaction, with three fee tiers that are adjusted annually to account for increases in the Gross National Product.

[619] Marco Ottaviani and Abraham L. Wickelgren, 'Ex Ante or Ex Post Competition Policy? A Progress Report' (2011) 29 International Journal of Industrial Organization. 10.1016/j.ijindorg.2011.02.004

[620] Indocin and NeoProfen are paediatric heart drugs used to treat PDA, a potentially fatal heart condition that primarily affects premature babies. Surgery or pharmaceutical drugs are both treatment options for PDA, however, due to the health risks and high costs of surgery, use of drugs is a more favourable treatment.

[621] Ibid.

[622] FTC Sues Ovation Pharmaceuticals for Illegally Acquiring Drug Used to Treat Premature Babies with Life-Threatening Heart Condition" (Federal Trade Commission November 20, 2013) https://www.ftc.gov/news-events/news/press-releases/2008/12/ftc-sues-ovation-pharmaceuticals-illegally-acquiring-drug-used-treat-premature-babies-life

or state laws when it combined Indocin and NeoProfen. As the judge stated that according to FDA the drugs don't fall in the same category of drugs. This judgement was further challenged.[623] The FTC has challenged many consummated mergers since 2009 and many of these mergers did not have pre-merger review as they were below the threshold.

As anticipated, another example that ex post review is also an import aspect to be included in the merger regulations. As not all companies fall under the pre-merger regulations. It is also important to note that after the companies' merge, they can hamper competition and that has to be monitored and regulated to eliminate the possibility of the companies causing harm to the market.

Another example for ex post review is in the case of WhatsApp's acquisition by Facebook. On 19th February 2014 Facebook announced the acquisition of WhatsApp by providing to pay 19 billion US $ in cash and in stock. Under the Council Regulation139/2004 the merger did not reach the turnover thresholds but still Facebook opted to use the one-stop shop principle of EU, since it affected three member states (Spain, Portugal and UK) and their market share. The merger was approved on 3rd October 2014.[624] The Commission Vice President in charge of competition policy, Joaquín Almunia, said:

> *"Consumer communications apps keep European citizens connected and are becoming increasingly popular. While Facebook Messenger and WhatsApp are two of the most popular apps, most people use more than one communications app. We have carefully reviewed this proposed acquisition and come to the conclusion that it would not hamper competition in this*

[623] Federal Trade Commission and State of Minnesota v Lundbeck Inc [2011] On Appeal from The United States District Court for The District of Minnesota, Appellate Case: 10-3458 (On Appeal from The United States District Court for The District of Minnesota).

[624] Bram Visser The Facebook: WhatsApp merger case. European Commission's lucky break or proof of impermeable system of merger control? Vrije University Brussels DOI: 10.13140/RG.2.2.18429.46561

dynamic and growing market. Consumers will continue to have a wide choice of consumer communications apps."[625]

The Commission's investigation had focused on three main aspects. First consumer communication services, second, social networking services and lastly online advertising services. Two years after the merger in 2016, Facebook was fined €110 million for providing misleading information to the Commission. In 2014 Facebook had informed in its notification and a reply to commission that it won't be able to establish reliable an automated matching between Facebook users account and WhatsApp users' account. However, the Commission found out that Facebooks statement were contrary to what it had told. The Commission told Facebook that it provided incorrect and misleading information during the review.

Commissioner Margrethe Vestager, in charge of competition policy, said in regards to the €110 million fine that:

"*Today's decision sends a clear signal to companies that they must comply with all aspects of EU merger rules, including the obligation to provide correct information. And it imposes a proportionate and deterrent fine on Facebook. The Commission must be able to take decisions about mergers' effects on competition in full knowledge of accurate facts."*[626]

These two ex post review examples focus on two areas of post-merger review. One, where the competition authority did not conduct the merger review because the merger was below the threshold required. And the other case throws light on a merger which had been previously investigated and the due diligence had been conducted. Also, it is important to note that both these economies have one of the best antitrust laws in the world and many developing economies have relied on these models to formulate their own competition laws and policies.

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[625] Mergers: Commission approves acquisition of WhatsApp by Facebook European commission, 2014 <https://ec.europa.eu/commission/presscorner/detail/en/IP_14_1088 >

[626] Mergers: Commission fines Facebook €110 million for providing misleading information about WhatsApp takeover. European Commission. https://ec.europa.eu/commission/presscorner/detail/en/IP_17_1369

Many jurisdictions such as, South Africa, India, Pakistan, Zambia, Mexico etc[627] have provisions that state if the companies have knowingly provided false statement or information, they can be fined. However, there are no cases which challenges the merger itself. While considering the regulations on merger control it is important to make note of both ex-ante and ex-post-merger review.

Competition regulations of Argentina, Brazil, Chile, India, Indonesia, Malaysia Namibia, Nigeria, Seychelles, South Africa, Zambia, Zimbabwe provide the definition, notification requirement and provides a threshold for a proposed merger. While in case West African Monetary and Economic Union (WAEU), the competition law provides with a definition of merger but does not state the need for compulsory threshold, unless the merging companies are going to gain a domain position after the merger.

Even though most of the jurisdictions have established merger control regime, cross-border mergers still come with its set of challenges. For instance, in cross-border M&A deal, between Uber and Grab (Southeast Asia) it had a significant impact on competition and consumers welfare of SEA digital market. The countries affected by the deal were, Indonesia, Philippines, Singapore and Viet Nam, these are the four major ASEAN counties.[628] In this case, even though the firms completed their transaction, each of the authorities applied different remedies to this case.

Singapore and the Philippines authorities decided that the Grab-Uber merger restricts competition, while the Indonesian and Viet Nam authorities considered these mergers to not restrict competition in the market. [629] The merger review regimes of Indonesia,[630]

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[627] 'Templates - ICN' (*ICN*, 2020) <https://www.internationalcompetitionnetwork.org/working-groups/merger/templates/>

[628] ASEAN Experts Group on Competition (AEGC) was established in 2015 as a forum for discussing and coordinating competition policies, with a 2016-2025 agenda to help all ASEAN members implement effectively national competition law. As nine out of ten members have national competition laws, with Cambodia still reviewing its draft laws.

[629] Jang, Yungshin and Kang, Gu Sang, Merger Review Regimes in the ASEAN Region and Case Analysis of Grab-Uber Merger (September 3, 2021). KIEP Research Paper, World Economy Brief 21-39, Available at SSRN: https://ssrn.com/abstract=3929108 or http://dx.doi.org/10.2139/ssrn.3929108

[630] Commission for the Supervision of Business Competition < http://eng.kppu.go.id/>

Singapore,[631] Viet Nam[632] and the Philippines[633] are very different, Indonesia follows a voluntary pre-merger consultation and mandatory post-merger notification, while in case of Singapore it follows a voluntary post-merger notification. And in case of Viet Nam and Philippines both have a mandatory requirement of pre-merger notification.

The Singapore competition authority decided that the merger raises competition concern, as the merger would consolidate Grab's market power and would further strengthen it as the merger would eliminate competition. Nonetheless, the merger was approved given the post-review regime in the merger regulation. The Philippines competition authority also approved the merger by choosing to comply with a consent order. The competition authority in Indonesia, did not apply the competition law as it argued that the merger did not show any restrictive trade practices in the market. However, the Viet Nam competition authority and the consumer authority (VCCA), was of the opinion that M&A should not go ahead as it has potential to harm competition in the market. However, the competition authority at the end approved the merger without any condition. After the mergers, the anticompetitive effects have been felt in all four jurisdictions. Singapore competition authority later fined Uber $6.58 million in September 2018 over anti-competitive practices and has upheld this verdict after Uber appealed in 2021. [634]

The disparities among the competition laws and polices widens the regulatory gaps in cases of cross-border mergers. The institutional differences further add to these challenges, as it can increase burden and cost on the firm conducting the cross-border M&As. In the above case, the different approach taken by the competition authorities of Indonesia, Philippine, Singapore and Vietnam makes it clear that it is important to synchronize the state regimes of the ASEAN members. The increase in digital trade and digital platforms has complicated the implementation of competition law enforcement, the regional competition agreements and authorities should also focus on changing and

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[631] Competition Commission of Singapore < http://www.ccs.gov.sg/>

[632] Vietnam Competition Authority < http://www.vca.gov.vn/>

[633] Philippines Competition Commission < https://www.phcc.gov.ph/>

[634] Jang, Yungshin and Kang, Gu Sang, Merger Review Regimes in the ASEAN Region and Case Analysis of Grab-Uber Merger (September 3, 2021). KIEP Research Paper, World Economy Brief 21-39, Available at SSRN: https://ssrn.com/abstract=3929108 or http://dx.doi.org/10.2139/ssrn.3929108

adapting to the digital competition environments and educating the member countries. Thus, the amalgamation of the competition regimes at a regional level can prove to be very useful for developing economies.

4.2.3.2.4. Merger regulations and regional agreements

Regional integration has led to a significant increase in the regional competition agreements. Because of the rising number of competition cases around the world, competition agencies are opting for various forms of international co-operation.[635] The increase of international trade, competition laws of any country have to have rules ensuring a good and effective extraterritorial approach. In many developing countries the competition laws are not yet developed to have an effective international approach. In such cases the regional agreements help to develop laws and regulations which in turn helps to regulate competition cases with an international scope. These agreements seek to harmonize the different levels of intensity depending on the varying degrees of integration which these countries aim to establish. [636]

There has been a rise in the number of regional competition agreements as these agreements have great potential for solving the enforcement and resource problems of developing jurisdictions. Some of these agreements are the southern common market MERCOSUR [637], in Africa Common Market for Eastern and Southern Africa COMESA[638], the Economic Community of West African States ECOWAS[639], Economic and Monetary Community of Central Africa CEMAC[640] and in Asia: Association of Southeast Asian Nations ASEAN[641].

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[635] 'Regional competition agreements: benefits and challenges' (OECD 2018) <DAF/COMP/GF/WD (2018)14>.

[636] Marsilia Armando Liakopoulos Dimitris, *The Regulation of Transnational Mergers in International and European Law* (Martinus Nijhoff Publishers, 2010) 131–132.

[637] 'MERCOSUR The Southern Common Market' <https://www.mercosur.int/en/>.

[638] 'COMESA The Southern Common Market' <https://www.comesa.int/>.

[639] ECOWAS Economic Community of West African States <https://www.ecowas.int/>

[640] CEMAC Economic and Monetary Community of Central Africa < http://www.cemac.int/>

[641] ASEAN (Association of South East Asian Nations) < https://asean.org/>

As previously discussed,[642] many jurisdictions now have merger control regime, compliance with which may become burdensome and expensive for all economies to comply with such regime. Thus, in cases where the countries are within the same jurisdiction and have the same economic standing to some degree, these regional competition agreements are helpful. For instance, COMESA is a free trade area which consists of twenty-one member states[643] stretching from Tunisia to Eswatini. The States have agreed to co-operate in developing their natural and human resources for the benefit of the people.

Under COMESA there are many institutions which regulate different aspects such as trade insurance, business council and the COMESA competition commission.[644] The commission is an international organization established by COMESA competition regulations which were issued in the COMESA official gazette[645], these regulations are binding on all the member states. In regards to merger notifications mergers have to be notified only if they have a regional dimension with the target firm or acquiring firm operating in more than two COMESA states. Between the year 2013 to 2019, the commission allowed 170 mergers with unconditional clearance and 21 mergers with conditional clearance and during this period in ten cases the merger was either abandoned or withdrawn. [646]

Once the commission has considered the merger notification it takes around 120 days to determine if to approve the merger without any condition or with condition or reject the merger, the commission does a thorough check of the impact of any merger or acquisition in the market.[647] In the case of proposed acquisition by Groupe Bernard Hayot of Vindemia Group SAS, the commission received a merger notification on 24th

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642 Chapter 4: Merger, ii. Merger control regime in developing countries.

643 The 21 COMESA member states consist of: Burundi, Comoros, Djibouti, Democratic Republic of the Congo, Egypt, Eritrea, Ethiopia, Kenya, Libya, Madagascar, Malawi, Mauritius, Rwanda, Seychelles, Sudan, Swaziland, Uganda, Zambia and Zimbabwe. Most recently, Somalia and Tunisia.

644 'Common Market for Eastern and Southern Africa (COMESA)' <https://www.comesa.int/>.

645 COMESA Official Gazette Vol. 9 No.2 as Decision No. 43 of Notice No 2 of 2004' <https://www.comesacompetition.org/>.

646 COMESA merger statistics 2018-2019 <https://www.comesacompetition.org/>.

647 COMESA how to file a merger <https://www.comesacompetition.org/>.

January 2020 under the Article 24(1) of the COMESA competition regulation 2004 and in accordance with Article 26 of the regulation the commission is required to assess whether the transaction between the parties would likely affect the competition or not.[648]

Groupe Bernard Hayot (GBH), a French entity was founded in 1960 and had its presence in 17 states around the world, it deals in three main areas i.e., mass retail, automobile distribution and various other industrial activities such as production of yoghurt under the Danone brand. Vindemia a leading food retailer with supermarkets and convenience stores in various territories was founded in 1972 and has approximately 119 stores in (with 26 in Reunion, 32 in Mayotte, 7 in Mauritius and 54 in Madagascar)[649]

The parties submitted that GBH will acquire all the issued share capital of Vindemia. The committee responsible for the initial determination (CID) observed in the investigation that there are no overlaps in the activities of the acquirer. In this case the CID considered that there is likely no prevention or distorting of competition in this case as the activities of the acquirer was in a separate product market for retail for daily consumers which is mainly carried out in retails outlets such as supermarkets. Which were distinct than the other specialized outlet such as butcher, bakers, petrol service stations etc., as these outlets are more specialized and has wide array of products than that of supermarkets.

"*The CID the defined the relevant market as:*

a) *Retail supply of daily consumer goods at local level (within a radius of 20 minutes driving time) in Mauritius and Madagascar;*
b) *Wholesale supply of food products at national level in Mauritius and Madagascar*"[650]

[648] CCC Merger Inquiry Notice No 3 of 2020, 'Notice of Inquiry into the Proposed Merger Involving Groupe Bernard Hayot and Vindémia Group SAS' (Malawi,) 1–2 <SOM/3/2020>.

[649] CCC Merger Inquiry Notice No 3 of 2020, 'Notice of Inquiry into the Proposed Merger Involving Groupe Bernard Hayot and Vindémia Group SAS' (Malawi,) 1–2 <SOM/3/2020>.

[650] COMESA, 'Groupe Bernard Hayot and Vindémia Group SAS' 2–3.

The CID after its investigation determined that the transaction is unlikely to have a negative impact on trade between Member states and thus approved with the transaction in accordance with Article 26 of the regulation.

This case makes it clear that if a transaction when handled efficiently by a competent competition agency or committee with resources at hand, then these transactions between entities would be monitored and dealt with in a speedy manner. As it can be seen in this case the notification was bought in front of the commission on 24th January 2020 and the CID approved the acquisition by 9 March 2020.

In 2019, a merger notification was brought in front of the commission for the proposed merger between the parties Augusta, a wholly owned subsidiary of the Uber International B. V. and ultimately was controlled by Uber Technologies Inc. (UTI) which was a holding of Uber Group (¨Uber¨) and Careem Inc. which is the ultimate holding company of the Careem Group.[651]

In this particular case the commission observed that the parties even though operational in more than one-member state, the merger did not satisfy the merger notification thresholds under Rule 4 of the Rules on the determination of merger notification. In this case the party's operation only overlapped in Egypt, UTI had operations in Egypt, Kenya and Uganda while Careem has operations in Sudan and Egypt.[652]

In this case the CID observed that the relevant market is highly concentrated and the merging parties were already dominant players in the market. The CID was concerned regarding the post-merger transaction, but it came to the conclusion that as the sector is still at the beginning stages in the relevant market it is necessary to avoid any further foreclosure and for this the CID made the parties take some conditional undertakings which included no use of exclusivity provisions or any measures having equivalent effect. Also, it was agreed that Uber will not increasing a total organic fare beyond 10 per cent per year above the inflationary cost in Egypt. And that there shall be no reduction in the

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[651] 'Committee responsible for initial determination regarding the proposed merger between Augusta Acquisition B.V. and Careem Inc.' 1 1–2 <https://www.comesacompetition.org/?page_id=639>.

[652] COMESA, 'Committee Responsible for Initial Determination Regarding the Proposed Merger between Augusta Acquisition B.V. and Careem Inc.' 3 3–4 <https://www.comesacompetition.org/?page_id=639>.

service quality and the parties need to apply to the regulations very strictly. Further, CID in their decision obliges Uber to engage in a monitoring trustee that shall submit a written report to the commission in English every six month for a certain period of time.[653]

The above cases are good examples of the functioning of COMESA and how it can be beneficial. The level of cooperation and the goal of the agreement are different in different agreements. The type of agreements which gives the highest benefits are that which focus on competition enforcement and education through a central competition law authority whether or not parallel to a central competition authority.[654] For instance the model of MERCOSUR adopts a lower degree of co-operation which may include a joint creation of a competition culture, information sharing and enforcement by the national competition authorities. [655]

Further not all regional competition agreements are binding, some of them such as ASEAN are based more on secondary legislation and soft laws i.e., providing guidelines, conducting educative sessions for professionals and so on. The agreement does provide the ASEAN member states (AMS) with a basic substance of what practices are prohibited under competition laws. In case of mergers which may harm the market, the agreement provides that these mergers may only be approved by the respective AMS competition authorities.[656]

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[653] COMESA ´Committee responsible for initial determination regarding the proposed merger between Augusta acquisition B.V. and Careem Inc. ´ 3 pg. 3-4 <https://www.comesacompetition.org/?page_id=639>

[654] Michal Gal and Inbal Faibish, 'Regional agreements of developing jurisdictions: unleashing the potential', Competition Policy and Regional Integration in Developing Countries (Edward Elgar Publishing 2011) <http://www.e-elgar.com>.

[655] Michal Gal and Inbal Faibish, 'Regional agreements of developing jurisdictions: unleashing the potential', Competition Policy and Regional Integration in Developing Countries (Edward Elgar Publishing 2011) <http://www.e-elgar.com>

[656] 'Handbook on competition policy and law in ASEAN for business 2017' [2017] ASEAN <https://asean.org/storage/2016/12/Handbook-on-Competition-Policy-and-Law-in-ASEAN-for-Business-2017_Full.pdf>

The Caribbean community (CARICOM) is the group of fifteen member states and five associate members.[657] The treaty of Chaguaramas established the Caribbean community and common market, which was later known as the CARICOM.[658] In 2001, the treaty was revised and established the CARICOM single market and economy (CSME). Many of the member states have recently adopted competition laws and these CARICOM countries have lost a lot of important import due to the intense competition from international firms because of lowering trade barriers to enter the domestic market. [659]

In case of merger control provisions, not all members of CARICOM have a merger control regime and therefore CARICOM is in the process of developing merger control regime. Recently, member states Barbados[660], Trinidad and Tobago[661]. have incorporated merger control provisions into their national competition laws. Jamaica has no detailed merger policy or provision and is in the process of developing it. The Jamaican merger regime allows a post-merger notification, i.e. firms continue with the M&A deal and if the Fair Trading Commission (FTC) finds out that there is any harm done in the market, it has the right to go ahead and question the firms involved.[662] For the proper functioning of CSME it is very important that all member states have unified merger control regime and is helping member states to develop a strong merger control regime.[663]

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[657] Members include Antigua and Barbuda, The Bahamas, Barbados, Belize, Dominica, Grenada, Guyana, Haiti, Jamaica, Montserrat, Saint Kitts and Nevis, Saint Lucia, Saint Vincent and the Grenadines, Suriname, and Trinidad and Tobago. Anguilla, Bermuda, the British Virgin Islands, the Cayman Islands, and the Turks and Caicos Islands have associate member status, and Aruba, Colombia, the Dominican Republic, Mexico, Puerto Rico, and Venezuela maintain observer status.

[658] The Treaty of Chaguaramas was signed on July 4, 1973 in Chaguaramas, Trinidad and Tobago.[1] It was signed by Barbados, Guyana, Jamaica, and Trinidad and Tobago. It came into effect on 1 August 1973. The treaty also established the Caribbean Community including the Caribbean Single Market and Economy, replacing the Caribbean Free Trade Association which ceased to exist on 1 May 1974.

[659] Competition policy and law in the CSME (CARICOM 2020) <http://csme.caricom.org>

[660] Barbados Fair Competition Act Cap 326B - <http://www.ftc.gov.bb/library/CAP326C.pdf >

[661] Trinidad and Tobago Fair Trading Commission - <http://www.tandtftc.org>

[662] 'Fair Trading Commission Developing Merger Review Framework' (31 August 2018) <https://jis.gov.jm/fair-trading-commission-developing-merger-review-framework/>.

[663] 'Latin America and Caribbean competition forum session ii: merger control in Latin America and the Caribbean - recent developments and trends' (2017) DAF/COMP/LACF (2017)9 OECD.

The CSME, is under its way to develop merger control regime which will include all sectors and will effects mergers which create a cross-border transactions.

On April 2nd of 2015 the British telecommunication company Cable and Wireless Communications Plc (CWC) completed its 1.85 billion US$ acquisition of Columbus International Inc (CII). CII is a privately owned telecommunication and technology service company which is based in Barbados and has customer base in the Caribbean, Central America and the Andean region. While CWC has its reach in 17 countries which includes Caribbean, Latin America and the Seychelles. Like CII, CWC also provides custom IT solutions. The acquisition will give the CWC with a greater regional presence and scale and scope with assets.[664]

Before the acquisition CARICOM competition commission stated that the agreement by CWC to acquire CII may harm competition within CSME and as this merger may have a possible cross border effect, it is important to look into it before the transaction is finalized. Thus, the commission requested the national competition authorities to examine the matter and report to the commission within 30 days from the date of the request.[665]

The proposed acquisition was also seen as a concern to Digicel a telecommunication company in the Caribbean, as it stated that the acquisition of CWC and CII would create an entity which may have dominant position and it is possible that the company may take part in many anti-competitive practices and it started this to the competition authorities to [666] The countries which would have affected most by the merger included Barbados, Grenada, Jamaica, Saint Lucia, Saint Vincent and the Grenadines.

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[664] Cable & wireless communications plc proposed acquisition of Columbus International Inc. placing of new shares (Cable and Wireless communications 2014) <https://www.cwc.com/live/news-and-media/press-releases/cwccolumbus-merger-finalized.html> accessed 2 June 2020.

[665] 'Telecoms Merger Has Potential to Prejudice Trade, Says CARICOM Competition Commission - CARICOM' (*CARICOM*, 2015) <https://caricom.org/telecoms-merger-has-potential-to-prejudice-trade-says-caricom-competition-commission/> accessed 2 June 2020.

[666] Nicole Greene, 'Digicel Responds to CWC'S Columbus Buy' (2014) <https://technewstt.com/digicels-cwc-response/> accessed 2 June 2020.

The impact will also be felt in Trinidad and Tobago too.[667] In some countries the effect would be more than others for instance in Barbados, it was estimated by the Fair-Trading Commission that Columbus' FLOW network, combined with Cable & Wireless' LIME network, would have at least a 90 per cent market share of the fixed internet sector.[668] As the market share created a dominant position of the company and to avoid the entities to abuse its position the NCA did approve the merger but based on condition that the entity deprives itself of one set of cables in the zones where there exists a total overlap of the LIME and FLOW networks. [669] Jamaica was the first country to grant the regulatory approval for the merger, as it was indicated by the technology minister Philip Paulwell that the countries Telecommunications Act doesn't not authorize the government to impose conditions in relation to the transaction. Jamaica still doesn't have merger regulation provisions in its competition laws; thus, it could not investigate the companies in the same manner as the other Caribbean communities.[670]

In Trinidad and Tobago, the telecommunication authority asked the CWC to give up its 49 per cent of share ownership of the Telecommunications Services of Trinidad and Tobago (TSTT) company as this 51 per cent state-owned company was a broadband service provider under the name "BLINK" and mobile phone service provider under the name "bmobile". The reason for this being that as Columbus' FLOW network was a primary competitor of TSTT and given that CWC owned 49 per cent of the share, thus after the merger a single entity holding such a huge share in the market would possibly distort competition. CWC agreed to offload TSTT stake withing 18 months. [671]

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[667] ' A new era in Caribbean telecommunications' [2015] United Nation ECLAC Magazine of the Caribbean Development and Cooperation Committee (CDCC). Issue 3/ July-September 2015.

[668] 'Proposed Acquisition of Columbus Networks International Inc. By CEC Communication Plc' (Fair Trading Commission Barbados 2015) Summary Report DOC No. FDC20150326 <https://www.ftc.gov.bb/library/2015-04-30_summary_report_cwc_columbus.pdf> accessed 2 June 2020.

[669] ' A new era in Caribbean telecommunications' [2015] United Nation ECLAC Magazine of the Caribbean Development and Cooperation Committee (CDCC). Issue 3/ July-September 2015.

[670] 'A new era in Caribbean telecommunications' [2015] United Nation ECLAC Magazine of the Caribbean Development and Cooperation Committee (CDCC). Issue 3/ July-September 2015.

[671] 'A new era in Caribbean telecommunications' [2015] United Nation ECLAC Magazine of the Caribbean Development and Cooperation Committee (CDCC). Issue 3/ July-September 2015.

In the case of this regional competition agreement, the sole decision was not of the CARICOM but was taken by induvial NCAs. Each MS has its own competition laws and way to investigate and implement conditions on the entities. From the above we can see that the approach of condition applied on the company was different in Trinidad and Tobago than Barbados. Some of the MS have stronger competition laws than the other and this was shown in the way they investigated the entities and its impact on the market. For instance, the investigative power in Jamaica was different than that of Barbados.

The above regional agreements are effective tool to help developing economies in enforcing competition laws and especially in cases which have international dimension to it. Even though these agreements are different and have different purposes, it still helps develop a strong competition law in the member states. Some of the agreements are binding while some act as a guiding source. In case of developing nations, it is important to have strong regional institutions to help them understand the impact of international entities which may have a huge impact on the market of these jurisdiction in the given region.

5. GLOBAL COMPETITION FRAMEWORK

5.1. Introduction

International institutions have been instrumental in shaping international trade across the world. Some institutions set binding norms and processes while others set non-binding guidelines and help countries in the matter of trade by providing countries with guidelines to draft laws etc. There is an increase of economic interdependence, many businesses have their chain of production scattered around the world. Liberalisation of trade, increase of foreign direct investment and increase of e-commerce has given businesses opportunities to establish their manufacturing and producing plants in various countries. The concept of division of labour is being used to its full potential.

The assemblage unit of the business are frequently in a country with cheaper labour forces, thus; generating more profits to business around the world. Despite of various efforts made by international institutions in the area of transnational competition law there still exists a wide regulatory gap. Competition authorities around the world face challenges in cross-border investigations.[672] There is certainly a need for institutions that can monitor the activities of companies in different jurisdictions, to protect market from any anti-competitive practices.

There is a very strong co-relation between trade and competition, it is vital that the economies need co-operation among competition authorities across the world for the enforcement of competition laws. It is also important that older and more experienced competition authorities help and provide assistance to young competition authorities by acting as their mentors. (This concept will be discussed in more detail below).

In an OECD report on challenges of international co-operation in competition law it states that in the years to come:

> "*Policymakers will have to deal with two intertwined developments: rising global interdependence and an increasingly*

[672] OECD, 'Challenges of international co-operation in competition law enforcement' (2014). < https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm >

> *multipolar world as emerging economies will form a growing share of the world economy. The former will have several implications. First, the effects of economic shocks will in many cases be shared with trading partners to a larger extent, reducing volatility and risks for individual countries. In the same vein, international spill over effects from policies are likely to increase too, in some cases pointing to benefits from further international policy coordination. The latter will make such coordination more complex as the number of key stakeholders – often with different perspectives and policy priorities – will increase."*[673]

In 2019, developing economies' share in world exports of goods has been just above 44 per cent and in case of world services exports (US$6.1 trillion) was 30 per cent (US$1.83 trillion). The highest share of world services exports was recorded by countries in Asia at more than 24 per cent. The top three services exporters are China (4.6 per cent), India (3.4 per cent) and Singapore (3.5 per cent). They account for more than 40 per cent of developing economies' services exports.[674]

This section of the thesis will identify the hurdles faced by economies, especially developing economies while enforcing transnational competition laws. Many economies have embraced extraterritorial scope in their domestic competition regulations and policies. However, the deficiencies in the global regulatory system have proved to be an obstacle for economies to overcome the challenges associated with extraterritorial cases.

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[673] OECD, 'Challenges of international co-operation in competition law enforcement' (2014 < https://www.oecd.org/competition/challenges-international-coop-competition-2014.htm >

[674] UNCTAD, 'International trade in developing economies' (2020) <https://sdgpulse.unctad.org/trade-developing-economies/>.

The first part of the chapter will shed light on international institutions such as, ICN, OECD and UNCTAD and will analyse the competition regulations and recommendation provisions under their umbrella. The focus will then shift onto drafting of competition laws for developing economies; this section will deal with important questions such as, is it better for developing economies to transpose the laws from other developed economies such as the United States or European Union? Or the developing economies should devise their own laws depending on their economic needs and regulation enforcement mechanism?[675]

Early on, many jurisdictions saw the deficiencies in the global competition system, many economies jointly agreed on the need to solve the problem at a multilateral level. The successor of GATT, WTO was formed with the aim to reduce trade obstacles, in 1996 member-countries decided at the Singapore Ministerial Conference to set up three working groups, one of the groups was `The Working Group on the Interaction between Trade and Competition Policy´ (WGTCP), it was launched to address the issue on how does domestic and international competition policy instruments interact with the international trade? This part of the chapter will analyse the different point of views of various economies on the need to have a multilateral competition regulation system at a global level. One of the analyses which was derived during the working group program was the need for international co-operation in competition enforcement. Even though the General Council of WTO decided to drop this program in 2004; since then, a lot of effort has been directed towards this direction.

The detailed analysis of various cases throughout the thesis shows that despite the growth of institutional efforts there still exists regulatory gaps. This last part of the thesis makes proposal to better international co-operation among the different competition and will also propose a program where experienced competition agencies can mentor younger competition agencies and thus, can help them develop and enhance competition enforcement and co-operation by way of such mentoring programs.

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[675] 'Drafting Competition Law For Developing Jurisdictions: Learning From Experience' (*Lsr.Nellco.Org*, 2014)< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425329 > Accessed 18 June 2018.

5.2. International institutions and competition law

As discussed in the earlier chapters, international institutions provide for some rules which focus on competition provisions. The Organisation for Economic Co-operation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and the International Competition Network (ICN) are bridging institutions which have no binding rule-making or decision-making powers. Even though they do not have any binding effects they provide with guidelines and soft laws which eventually may intertwine at times with the national laws of countries. In the next section we will discuss in detail the role of guidelines and soft laws in the devising of competition law.

OECD caters to developed economies but also includes the emerging economies with its global competition forum. UNCTAD caters to developing countries through its UN member countries meeting and conferences. ICN is composed of competition authorities which have a special recognition and agendas for developing countries. [676]

5.2.1. International Competition Network (ICN)

ICN is a platform where the competition authorities of various countries address the practical concerns with regards to competition. It is an informal venue which serves to build consensus and convergence towards a healthy competition policy principle across the global antitrust community. It is the only international institution which deals with only competition law enforcement, there is not rule-making functions involved.[677]

The ICN originated out of a recommendation which was made by the International Competition Policy Advisory Committee (ICPAC). ICPAC was established in 1997 to deal with the global antitrust issues and concerns which came along with the increase in liberalization and globalization. ICN was created so that the government officials, private firms and non-governmental organizations could consult on antitrust matters. In 2001,

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[676] Eleanor M Fox and Michael J Trebilcock, The design of competition law institutions (Oxford 2013) <http://www.oxfordscholarship.com/view/10.1093/acprof:oso/9780199670048.001.0001/acprof-9780199670048>. pg. 12

[677] 'International Competition Network' <https://www.internationalcompetitionnetwork.org/about/>.

top antitrust officials from 14 jurisdictions[678] launched ICN in New York. [679] Currently there are 140 competition agencies involved with ICN to promote the standard and procedures on competition enforcement and polices by member agencies from all over the world. Apart from establishing a network for all competition authorities the ICN provides additional expert advice through the involvement of Non-Governmental Advisors (NGAs).[680]

The NGA consists of professionals specializing in competition laws. It involves lawyers, economists, in-house councils and members of industries and consumer groups, academics and judges. The competition authorities and the NGAs participate in mainly five working groups established under ICN. The ICN working group consists of advocacy working that helps to promote the development of a competition culture among its members. It also focuses on agency effectiveness by focusing on the operation of competition agencies. Under the ICN there is also cartels, mergers and unilateral conduct working groups which focus on anti-cartel enforcement, as well as on promoting the best adoption in the design of merger guidelines. And examines the challenges which are involved in unilateral conducts of the dominant firms and firms with power.[681]

The ICN collaborates with OECD on many areas of competition laws, especially on international co-operation in competition enforcement. They have published reports on international co-operation together, the most recent report of published in 2021.[682] The report focuses on the importance of co-operation among competition authorities in the age of globalization and digitalization.

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[678] In October 25, 2001, top antitrust officials from 14 jurisdictions – Australia, Canada, European Union, France, Germany, Israel, Italy, Japan, Korea, Mexico, South Africa, United Kingdom, United States, and Zambia – launched the ICN at a meeting in New York City.

[679] International competition network. <https://www.internationalcompetitionnetwork.org/about/ >

[680] International competition network. < https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/membership-ngas/ >

[681] International competition network. < https://www.internationalcompetitionnetwork.org/working-groups/icn-operations/membership-ngas/>

[682] OECD and ICN, 'OECD/ICN report on international co-operation in competition enforcement' <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf>.

It emphasises the idea that, for an effective collaboration among competition authorities, it is necessary that they share the common mission.

> "*The Report provides four key areas of focus to address these limitations:*
>
> 1. *develop further enforcement co-operation work-products and network;*
> 2. *improve transparency and trust between competition authorities;*
> 3. *provide policy and practical support for further developing effective regional enforcement co-operation;*
> 4. *remove substantive and legal barriers to co-operation*
>
> *The OECD and ICN are well placed to develop ambitious solutions to the identified challenges."* [683]

The ICN is a network-based organization which works and collaborates with NGAS and other institutions such as OECD. It has a shared mission with OECD to better competition polices and enhance co-operation among competition authorities.

5.2.2. Organisation for Economic Co-operation and Development (OECD)

OECD is an institution which has been active in the front of co-operations since a long time and its 2014 intensive work on the recommendation on international co-operation enforcement was the starting point for the later series, with the latest published in 2021.

[683] OECD and ICN, 'OECD/ICN report on international co-operation in competition enforcement' <https://www.internationalcompetitionnetwork.org/wp-content/uploads/2021/01/OECD-ICN-Report-on-International-Co-operation-in-Competition-Enforcement.pdf>.

The OECD has competition forum that deal in capacity building, guidelines on cooperation and hold annual seminars or forums for enhancement of competition policies. [684]

OECD provide with guidelines and recommendation concerning the international co-operation on competition. It has taken many initiatives to engage competition authorities around the world to help them reinforce their competition framework. Under the OECD there is the competition regional centres, the focus of it is to manage the capacity building between the Asian region, the central, the eastern and south-east Europe and in the Latin American region.[685] OECD also consists of a competition forum; it brings high-level competition officials around the world annually for roundtable discussions on strengthening the international policies and issued which can help develop competition policies. Apart from the competition forum it also has a Latin American and Caribbean competition forum.[686] In this forum high level officials form the Latin American and Caribbean region promote dialogue and network building in the region annually. The OECD has also held various seminars for national judges from different jurisdictions such as Russia, Southern Africa, Brazil, European commission etc.[687]

The OECD has also promoted co-operation by facilitating an agency to agency-based memoranda of understanding (MoUs). Since 2000 there are a total of 180 MoUs between competition authorities, most of these MoUs are modelled on inter-governmental cooperation agreements which have similar structure. These provisions are formal and consist of the basic elements of cooperation such as provisions of transparency, communication and/or technical co-operation which includes participation in seminars,

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[684] 'OECD Recommendation Concerning International Co-Operation on Competition Investigations and Proceedings' <https://www.oecd.org/competition/international-coop-competition-2014-recommendation.htm>.

[685]'OECD Competition Global Relations' <https://www.oecd.org/fr/daf/concurrence/competitionglobalrelations.htm>.

[686] `Latin American and Caribbean competition forum´ <https://www.oecd.org/competition/latinamerica/>

[687]'OECD Competition Global Relations' <https://www.oecd.org/fr/daf/concurrence/competitionglobalrelations.htm>.

conferences, training, study trips and aiding in advocacy activities. Most of the MoUs are first generation agreements. [688]

MoUs among competition authorities are very useful as the countries agree to the terms and conditions on cooperation on competition related aspects.

5.2.3. United Nations Conference on Trade and Development (UNCTAD)

UNCTAD is a permanent intergovernmental body established by the United Nations General Assembly in 1964, its supports developing countries to have better access to the benefits to be attained by the increase in globalization. Apart from working on enhancing and facilitating trade in developing economies it also protects consumers from abuse and curbs regulations which may stifle competition.[689]

UNCTAD's approach in competition polices is to provide intergovernmental group of experts and review conferences. It provides technical assistance to support developing countries to develop and implement competition law and polices. It also facilities regional and international co-operation with help of other institutes such as ICN, OECD. [690]

In the 1980s, the United Nations conference on restrictive business practices approved `the Set of Multilateral agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (henceforth called `The UN set´) ´.

> *"The UN Set is a multilateral agreement on competition policy that:*
>
> - *Provides a set of equitable rules for the control of anti-competitive practices.*
> - *Recognizes the development dimension of competition law and policy.*

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[688] 'OECD inventory of international co-operation agreements between competition agencies (MoUs)' https://www.oecd.org/competition/inventory-competition-agency-mous.htm

[689] 'United Nations Conference on Trade and Development' <https://unctad.org/about>.

[690] 'United Nations Conference on Trade and Development' <https://unctad.org/about>.

- *Provides a framework for international operation and exchange of best practices.*

This framework also provides vital technical assistance and capacity-building for interested member States so that they are better equipped to use competition law and policy for development."[691]

The UNCTAD competition and consumer protection covers voluntary peer review of competition policy and consumer protection laws. It further provides guidelines on competition policies. Its work is mainly focused on developing economies and, since the adoption of The UN set, it has helped 22 developing countries and countries in transition to adopt competition laws. The guidelines provided by UNCTAD have proved to be useful by many competition authorities, such as CADE, South Africa etc. [692]

Like the OCED and ICN, the guidelines provided by UNCTAD are voluntary in nature and it is on the countries to either refer to it or not. Efforts made by these institutions have helped all economies to better their competition laws and provisions; it has especially played an important role in helping developing countries draft competition laws.

5.3. Drafting of Competition laws for Developing Economies

Within the last twenty-five years almost two third of the countries have adopted competition policies and most of these jurisdictions consist of developing economies.[693] Competition law prohibits restrictive trade practices which hamper the competition in the market.

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[691] 'The United Nations set of principles on competition (The UN Set)' <https://unctad.org>.

[692] UNCTAD online Set, Its History and Developments over the Last 30 Years (Directed by UNCTAD online, 2013) <https://www.youtube.com/watch?v=SbTtFme8JJU>

[693] Cindy Cheng and Tim Buthe, 'The effect of competition law on innovation: A cross-national statistical analysis', a step ahead: competition policy for shared prosperity and inclusive growth (World Bank Publications 2017). 183–220

These practices which may result into competitors fixing prices or dividing markets in order to undermine the market competition.[694] Such practices do not only hamper competition but affect the trade and businesses, as they do not give the competitors a fair chance to compete in the relevant market. It is of important for economies to have a strong competition law and a stronger enforcement mechanism.

Many developing countries are embarrassing extraterritoriality in their domestic competition laws[695] and for the enforcement of competition laws and regulation in developing economies; the question which arises is whether it is better for the developing economies to transpose the laws from other developed economies such as the United States or European Union? Or the developing economies should devise their own laws depending on their economic needs and regulation enforcement mechanism?[696]

There is no one particular way to answer this question; it can only be answered by looking at examples of various developing countries and referring their experiences while adapting of competition laws. Even though not all economies have the same growth level, as no one size fits them all but most economies have shared goals and principles.[697]

The designing of competition law is affected by different motivations, especially for the developing economies. One of the main goals of such economies is to foster trade and encourage the process of growth by eliminating anti-competitive practices. A suitably implemented competition law could enhance the growth of the given economy.[698] Competition is important to reach an utmost potential of an economy as a well-planned

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[694] 'Competition law & policy in developing countries: explaining variations in outcomes; exploring possibilities and limits' (*Scholarship.Law.Duke.Edu*, 2016) <Https://Scholarship.Law.Duke.Edu/Cgi/Viewcontent.Cgi?Article=4801&Context=Lcp>.

[695] 'Developing Country Experience with Extraterritoriality in Competition Law, Report of the United Nations Conference on Trade and Development UNCTAD/DITC/CPLP/2021/3' (United Nations 2021) <https://ssrn.com/abstract=3981818>.

[696] 'Drafting competition law for developing jurisdictions: learning from experience' (*Lsr.Nellco.Org*, 2014)< https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425329 >

[697] 'The ICN's Vision for its Second Decade; presented at the 10th annual conference of the ICN' (*Internationalcompetitionnetwork.Org*,2011) <Http://Www.Internationalcompetitionnetwork.Org/Uploads/Library/Doc755.Pdf>

[698] 'Competition law & policy in developing countries: explaining variations in outcomes; exploring possibilities and limits' (*Scholarship.Law.Duke.Edu*, 2016) <Https://Scholarship.Law.Duke.Edu/Cgi/Viewcontent.Cgi?Article=4801&Context=Lcp>

market economy could lead to innovation, growth and increased quality of products and could relatively bring down the manufacturing cost, thus providing consumers with relatively low-price goods and services.

In designing the competition laws of the economies, the jurisdiction must pay attention to their motivation, trade relations and how does the particular competition laws affect trade not only within the economy, but also with international trade.[699] For the purpose of this chapter we will deal with the questions individually.

5.3.1. Transposing of Competition laws

As we have discussed earlier there is similarity between the concepts of competition laws, it remains to the economies to decide if they would prefer transposing competition laws from other economies or devise their own competition laws.

During the last two decades many developing economies have adopted competition laws, many of these economies have taken reference from EU Competition Policies. The main motive behind these economies to adopt competition policies was to have a favourable impact on the businesses and include more foreign direct investments.[700]

The European Commission has engaged in many activities involving co-operation with the competition authorities of countries outside of EU. There are few bilateral agreements which have come into place which solely deal in competition provisions which is called as the *"dedicated agreements"*. These agreements consist of free trade agreements, partnership agreements, association agreements etc.[701]

The Euro-Mediterranean Association Agreements came into force between the EU and nine of its Mediterranean partners to replace the 1970s co-operation agreement. The agreements came into force between the period of 1996-2004. For example, between

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[699] 'Drafting competition law for developing jurisdictions: learning from experience' (*Lsr.Nellco.Org*, 2014) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2425329 >

[700] "Mediterranean Competition Bulletin Bulletin Méditerranéen De Concurrence" https://ec.europa.eu/competition/publications/mediterranean/mcb_5_1_en.pdf>

[701] 'European Commission - Competition' (Ec.Europa.Eu, 2018) <Http://Ec.Europa.Eu/Competition/International/Bilateral/>

EU and Tunisia (since 1998), Morocco (2000), Algeria (2001) Jordan (2002), Egypt (2004) and the Palestinian authority (1997). This agreement governs various bilateral relations and is applied to several economies differently, while most of these economies are developing or in transition. This agreement mainly focuses on the competition aspect of the economies. [702]

The competition law of Morocco, Law No. 06-99 on Free Pricing and Competition (promulgated by Dahir No. 1-00-225 of 2 Rabii 1421) has been largely influenced by the French ordinance of 1986 and the European legislation.[703] It came into force on 5th June 2000.

The restrictive agreements and practices are regulated by the Morocco's Competition Law no. 06-99 which outlines the authority of the competition council; together with the central authority for the prevention of corruption and competition council; it plays an important role to liberalize the market and to improve the public governance.[704]

The two provisions of Articles 101 and 102 TFEU are included in the agreements with other Southern Mediterranean countries and are applied to the parties which affect common trade with the EU, this also includes Morocco and Algeria.[705] The adoption and enforcement of competition rules and provisions in these countries can be a slow process, as these countries still are in their developing phase. As already mentioned, these rules have been adopted in the case of Algeria and Morocco; in the case of Algeria the rules have entered force as a part of Annex V to the agreement (Annex VIII also

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[702] 'European Commission - Press Releases - Press Release - Euro-Mediterranean Association Agreements: The Partnership Is Moving Forward' (*Europa.Eu*, 2018) <Http://Europa.Eu/Rapid/Press-Release_Memo-04-275_En.Htm>

[703] 'Competition Law in Morocco Frédéric Elbar Cms Bureau Francis Lefebvre Maroc Casablanca' (2018) <Http://Www.Gwclc.Com/Library/Africa/Morocco/Morocco%20competition%20law%20overview.Pdfhttp://Www.Gwclc.Com/Library/Africa/Morocco/Morocco%20competition%20law%20overview.Pdf>

[704] 'Export.Gov' (*Export.Gov*, 2018) <Https://Www.Export.Gov/Apex/Article2?Id=Morocco-Legal-Regime>

[705] Anestis S Papadopoulos, *The International Dimension Of Eu Competition Law And Policy* (2010). P. 110-112.

consists of rules to be applied by Syria but it has not been ratified till date).[706] In regards to Morocco, the competition rules are adopted in the part of council decisions.[707]

The Moroccan Competition Council had to be reactivated on August 2009, as it faced problems due to the limited role of competition council. It faced difficulties in regard to dealing with the aspect of the law 06-99 in order to build a strong and suitable competition body to help the laws to be enforced and to mainly benefit the economies. [708] The Mediterranean competition bulletin mentions that the competition laws 06-99 was not able to coordinate between the economic regulator and sectoral regulators; also, the competition council was limited only to consultative role and was not updated to the current legislative framework. Thus, it was necessary to change and enhance the legislative and regulatory framework in accordance to the need of the economy.

The need to change the regulatory framework was felt due to the lack of competition culture in Morocco and the enforcement of the Law 06-99 was not done in a fruitful manner leaving the economy with no benefit from the above-mentioned law and regulations.[709] The first competition model of Morocco did not work well as the need of this economy was different, and a proper guideline and organization was needed.

Further, eleven years after the enforcement of the Competition Act in Morocco; on June 2011, the King Mohammed VI announced that the Competition council will be re-established and will be granted with independent executive powers. The re-establishment of the competition council linked it in a better manner to the other sector specific policies and institutions. The council was granted with additional coherent and judicial powers, with a large focus being shifted to the welfare of the consumers and the enhance the businesses in the economy. The preparation for this comprehensive reform

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[706] ibid 110-112

[707] European Commission (2009), Rapport De Suivi Maroc, Sec (2009)520/2 (Brussels, 23 April 2009) 13–14

[708] The EU Competition Law Model and The Mediterranean Countries, By Mohamed El Merghadi and Abdelali Benamour <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_5_1_En.Pdf>

[709] The EU Competition Law Model and the Mediterranean Countries, By Mohamed El Merghadi and Abdelali Benamour <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_5_1_En.Pdf>.

came in to force with the help of the 'twinning project'[710] entered between Germany and Morocco, financed by European Union. The twinning team drafted the new Competition policies for Morocco which is taken as a base for other Middle East/ North African countries[711] (MENA)[712]

Apart from Morocco, Algeria and Tunisia also have all adopted domestic competition laws that are modelled in the French Ordinances of the 1st December 1986 and the EU legislation under the Euro-Med Association Agreement. On a substantive level, the competition laws on all these three countries prohibit any act or practices which restrict competition. It also prohibits the abuse of dominant position in the market.

The assessment has been made in accordance to the principle of *'Bilan conomique'* [713] which is also known in the French competition law and the EC competition law. [714]

Unlike the Moroccan Competition council, the competition council of Algeria and Tunisia were given with a wide range of powers and function in accordance to the French Ordinance; such as drafting regulatory proposals, injunctions and sanctions. However, it is not easy to determine the progress of these laws and its enforcement, given the fact that these countries have not constantly updated the cases and also the regulatory update on their website.

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[710] Twinning is an EU instrument for institutional cooperation between public administration of EU member states and of beneficiary or partner countries. the twinning instruments aims to provide support for the transposition implementation and enforcement of the EU legislation (the union acquis).

[711] Middle East/North Africa (Mena) Countries Consists of Algeria, Bahrain, Iran, Iraq, Israel, Jordan, Kuwait, Lebanon, Libya, Morocco, Oman, Saudi Arabia, Syria, Tunisia, UAE and Yemen.

[712] Krzysztof Jaros, 'Developing Competition Policy in Morocco- A Model for The Mena-Region?' [2012] Mediterranean Competition Bulletin <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_6_1_En.Pdf>.

[713] Bilan Conomique' Means Economic Balance.

[714] 'Competition policy in the southern Mediterranean Countries' (*Citeseerx.Ist.Psu.Edu*, 2004) <Http://Citeseerx.Ist.Psu.Edu/Viewdoc/Download?Doi=10.1.1.196.497&Rep=Rep1&Type=Pdf>.

Now, taking the example of Egypt, where the competition law was introduced in the year 2005. Previous to the introduction of competition law, Egypt made several attempts to develop and adopt competition law regimes.[715]

One of the main reasons for the adoption of competition law in Egypt was trade liberalization. In the year 1991 Egypt launched 'the Economic Reform and Structural Transformation Program' (ERSAP), privatization was one of the pillars of ERSAP that resulted into the fully or partially privatization of 382 SOEs.[716]

Since there was a wave of liberalization, the need for having a strong competition policy was felt. Further, the Euro-Mediterranean Association Agreement with Egypt (EMAA) [717] which also dealt with the competition provisions were signed between the parties in June 2001 and came into force on June 2004.[718]

Over the years' Egyptian government faced several internal and external pressure from various international authorities to adopt Competition law. Egypt was given a five-year provisional period for the implementation of some of the obligation, which also included competition provisions. During this time, Egypt had still not enacted its competition laws. It is believed that the EMAA was one of the reasons for the enforcement of competition laws in 2005.[719]

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[715] 'Domestic competition regimes in the Mediterranean partners' (*Vlex*, 2018) <Https://International.Vlex.Com/Vid/Domestic-Regimes-Mediterranean-Partners-463102>.

[716] 'Privatization: A Key To Solving Egypt's Economic Woes' (*Voices And Views: Middle East And North Africa*, 2014) <Http://Blogs.Worldbank.Org/Arabvoices/Privatization-Key-Solving-Egypt-S-Economic-Woes>

[717] The key objective of the trade partnership agreement was to create a deep Euro-Mediterranean free trade area, the aim of it was to remove trade and investment barriers between both EU and southern Mediterranean countries and between these south Mediterranean countries and themselves. this euro-Mediterranean association agreement is in force with most of the partners (with the exception of Syria and Libya). this agreement also consists of provisions focusing on competition laws and its enforcement in the partner countries. together the region represents 9.4% of the total EU external trade in 2016.

[718] The Eu- Egypt Association Agreement (2004, June) <Http://Ec.Europa.Eu/Competition/International/Bilateral/Egypt.Html>

[719] 'The Effectiveness Of The Enforcement Activity Of Egyptian Competition Law' (*Ec.Europa.Eu*, 2012) <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_7_En.Pdf>.

According to Article 34 (1) and Article 34 (2), Chapter 2 on Competition and other Economic matters of EMAA:[720]

1. The following are incompatible with the proper functioning of the Agreement, insofar as they may affect trade between the Community and Egypt:

    i. all agreements between undertakings, decisions by associations of undertakings and concerted practices between undertakings which have as their object or effect the prevention, restriction or distortion of competition;

    ii. abuse by one or more undertakings of a dominant position in the territories of the Community or Egypt as a whole or in a substantial part thereof;

    iii. any public aid which distorts, or threatens to distort, competition by favouring certain undertakings or the production of certain goods.

2. The Association Council shall, within five years of the entry into force of the Agreement, adopt by decision the necessary rules for the implementation of paragraph 1.

The main motive behind this particular article is to have a strong competition law to comply with the main aim of EMAA, that is, to enhance and foster trade while protecting the competition in the market. Thus, the effect on trade between member countries is the main turning point in any disputes within the context of EMAA.

Hence it is easy to say that EMAA was one of the main factors which contributed to the enforcement of competition laws in Egypt. However, in regards to the transposing of competition laws, the Declaration made by the European Community on Article 34 of the EU-Egypt Association Agreement, which on a detailed reading implies that Article 34 (1) should not be read in isolation, but must be read with Article 34(2), which states that if Egypt is unable to implement Article 34(1) it would result into hindrances of the trade

[720] 'Euro-Mediterranean Agreement Establishing An Association Between The European Communities And Their Member States, Of The One Part, And The Arab Republic Of Egypt, Of The Other Part' (*Trade.Ec.Europa.Eu*, 2018) <Http://Trade.Ec.Europa.Eu/Doclib/Docs/2004/June/Tradoc_117680.Pdf>.

relationship between EU-Egypt.[721] Further, in the Joint Declaration on Article 34 it clearly states that: '*While drafting its laws, Egypt will take into account the competition rules developed with the European Union*'[722]

However, as mentioned in the 2012 Mediterranean Competition bulletin of the EU[723], contending that there is no truth in the fact that EU negotiators were trying to force Egypt to import EU rules on competition is contrary to the above statement which has been made in the Joint Declaration of the Article 34. This makes it difficult to concretely tell if Egypt has adopted the competition laws from the EU or has adopted the law based on the fair competition and fair market principle.

Further, the bulletin states that Article 34 of EMAA which has been based on Article 101, 102 and 107 of TFEU servers mainly as a guideline for Egypt to take into account while drafting its own competition laws. The Law No. 3/2005 which prohibits the horizontal restraints, vertical restraint and abuse of dominant position as mentioned in the Article 6, 7 and Article 8; there by corresponding with the international standards. And in contrast to the EU laws, the Egypt competition laws do not cover provisions on state aid and merger control regulations for the assessment of the concentration.[724]

One of the main aspects of the Joint Declaration was that Egyptian Competition Authority (ECA) must consist of a strong and important place in the system. As mentioned in Article 1 (definition) that the applicant and requested authority of the party in this case Egypt's competition authority must be competent. In the recent years, it can be seen that ECA has an effective and competent enforcement policy with a strategic vision to enhance competition, and create free market for increasing the trade liberalization.

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[721] The effectiveness of the enforcement activity of Egyptian competition law' (EC.Europa.EU, 2012) <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_7_En.Pdf>

[722] 'Euro-Mediterranean Agreement Establishing an association between the European Communities and their member states, of the one part, and the arab republic of Egypt, Of the other part' (*Trade.EC.Europa.EU*, 2018) <Http://Trade.Ec.Europa.Eu/Doclib/Docs/2004/June/Tradoc_117680.Pdf>

[723] The effectiveness of the enforcement activity of Egyptian competition law' (Ec.Europa.Eu, 2012) <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_7_En.Pdf>

[724] The effectiveness of the enforcement activity of Egyptian competition law' (Ec.Europa.Eu, 2012) <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_7_En.Pdf>

Over the years the ECA has prioritised the use of its available recourses to curb anti-competitive practices such as cartels, abuse of dominant positions and the ECA has planned to introduce a full-fledged pre-merger control regime by sending a strong message to all the stake holders.[725] The ECA has played an important role since the enforcement of the competition laws after 2005, and has dealt in many important cases, such as the Cement and Steel case which has been already discussed in the thesis and many international competition authorities have ranked it among one of the top young competition authorities. Since the period 2006-2011 it has dealt with 85 competition cases.[726]

Adoption of ready-made laws certainly saves time and cost, the transposition of laws may allow the jurisdictions to refer to already established case laws, which can be used as a reference during similar case proceedings. For instance, in the case of Google violating its dominant position in Indian market, the CCI [727] referred to EU commissions 2018 Android decision[728]. This gives the economies to learn from the mistakes from the other economies. However, the most important part of devising and transposing of competition law is the enforcement of laws in a proper and effective manner. The enforcement of the laws may depend on many factors such as economic, social and even the political factor of the given country. However, transposing of laws does not necessarily lead to a better solution for the economy, as seen in the case of Morocco.

The design of competition laws effects different economies differently, even though the motivation behind the adoption of such laws is more or less the same, i.e., to have a competitive market while protecting the markets from the competitor's unlawful practices. Thus, it can be rightly said that even though laws are transposed either partially or fully from a large and developed economy to a developing and transitioning economy, this may result into different consequences for different economies. After looking into the

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[725] 'Egypt: Competition Authority -The European, Middle Eastern and African Antitrust Review 2018 - GCR - Global Competition Review' (*Globalcompetitionreview.Com*, 2017) <Https://Globalcompetitionreview.Com/Insight/The-European-Middle-Eastern-And-African-Antitrust-Review-2018/1145575/Egypt-Competition-Authority>

[726] The effectiveness of the enforcement activity of Egyptian competition law' (Ec.Europa.Eu, 2012) <Http://Ec.Europa.Eu/Competition/Publications/Mediterranean/Mcb_7_En.Pdf>

[727] Mr. Umar Javed & others v Google (2018) Case No. 39 Competition commission of India Para 7 (1)

[728] Google Android case at. 40099

example of Algeria, Tunisia and even Egypt it can be said that the transposition can be beneficial either partly or fully. As already mentioned, solely transposition of competition law is not a factor for the economy to grow but one must not forget the key factor depends on the way these laws are enforced.

As seen, the adoption of EU law in few of the economies mentioned above has led to also a strong trade relation between these economies. While from the case study of Egypt it would be correct to say that at times there are more external pressure to adopt the laws in a certain way, this laws and provisions may or may not benefit the economy depending on the needs of each economy.

5.3.2. Devising their own Competition laws

Devising laws can be a lengthy and time-consuming process. The design of the competition laws can be affected by various factors, for young and small jurisdictions it would be to follow the footsteps of other economies who have stronger laws in force. However, the need to design rules so that a country can benefit to its full potential from the adoption of such cherry picked and handpicked laws, also depends on the special characteristics of a given economy[729]

Design of competition laws requires the economies to determine what are the main purposes for implementation of the particular laws. How strict or lenient the law should be determined in the light of the necessity of the economy. Both domestic and international trade certainly plays an important role, as we have already seen that competition will benefit trade and vice-versa.

There are many international organizations which provide for the guidelines and policy recommendation for the enforcement of the competition laws, such institutions include ICN, OECD and UN. In cases where developing economies prefer to devise their competition laws depending on their specific character, these guidelines can be helpful.

[729] Michal Gal and Eleanor M Fox, 'Drafting competition law for developing jurisdictions: Learning from experience', economic characteristics of developing jurisdictions: their implications for competition law, (Edward Elgar Publishing 2015) <http://www.e-elgar.com>

The ICN has developed a paper on the recommended practices on competition assessment in the year 2014.[730] This particular recommendation is also being used by UN and OECD to help the competition agencies improve the formation of competition laws. As mentioned in the recommend practices by ICN, the main goal of competition agencies is to promote competitive markets and thus protecting the consumers.

According to definition of 'Competition Advocacy' by ICN:

> *"Competition advocacy refers to those activities conducted by the competition agency related to the promotion of a competitive environment for economic activities by means of non-enforcement mechanisms, mainly through its relationships with other government bodies and by increasing public awareness of the benefits of competition"*.[731]

The goal of competition advocacy is to enhance the understanding of the competition process and the framework of the public policy keeping the competition perspective in mind. Further, ICN recommends that the recognition of the legislations, regulations and polices which may restrict competition may help the policymakers to evaluate the impact of such policy in the market.[732]

Competition assessment is an evaluation of the potential competitive effects of a proposed or existing policy. The evaluation can be assessed by either the competition authority or by the government body where the law has been proposed.[733]

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[730] Definition Of Advocacy from the 2002 ICN Advocacy Report, "Advocacy and Competition Policy" <Https://Www.Internationalcompetitionnetwork.Org/Wp Content/Uploads/2018/07/Awg_Rp_English.Pdf >

[731] Definition Of Advocacy from the 2002 Icn Advocacy Report, "Advocacy and Competition Policy" <Https://Www.Internationalcompetitionnetwork.Org/Wp Content/Uploads/2018/07/Awg_Rp_English.Pdf >

[732] 'Recommended practices on competition assessment' (*Internationalcompetitionnetwork.Org*, 2014) <Http://Www.Internationalcompetitionnetwork.Org/Uploads/Library/Doc978.Pdf>

[733] 'Recommended practices on competition assessment' (*Internationalcompetitionnetwork.Org*, 2014) <Http://Www.Internationalcompetitionnetwork.Org/Uploads/Library/Doc978.Pdf>

In much simpler terms it can be said that competition assessment helps the competition agency or any governmental body (which is affected by the implementation of the competition regulations) clarifies the impact of the existing or proposed policy on the competition in the market.

The competition assessment can take many forms such as recommendations, support by general economic theory and the competitive impact assessment. The foundation of the competition assessment makes a strong base for the function and founding of the later advocacies. Before the ICN recommendations, the OECD Competition Assessment Toolkit came into place in the year 2007, which was further amended and revised in the year 2010 and then later in year 2015, 2018.[734]

From the above we can see that international organizations certainly realized the importance of competition laws in the economies. As mentioned in the OECD Competition Assessment toolkit, one of the main reasons for publishing such guidelines was due to the effect of increase in competition in the economies and their performance. Further, as there is an ongoing and increasing trade liberalization in the economy, the focus of the jurists shifted to devising efficient competition laws, particularly since they came to realize that there are many laws and regulations in most of the economies including developing economies that restrict the competition in the marketplace. The OECD competition assessment toolkit thus was aimed at eliminating the barriers to competition which restraint efficient market activities.[735]

Moving back to them, ICN recommended practices provided a guideline for the general framework for competition assessment. They included mainly thirteen frameworks, which focus on the competition assessment and elimination of laws and regulations restraining competition in the market. One of the relevant framework states that the competition agencies should focus on the competition assessments especially on the type of restrictions on competition, which pose the greatest threat there. And in regards to the evaluation of the impact of competition, the ICN mentions that once the economy has

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[734] 'Competition assessment toolkit - OECD' (*Oecd.Org*, 2018) <Http://Www.Oecd.Org/Competition/Assessment-Toolkit.Htm>

[735] 'Competition assessment toolkit - OECD' (*Oecd.Org*, 2018) <Http://Www.Oecd.Org/Competition/Assessment-Toolkit.Htm>

pin-pointed the restraint which is caused on the competition, the competition agency should evaluate the competitive effects on the economy and the economy principles.[736]

For instance, in Indonesia the competition law and the extensive enforcement advocacy efforts of the Commission for the Supervision of Business Competition (Komisi Pengawas Persaingan Usaha; in short KPPU); have been in place more than a decade. The Indonesian competition law was one of the first competition laws in the ASEAN region to come into force in 1999.[737] The government proposed law mainly focusing on enhancing the economic performance, as Indonesia at that time of the national development kept the proposed law in accordance with the societal reform i.e., Panscasila. [738]

This shows that the purpose of enacting or implementing of competition law can vary for countries. This was the case of Indonesia, where the economic efficiency was one of the top priorities, but was also the societal reform, as in Indonesia the five principles of Panscasila play a crucial role in day-to-day activity including the drafting of laws.

Further, on April 28th, 2017, the Competition law of Indonesia was proposed for amendment and the draft of the amended competition law was approved in the Plenary Meeting which was an initiative by the commission VI on the Draft Law on Prohibition of Monopoly Practices and Unfair Business Competition (New Competition Law).

Apart from the main basic concepts of competition laws, the Indonesian competition law also consisted mainly of seven features. One of the features being that the laws were able to reach the anti-competitive behaviours in the digital based business such as e-commerce, e-procurement, e-payment, etc. The other dealt with the introduction of leniency program as an effective tool to eradicate cartels and to ensure as much as

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[736] 'Recommended Practices on Competition Assessment' (*Internationalcompetitionnetwork.Org*, 2014) <Http://Www.Internationalcompetitionnetwork.Org/Uploads/Library/Doc978.Pdf>

[737] 'OECD reviews of regulatory reform Indonesia competition law and policy' (*Oecd.Org*, 2012) <Https://Www.Oecd.Org/Indonesia/Chap%203%20-%20competition%20law%20and%20policy.Pdf>

[738] The term 'Pancasila' is a word which embodies the Indonesian philosophy. the term is made up of two old Javanese words, "pancha" meaning five and "sila" meaning principles. These 5 principles which are i) belief in one God; ii) just and civilized humanity; iii) the unity of the country; iv) democracy guided by the inner wisdom in the unanimity arising out of deliberations amongst representatives and v) social justice for all the people of the country. the people in Indonesia regard it as a common statement or basis of Indonesian unity and diversity.

possible that the institutional strengthening would play an important role in the structuring and governance of the competition laws in Indonesia. This shows us that the economic development of an economy plays a key factor in determining the laws and regulation.

Thus, in devising of the competition laws the economy must consider three sets of questions, related firstly to substance, secondly to strategy and third to application. [739] The economies, while considering to implement competition laws must focus on the fact as to why do they need it? The other main factor being not to be only pressurized by trading partners to adopt it. The question that should make sense for the economy is 'What does the country want the law to do for it?' The answer to the above questions will help the agency to adopt competition law by benefiting the economy in a true sense, i.e., by enhancing the economic development. The third category of application consists of how a country should draft the laws and formulate the desired goals; this can be achieved with the help of guiding principles of international intuitions or, if the country deems it fit to transpose the law directly from another transforming or developed economy, in which case the application of the laws and goals can be relatively simple.

However, we need to keep in mind that, even though countries may choose to transpose laws or devise laws, there will not be a guaranteed result of the success of the particular competition law. Application and enforcement of the law plays a crucial role in the success of a given law.

Co-operation among agencies is important for the application of extra-territorial enforcement of competition law. International comity realised the importance of international competition law and decided to enhance and build laws and provisions on a multilateral level under the umbrella of WTO.

The next section focused on the WGTCP and different stand taken by jurisdiction on the need for a binding international competition regulation.

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[739] Michal Gal and Eleanor M Fox, 'Drafting Competition Law for Developing Jurisdictions: Learning From Experience', Economic Characteristics of Developing Jurisdictions: Their Implications for Competition Law, (Edward Elgar Publishing 2015) <http://www.e-elgar.com>

5.4. Working Group on the Interaction between Trade and Competition Policy (WGTCP)

WTO[740] was born out of a negotiation among countries with the main aim to reduce trade obstacles, this agreement led to many countries open their borders, especially developing and least-developing countries. Under this organization, governments negotiate trade agreements and also settle their trade disputes. One of the main factors leading to a success of this institution is that there is a dispute settlement mechanism, thus giving governments confidence to open their market while knowing that there is some security involved in the form of dispute settlement body. WTO also helps developing countries build their trade capacities and its main principles consist of non-discrimination and transparency which gives countries, traders and business direct access to all the agreement provisions from the website. [741]

The international competition law was an important WTO agenda, it did not go forward due to the different approaches between countries, there was huge differences among the thought process of developed and developing economies.

This chapter will talk in depth about the different approach countries have towards a binding multilateral framework in competition.

The competition concerns and their impact on international trade have been in existence for long, even before the establishments of WTO, the draft of Havana Charter 1948 which was designed to create International Trade Organization (ITO) had the provisions regarding how international cartels and restrictive business practices would distort market access. Its Chapter V on restrictive business practices proposed a comprehensive provision on dealing with restrictive business practices and a comprehensive control over price-fixing and other forms of anti-competitive laws.[742] Even though the ITO was never ratified some of the provisions were adopted in GATT

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[740] WTO <https://www.wto.org/>

[741] 'WTO Annual Report 2019' (2019) <https://www.wto.org/english/res_e/booksp_e/anrep19_e.pdf>.

[742] 'United Nations Conference on Trade and Employment Held at Havana, Cuba, from November 21, 1947, to March 24, 1948' (1948) <https://www.wto.org/english/docs_e/legal_e/havana_e.pdf>.

and then later on it was adopted by WTO. [743] In 1995 when GATT was superseded by the WTO, along with the General Agreement on Trade in Services (GATS) came along several specialized subjects, but WTO did not succeed in dealing in detail with competition policy issues. However, there are a few provisions[744] on competition laws which are embedded in the agreement.[745]

In 1996 member-countries decided at the Singapore Ministerial Conference to set up three new working groups: on trade and investment, on competition policy, and on transparency in government procurement. They also focused on simplifying trade procedures and the WTO goods Council was instructed to investigate the matter.

By the beginning of August 2004, there was no consensus by the members to proceed with negotiations in three of the matters except the trade facilitation. [746]

The Working Group on the Interaction between Trade and Competition Policy (WGTCP) was launched to address how does domestic and international competition policy instruments interact with the international trade. In the meeting of 16th and 17th September of 1997 the working group started its discussions on two areas:

i. *"the relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy, and their relationship to development and economic growth; and*
ii. *Stocktaking and analysis of existing instruments, standards and activities regarding trade and competition policy, including of experience with their application, taking up in turn each of the three sub-items, namely*

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[743] Mitsuo Matsushita, 'Competition law and policy in the context of the WTO system' (1995) 44 1097, 1097–1363 <https://via.library.depaul.edu/cgi/viewcontent.cgi?article=1835&context=law-review>.

[744] The core GATT articles such as Article II, III, XI, some GATS articles, and WTO agreements such as Trade-Related Aspects of Intellectual Property Rights (TRIPS), agreements on anti-dumping also contain elements of competition policy.

[745] Gary Clyde Hufbauer and Jusun Kim, 'International Competition Policy and the WTO' (2008) <https://www.piie.com/commentary/speeches-papers/international-competition-policy-and-wto>.

[746] WTO, 'Investment, Competition, Procurement, Simpler Procedures' <https://www.wto.org/english/thewto_e/whatis_e/tif_e/bey3_e.htm#investment>.

national competition policies, laws and instruments as they relate to trade, existing WTO provisions, and bilateral, regional, plurilateral and multilateral agreements and initiatives."[747]

The WTO involved several international institutions such as the OECD, ICN and UNCTAD to actively discuss the creation of international framework to shape competition policy. The WGTCP during 1997-1998 formed a theoretical basis for discussion which is mentioned below, and it proceeded to work on those issues from 1999-2001. The main discussion revolved around:

i. The pros and cons of developing multilateral systems for competition enforcement.
ii. The scope and application of core principles mentioned in the Para 25 of the Doha Ministerial Declaration which included transparency, non-discrimination, and procedural fairness etc.
iii. Concerns regarding the incorporation of the principles of multilateral framework for competition.
iv. Harm caused by international hardcore cartels.
v. Scope and nature of the manner to establish a cooperation between the members in this area.
vi. Alternative approaches to cooperation on competition policies at a multilateral level.[748]

The WGTCP at the Doha Ministerial Conference 2001 recognized the need for multilateral framework to enhance competition policy and they agreed to proceed with the matters discussed between 1999-2001 with the condition that it should be agreed by

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[747] 'Working Group on the Interaction

between Trade and Competition Policy (1997) to the general council' (1997).

[748] WTO, 'Report (2003) of the working group on the interaction between trade and competition policy to the general council' (2003).

an explicit consensus. [749] After the Doha Ministerial Conference, the working groups explored ways to form the multilateral framework on the above-mentioned topic.

EU being the most vocal in the subject matter and many other countries especially developing countries were also very vocal but were not convinced by many of the issues which were raised during the negotiation. [750]

EU stated that a multilateral rule would be better suited than an FTA to tackle the anti-competitive practices in an international environment. EU made the following points for an establishment of multilateral rules in front of the WGTCP:

> *"The EU sought:*
>
> i. *a general commitment to a competition law by every WTO member, featuring the core principles of non-discrimination and transparency;*
> ii. *Member's commitment to take measures against hardcore cartels;*
> iii. *the development of modalities for voluntary cooperation on competition enforcement;*
> iv. *support for the strengthening of competition institutions in developing countries; and*
> v. *establishment of a WTO Committee on Competition Policy, as the platform for administering the multilateral agreement, sharing experiences and identifying technical assistance needs."* [751]

One of the problems with the proposals made by working groups was that WTO is too diverse and is not an appropriate forum to conduct this negotiation,

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[749] WTO (2001). WT/MIN (01)/DEC/1. Ministerial Conference - Fourth Session - Doha, 9 - 14 November 2001

[750] Julien Grollier and Karen Somasundaram, 'Trade and competition policy has past WTO work stood the test of time?' (CUTS International Geneva) 11 <http://www.cuts-geneva.org/pdf/STUDY%20-%20Trade%20and%20Competition%20Policy.pdf>.

[751] Karel Miert Van, 'EU _The WTO and competition policy: the need to consider negotiations' (1998) <https://ec.europa.eu/competition/speeches/text/sp1998_038_en.html>.

The other crucial factor to be considered here is that, at that time not many developing countries had competition law. Mr. Karel Van Miert, a member of the EU Commission in its letter addressed before the ambassadors to the WTO in 1998 stated that the diversity issue is not a major problem, as in the experience of EU, GATT has worked very well. However, there is a clear difference in individual competition laws, and a good example for this was the Boeing/Mc Donnel Douglas[752] case, which showed a disagreement between the US and EU competition legal systems.

Further, he stated that it is crucial to note that a single transaction can have different effects on two markets, and the case of Boeing has shown that there is an immense need for international co-operation. [753]

The positions of WTO Members towards the end of WGTCP discussions can be roughly categorised into four groups:

i. Countries supporting the EU proposal, including Switzerland, Canada, Australia, Korea, Chinese Taipei, Morocco, Costa Rica, and most Eastern European countries.

ii. Those members conditioning their support to a multilateral framework, emphasising that it should be sufficiently balanced by negotiations in other areas where they had more interest, e.g., agriculture. These included most South American members, including Brazil, Argentina and Chile.

iii. Those objecting to the EU proposal either because:

    a) they did not have a competition law at the time and did not want to commit to adopting one; or

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[752] Boeing/McDonnell Douglas [1997] Case No IV/M.877 (Council Regulation (EEC) No 4064/89).

[753] Karel Miert Van, 'EU _The WTO and Competition Policy:

The need to consider negotiations' (1998) <https://ec.europa.eu/competition/speeches/text/sp1998_038_en.html>.

b) opposed the application of WTO dispute settlement in the area of competition policy. These included inter alia Hong Kong, the United States, Malaysia, India, and Indonesia.

iv. Those who opposed the EU proposal on grounds that they could not afford a competition law because of their low level of development, which required them to have a strong industrial policy rather than promoting competition. These included most small developing and Least Developed Countries (LDCs).[754]

At the time of WGTCP, out of the 130 member countries only 80 of them had enacted national competition laws and the competition regimes in developing countries lacked features such as investigation, enforcement bodies etc.[755] Many of the developing countries were interested to have a multilateral agreement which could facilitate capacity building in creating a strong competition regime.

The WGTCP was not successful because all the members did not reach a consensus. It was clear by all the members that there is a need for multinational competition framework, but at the same time there were many concerns. Developing countries raised a lot of concerns.

They were reluctant to transplant a foreign competition policy, especially those countries which did not have competition policies. Also, there was a fear that the multinational competition framework would enable MNCs to obtain significant market power to dominate the domestic market. There was a fear of concentration of market power with MNCs. The lack of authority and power in terms of charging multinationals was also a concern, especially in cases of international cartels.[756]

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[754] Julien Grollier and Karen Somasundaram, 'Trade and competition policy has past WTO work stood the test of time?' (CUTS International Geneva) 11 <http://www.cuts-geneva.org/pdf/STUDY%20-%20Trade%20and%20Competition%20Policy.pdf>.

[755] WT/WGTCP/M/12, 'Report on the meeting Of 2-3 October 2000 Para 32' (2000) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/M12.pdf&Open=True>.

[756] Julien Grollier and Karen Somasundaram, 'Trade and competition policy has past WTO work stood the test of time?' (CUTS International Geneva) pg. 11-13 <http://www.cuts-geneva.org/pdf/STUDY%20-%20Trade%20and%20Competition%20Policy.pdf>.

Another very important concern was regarding the cost of implementing the multilateral system into domestic laws, for countries with less resources this was a major issue. One of the points of the EU proposal was for member countries to commit to adopt national competition laws.

The argument in this case was that a country can still have effective competition laws enshrined in other laws instead of laws specifically addressed thereto.[757] There was reluctance in in transplant a competition law framework in a one-size-fits-all manner, as not all economies are the same.

The WGTCP was not successful but it is important to know what was the stand taken by different countries on their approach to a multilateral framework for competition law. The section below discusses an in-depth approach taken by various countries on different subject matter covered under WGTCP, which includes WTO principles (Transparency and non - discrimination principles), cooperation, capacity building and technical assistance, hardcore cartels, dispute settlement.

WTO Principles

Transparency and non-discrimination principles are two core principles of WTO. Under the non-discrimination principle two main principles are covered i.e., the National Treatment (NT) and Most-Favoured Nation (MFN) principles. MFN principle prevents member countries to discriminate against other trading partners, i.e., if one favourable treatment is provided to any one of the members on like products the same treatment must be provided to all the other members immediately and unconditionally on that like products. The National treatment principle ensures that the imported like products must be treated equal to the domestic like products once they enter the domestic territory. There are certain exceptions to this principle such as general; security exception etc. [758]

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[757] WT/WGTCP/W/191 Working Group on the Interaction between Trade and Competition Policy, 'Provisions on hardcore cartels' (2020) <docs.wto.org>.

[758] Wto.org. 2021. WTO | Understanding the WTO - Contents. [online] Available at: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/tif_e.htm>

Under the transparency principle it is required by members to disclose their relevant policy measures to allow other members as trading partners to have access to it. Many of the members were in favour of including transparency in the multinational framework. Switzerland mentioned that the scope should extend to case decisions as well as advocacy.[759]

In the report of 2002 December, WGTCL stated that for the purpose of the frameworks it would be practical to define set of transparency obligations which would be useful.

The concern regarding non-discrimination was raised by mostly all members but especially by developing countries. The Egyptian representative in the meeting said that the uniform application of non-discrimination principles could cause inequalities between developing and developed country members. There were also concerns that the non-discrimination principles would lead to a conflict between competition policy and industrial and development policy objectives.[760] If applied to competition rules, the NT principle would give large multination unlimited access to the domestic market of developing countries. [761] It became of high relevance to developing countries to understand how the core principles will operate in areas of competition polices and most importantly how will it impact development. [762] Kenya pointed out to WGTCL that it must consider differences that exist in the national legal systems of different countries and unnecessary burden must be avoided.[763]

US raised some valid concerns with regards to the application of MFN principles in the multilateral framework for competition:

> *"United States noted that the proponents of a cooperation framework in a multilateral agreement had stated that cooperation could not be mandatory; that it was to be voluntary.*

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[759] 'WT/WGTCP/W/89 Communication from Switzerland' <docs.wto.org>.

[760] 'WT/WGTCP/7 Report of the working group on the interaction between trade and competition policy to the general council' (2003).

[761] 'WT/WGTCP/M/22 Report on the meeting of 26-27 may 2003' (2003) <<docs.wto.org>>. Para 31

[762] 'WT/WGTCP/M/22 Report on the meeting of 26-27 may 2003' (2003) <<docs.wto.org>>. Para 35

[763] WT/WGTCP/M/22 Report on the meeting of 26-27 may 2003' (2003) <<docs.wto.org>>. Para 36

> *However, if MFN rules applied to cooperation systems, how voluntary would the system really be? While the application of MFN to something like tariffs was clear, it was unclear how it could apply to requests for cooperative assistance in antitrust cases. What would happen if a country received more than one request in relation to the same investigation but one request required a greater use of resources than the other? Were those like circumstances? Was it necessary to favourably reply to both requests? What if the same amount of resources were required but one request was received when the agency was less busy and one when it was more busy and did not have the resources to respond? What if a country was one from which more mutual cooperation was expected as compared to another? The answers to these questions were unknown and for that reason, concern was expressed about the idea of applying WTO rules to something that was being characterized as voluntary."* [764]

It suggested that the real assessment of the application of the transparency requirement cannot be assessed until all the other substantive issues have been clarified and this will enable developing countries to have a more realistic approach. [765] Some countries such as Cuba, Hong Kong, Kenya, Malaysia and US[766] showed concerns over the potential burden on countries, as the new framework would mean that the regime must be adopted in the national competition rules and also to establish transparency might pressure some countries to change their legislation, enforcement practices or even scope of exemption within their domestic laws.[767]

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[764] WT/WGTCP/M/14 report on the meeting of 22-23 march 2001 <<docs.wto.org>>. Para 43

[765] WT/WGTCP/M/22 Report on the meeting of 26-27 may 2003' (2003) <<docs.wto.org>>. Para 37

[766] Julien Grollier and Karen Somasundaram, 'Trade and competition policy has past WTO work stood the test of time?' (CUTS International Geneva) 11 <http://www.cuts-geneva.org/pdf/STUDY%20-%20Trade%20and%20Competition%20Policy.pdf>.

[767] WT/WGTCP/M/19, Paragraph 24,39,61 <docs.wto.org>

5.4.1.1. Cooperation, capacity building and technical assistance:

In terms of co-operation, which was one of the main agendas of the WGTCP, India pointed out that these co-operations are useful and more effective when the transaction taking place is between similar economies with more or less the same conditions.[768]

India stated that competition policy was one area where convergence of economic and even political interests appeared to be essential to persuade countries to share information with foreign competition authorities. This enables them to investigate the practices of domestic enterprises that generated adverse anti-competitive effects in foreign markets while the gains of such practices accrued in the domestic market. EC and Japan[769] submitted papers to the WGTCP stating that there is certainly need for multilateral co-operation in and especially for small and developing economies. Developing countries also argued that their priority was to strengthen their national competition regimes before committing to multilateral rules for which they were not ready.[770]

Co-operation among competition authorities as regards multi-jurisdictional cases is a key component. At the WGTCP the discussion focused on voluntary co-operation to share information. The term "cooperation" has been used in a broad and a narrow sense in the Working Group. In its broad sense, it includes technical cooperation and capacity building and possible commitments on hardcore cartels in addition to narrower forms of cooperation such as notifications, consultations and mutual assistance in particular cases.

Based on the previous WGTCP meeting of the members, the following points have been made regarding the benefits of international cooperation in terms of its application with competition policy and depending on the nature and scope of each case:

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[768] 'WT/WGTCP/M/14 Report on the meeting of 22-23 march 2001' (2001) </docs.wto.org/>. Para 45

[769] WT/WGTCP/W/160 and WT/WGTCP/W/168

[770] Representatives of Malaysia, India, Pakistan and Trinidad and Tobago showed concerns.

WT/WGTCP/M/12, 'Report on the meeting Of 2-3 October 2000 Para 32' (2000) <https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=Q:/WT/WGTCP/M12.pdf&Open=True

i. It was suggested that the information in regard to procurement of information on markets, practices and the firms involved could facilitate the enforcement of relevant laws in particular cases

ii. The increased communication between competition authorities that would promote a desirable "soft convergence" of best practices among Members while alleviating judicial conflicts.

iii. Cooperation can minimize the management of conflicts which arises between two jurisdictions

iv. Further, cooperation between authorities can minimize inconsistencies and maximize results. [771]

The WGTCP has also illustrated the usefulness in tackling problems of international cartels though cooperation between competition authorities.[772]

The point made in the Working Group those bilateral agreements on cooperation in competition law enforcement have generated important benefits for the participating countries. [773] OECD and UNCTAD are especially involved in aiding countries by proving them non-binding instruments with easy accessibility. Even though all the members understood and agreed the need of cooperation in the multilateral agreements, there were some concerns and questions.

i. Would the co-operation require the enactment of a national competition law and the establishment of a competition authority by each participating WTO members? There were lot of objections in this regard by the members, as this does not consider the diversity and the divergence among the members. The response to this was that the only manner cooperation on competition policy is possible requires making sure that there is a well-established competition

[771] WT/WGTCP/W/192 Modalities for voluntary cooperation' (2002). <<docs.wto.org>>. Para 7

[772] WT/WGTCP/W/192 Modalities for voluntary cooperation' (2002). <<docs.wto.org>>. Para 9

[773] 'WT/WGTCP/W/192 Modalities for voluntary cooperation' (2002). <<docs.wto.org>>. Para 13

regime.[774] With regards to small island economies, it was proposed to operate more on a regional approach then national approach for the implementation of competition laws.

ii. The concern in terms of voluntary cooperation was how effective will it be in cases of problem concerning developing countries; the members suggested that if the request for the cooperation is reasonable by the countries and is properly motivated the cooperation would be given.

iii. There were doubts regarding the exchange of confidential case related information under the cooperation modality. [775]

In relation to hardcore cartel capacity building: for developing countries to implement their competition laws capacity building is a tool for their growth. The Doha Ministerial declaration has specifically focused on the support needed by the developing countries for the progressive reinforcement of competition institutions. [776]It certainly is very important for countries with limited resources, and for countries who are new to the implementation of competition laws to have cooperation in subjects like drafting of legislation, implementation, training of staff and other activities which are aimed at the creation and reinforcement of effective competition institutions. [777]

The communication from Trinidad and Tobago regarding the challenges faced by small open economies it raised some concerns on cooperation and capacity building on behalf of CARICOM and suggested:

a. *scholarships for academic/professional training*

b. *internships at competition authorities to gain experience;*

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[774] 'WT/WGTCP/5 Report (2001) of the working group on the interaction between trade and competition policy to the general council' (2001). <<docs.wto.org>>. Para 79

[775] 'WT/WGTCP/W/192 Modalities for voluntary cooperation' (2002). <<docs.wto.org>>. Para 26, 27, 28

[776] 'WT/MIN(01)/DEC/1 MINISTERIAL DECLARATION'. <<docs.wto.org>> para 23-25

[777] Julien Grollier and Karen Somasundaram, 'Trade and Competition Policy Has Past WTO Work Stood the Test of Time?' (CUTS International Geneva) 11 <http://www.cuts-geneva.org/pdf/STUDY%20-%20Trade%20and%20Competition%20Policy.pdf>.

c. *visiting staff from experienced agencies to guide and assist, particularly in procedural matters in the early years of new competition agencies;*

d. *resource persons/financial assistance for training workshops targeted at specific groups, such as lawyers, economists, and judges;*

e. *assistance in the facilitation of workshops for producers and consumers; and*

f. *guidance in the development of an information database system in new competition agencies.* [778]

Other countries such as Japan, US and Egypt have also recognized that capacity building and technical assistance must be made in accordance to the need and different national conditions. [779]

5.4.1.1.1. Hardcore Cartel:

WGTCP has recognized that hardcore cartels are the most pernicious type of anti-competitive practices from the point of view of trade and development. Also, it was recognized that the harm caused by international hardcore cartels affect most the developing countries. Some developing countries have also pointed out that these cartels are largely originated from developed countries, as we have seen in the international cartel chapter.

Apart from the measure on co-operation on cases of hardcore cartels, there has been a suggestion by WGTCP to include provisions on hardcore cartels. [780]

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[778] WT/WGTCP/4 report (2000) of the working group on the interaction between trade and competition policy to the general council. <<docs.wto.org>> para 64

[779] 'WT/WGTCP/2 Report (1998) of the working group on the interaction between trade and competition policy to the general council' (1998). <<docs.wto.org>>

[780] 'WT/WGTCP/W/191 Provisions on hardcore cartels' (2002) <<docs.wto.org>>

Due to the absence of a multilateral co-operation agreements, many countries faced problems in regard to the investigations. In case of the Sulphur Ash case, the cartel had an impact on more than one jurisdiction and it can be seen that many of the developing countries were not in a capacity to go ahead with the investigation as they did not have a strong extraterritorial domestic law against the international cartel, or they did not have enough resources to combat the matter. The outcomes in different jurisdictions for the same cartels was different. This would have been a different scenario if there was a multilateral system to help the developing countries by providing assistance though cooperation.

5.4.1.1.2. Dispute settlement:

There were concerns in regard to the dispute settlement which could review the judicial decisions of countries on competition cases. These issues include problems related, not only to member sovereignty but also to the required degree of specifications in the agreed rules as well as the ability of the panel to conduct complex fact-finding requirements for the enforcement of the competition laws. The DSB has always been criticized for its time-consuming process, this also was seen as a problem by countries.[781]

One of the most controversial topics which was discussed in WGTCP was on dispute settlement. In terms of dispute settlement there were no consensus by the members on the compliance problems and there were these following types of concerns and disagreements such as:

a) *The non-existence of a national competition law;*

b) *The inadequacy of an existing competition law (e.g., due to non-inclusion of agreed core principles);*

c) *The non-application/non-enforcement of a competition law;*

d) *The discriminatory or non-transparent application of a competition law;*

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[781] Scott S Lincicome and Davida L Connon, 'WTO Dispute Settlement—Long Delays Hit the System'<https://www.lexology.com/library/detail.aspx?g=13fe0fa8-2e4c-45ca-b619-c4609ae96797>.

e) Lack of co-operation between national competition agencies;

f) The non-enforcement of a ban on hard care cartels." [782]

The key issue has been that the DSU could have jurisdiction review decision taken by national competition authorities. In regard to the choosing of compliance focusing only on de jure evaluation this would preserve domestic laws from supranational review of their decisions but would lead countries to agree to the multilaterally accepted rules, principles and obligations. The issue between DSU and competition issues is that competition law enforcement is generally based on a "rule-of-reason" approach rather than on the enforcement of rules per se, as we see in trade law.

Thus, it is argued that the WTO is now well equipped to undertake dispute resolution in the sort of fact-intensive matters that characterise competition disputes. [783]

There was some discussion as to include only de jure information or both de jure and de facto information. EU suggested to include de jure information while Australia did support the idea to include both. [784] Egypt, keeping in mind the MFN principle and its application to competition regimes, stated that governments should not engage in ´de jure´ discrimination between international firms in similar situations while ´de facto´ discriminations in many instances were justifiable.

Throughout the WGTCP, all countries agreed to have strong co-operation among competition agencies to deal with extra-territorial scope of competition law. Given the unsuccessful attempt to form a multilateral system, the countries shifted to bi-lateral and regional agreement approach. However, most of the competition related provision were introduced under an umbrella of regional trade agreements. Below we discuss in depth if trade agreements are a good solution for competition related provisions.

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[782] 'WT/WGTCP/W/240 Communication from the OECD' (2003). <<docs.wto.org>> Para 3

[783] 'WT/WGTCP/W/240 Communication from the OECD' (2003). <<docs.wto.org>> Para 37, 38

[784]WT/WGTCP/6 and WT/WGTCP/M/19, Para 17 and 5 respectively <docs.wto.org>

5.5. Are trade agreements enough for competition related policies?

As discussed earlier in the section of co-relation and interaction between trade and competition laws, trade agreements have provisions regarding competition and anti-competitive practices. Since the work of WGTCP did not go ahead, countries took resort of FTAs, RTAs and other preferential agreements to fill the absence of international competition polices. In research done by Laprévote and Frish (2015) on competition related provisions of 216 FTAs, which include WTO and RTA databases, it was estimated that among 87 per cent of South-South FTAs included competition related provisions. [785]

As discussed in the chapter of anticompetitive practices which originate in one country but have anticompetitive effects abroad, FTA and RTAs have provisions on competition laws, but it is mostly soft law approach. And even if these agreements provide binding rules, the laws are very basic i.e., not to restrict trade. Many developing countries have adopted competition laws recently and have difficulty in catching up with economies which have a strong competition policy.

One of the reasons that developing countries are not benefiting by the competition provisions in these FTAs is that these agreements' focus is on trade and trade liberalisation. The trade agreements generally consist of a mixture of different economies, from developed economies to developing and even LDCs.

The main purpose of these economies involved in these agreements is to benefit from trade but when competition of developing economies starts getting distorted due to the over usage of the provisions of cooperation and capacity building, that is the time when competition provisions should be useful. Given the soft nature of competition provision in most of the agreements, they are not sufficiently useful when it is needed.

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[785] François-Charles Laprévote, Sven Frisch and Burcu Can, 'Competition Policy within the Context of Free Trade Agreements' (2015) <https://e15initiative.org/publications/competition-policy-within-the-context-of-free-trade-agreements/>.

Philippines adopted its competition laws in August 2015 and the authority i.e., the Philippine Competition Commission (PCC) was formally set up in February 2016.[786] It entered an FTA with the EFTA states, Iceland, Liechtenstein, Norway and Switzerland on 28 April 2016 and the agreement was fully implemented on 24 October 2018.[787] Article 10.1 of the agreement talks about rules of competition and it only consists of the basic competition provisions, such as the parties must not restrict competition in the market. The agreement also provides for mediation, consultation and dispute settlement provisions. In the case of dispute settlement, the chapter 13 of the agreements mentions that it may be referred to WTO.[788]

Japan has been helping the Philippines to improve its competition law enforcement and the technical capacity of the officials of PCC.[789] Philippines certainly benefits from the trade agreement, [790] but the competition policies and PCC are still in their development stage. The need to have an international competition authority or agency to monitor the progress of such trade agreements and provide developing countries with assistance is important.

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[786] Philippine Competition Law (R.A. 10667) < https://www.phcc.gov.ph/philippine-competition-law-r-10667/>

[787] 'Free Trade Agreement Philippines' <https://www.efta.int/free-trade/Free-Trade-Agreement/Philippines>.

[788] Free Trade Agreement between the EFTA states and the Philippines. <https://www.efta.int/sites/default/files/documents/legal-texts/free-trade-relations/philippines/EFTA-Philippines-Rectification-Main-Agreement.pdf>

[789] OECD, 'Competition Provisions in Trade Agreements – Contribution

from the Philippines' <https://one.oecd.org/document/DAF/COMP/GF/WD(2019)6/en/pdf>.

[790] Stacey Nicole M Bellido, 'Fast-Tracking a Philippine–EU Free Trade Agreement' <https://www.eastasiaforum.org/2020/07/03/fast-tracking-a-philippine-eu-free-trade-agreement/>.

The E15 initiative[791] research mentioned a range of issues which are covered by the chapters or provisions of these agreements:

i. promote competition.
ii. adopt or maintain competition laws;
iii. Regulate designated monopolies, SOEs, and enterprises entrusted with special or exclusive rights
iv. regulate state aid and subsidies to provisions;
v. lay down competition-specific exemptions;
vi. abolish trade defences; or set forth
vii. competition enforcement principles;
viii. cooperation and coordination mechanisms; and
ix. principles governing the settlement of competition-related disputes[792]

For the application of the above points developing economies need resources and assistance to intertwine in their receptive competition laws. In cases where the FTAs is between north – south countries, the south has always been on disadvantage in regard to the competition provisions.

In case of NAFTA and NAFTA inspired FTAs, these provisions include an extensive scheme on co-operation and co-ordination and they contain a very generic references to anti-competitive business conduct.

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[791] The International Centre for Trade and Sustainable Development (ICTSD), the

World Economic Forum, and 16 partnering institutions to bring together more than 375 international experts in over 80 interactive dialogues between 2012 and 2015 under the E15 Initiative. At the core of the initiative are 15 thematic Expert Groups and three Task Forces, each comprised of leading thinkers from developed and developing countries drawn from different fields and backgrounds. Their work has been complemented by an overarching dialogue looking at the global trade and investment architecture, involving consultations with hundreds of thinkers and policy-makers.

[792] François-Charles Laprévote, Sven Frisch and Burcu Can, 'Competition Policy within the Context

of Free Trade Agreements' (2015) <https://e15initiative.org/publications/competition-policy-within-the-context-of-free-trade-agreements/>.

In case of US-Australia FTA, Article 14:2 on competition laws and anticompetitive business conducts, it states that each authority is responsible for the enforcement of its competition rules.[793] While FTAs between EU and the accession candidates include provisions and obligation to ensure the compatibility of their legislations with EU competition laws.[794] On the other hand, the FTAs between Eastern Europe, Central Asia and other Caucasian countries generally do not state an obligation for members to adopt competition laws but just have provisions stating that unfair business practices are incompatible with the agreement's objectives.[795]

For instance, Article 16 of the Ukraine and Republic of Moldova talks about non-admission of competition restrictions. [796] The FTA between Kyrgyz Republic-Kazakhstan states the same as the FTA of Ukraine and Moldova. [797]

During the WGTCP India raised a point that there are very few FTAs on competition and those are mainly between developed nations which are at similar stages of development. Further, information sharing in these agreements among the competition authorities in the form of `positive comity´ excluded confidential information, which at the end proved to be ineffective. [798] In this regard, the European Community and its Member States stated that it is necessary to make a distinction in the various categories of information: on the one hand, non-public information, such as business secrets, that should not be shared in any other existing competition agreements; but, on the other hand, the non-

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[793] 'United States - Australia Free Trade Agreement' <http://www.sice.oas.org/Trade/US-AusFTAFinal/chapter14_23.asp>.

[794] François-Charles Laprévote, Sven Frisch and Burcu Can, 'Competition Policy within the Context

of Free Trade Agreements' (2015) <https://e15initiative.org/publications/competition-policy-within-the-context-of-free-trade-agreements/>.

[795] François-Charles Laprévote, Sven Frisch and Burcu Can, 'Competition Policy within the Context

of Free Trade Agreements' (2015) <https://e15initiative.org/publications/competition-policy-within-the-context-of-free-trade-agreements/>.

[796] 'Free Trade Agreement between the cabinet of ministers of Ukraine and the government of the Republic of Moldova' <https://wits.worldbank.org/gptad/pdf/archive/moldova-ukraine.pdf>.

[797] 'Agreement on Free Trade Between Government of The Kyrgyz Republic and

The Government of The Republic of Kazakhstan' <https://wits.worldbank.org/GPTAD/PDF/archive/Kazakhstan-Kyrgyzstan.pdf>.

[798] 'WT/WGTCP/M/14 Report on the meeting of 22-23 march 2001' (2001). <<docs.wto.org>>. Para 45

public information that could be shared and was useful to law enforcement processes for the legal or economic analysis and to make it available on the Internet for easy access.[799]

Another raising issue with multiple trade agreements is the overlap of these agreements, especially in cases of RTAs. The overlapping of the agreements makes it difficult to determine `country of origin´ of goods traded across these regions. The overlapping of agreements is also expressed as `the spaghetti bowl effect' or the noodle bowl effect. RTAs allow differential or special treatment to the members of the RTA. RTAs apply Rules of Origin (RoO) and Rules of Cumulation (RoC)[800] which allows countries and companies to know the products originating status.[801]

As of June 2020, there are a total of 304 notified RTAs out of which 35 are with Africa.[802]The Democratic Republic of Congo (DRC) is involved with 14 African regional organizations. Trade agreements and organizations such as COMESA; COMIFAC, AU etc. have provisions on competition law but only few of them have provisions on dispute settlement.

Even so, different regional agreements have different benefits for instance, Kenya benefits from COMESA to safeguard its markets for dumping of sugar, for which purpose, however, it cannot rely on EAC regulations.

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[799] 'WT/WGTCP/M/14 Report on the meeting of 22-23 march 2001' (2001). <<docs.wto.org>>. Para 46

[800] Rules of Origin (RoO) and Rules of Cumulation (RoC) play a crucial role in RTAs. They define how a product's country of origin is identified, which imports from another country are subject to preferential treatment, and how products are eligible for preferential treatment if they are manufactured in various countries. The application of these rules is being seen as the major vehicle for trade diversion as they define whether a product may cross borders under the conditions of an RTA's preferential treatment (Estevadeordal 2000; Cadot et.al. 2002).

[801] U Schüle and T Kleisinger, 'The "Spaghetti Bowl":

A case study on processing rules of origin and rules of cumulation' <https://www.econstor.eu/bitstream/10419/181886/1/uasm-dp-002.pdf>.

[802] WTO, 'WTO Members Continued to Notify RTAs amid the Covid-19 Pandemic. The

CRTA and the CTD Could However Not Meet during the Period under Review.' <https://www.wto.org/english/tratop_e/region_e/rtafactfig_e.pdf>.

Most of the economies have benefited by opening their trade barriers. Trade agreements have played a very important role in liberalizing trade. However, as developing economies are still strengthening and learning to adopt and enforce competition laws, the competition provision in such agreements is not enough. Even though a strong effort was made by WTO to create an international competition agreement, it was not successful due to many reasons which we have already discussed. One of such reasons is that there is difference between the domestic competition laws of developing and developed economies.

Having international binding rule for all countries is not feasible, given that each economy relies on a different legal structure to deal with competition and anti-competitive practices within its jurisdictions. Also, developing countries market structure needs to be kept in mind to frame laws on competition. However, it is necessary to have a strong co-operation agreement among economies, as this will facilitate the investigation, capacity building etc in cases of extraterritorial scope.

5.6. International cooperation and enforcement

It is clear that there is a need to have strong laws on competition and especially laws which have extraterritorial scope. The WTO's intent to create an agreement relating to international competition laws was not a success and one of the main reasons for this was that there was a strong reluctance from most economies to establish a fully binding international competition law.

The constrains put forth by different procedural processes and competition polices in different countries made it difficult to have a single binding competition law provision. It is a challenge to harmonize different national regimes into one single standard.

The United States in the WGTCP meeting of June 1999, mentioned that the binding efforts of the trade agreement has worked well for the economies, but there were certain concerns expressed regarding the binding nature of competition policies due to the

uncertainties regarding cooperation, transparencies and other matters which provided no assurance that a binding agreement will be beneficial.[803]

The representative of Hong Kong, China stated that in their experience with APEC Competition policy and the deregulation groups during the exchange of information between competition institutions, matters related to transparency and the implementation of various technical assistance instruments could all be addressed in a voluntary and non-binding manner.[804]

Whether all WTO members would have to adopt national competition laws?

This was a very concerning question among the members as implementing these laws could be easy for some members while may prove to be burdensome for others. Hong Kong, China and Singapore stated that as economies have different objectives of competition laws and the process of implementation are also diverse, this may cause fraction between economies.[805] Chile pointed out that the multilateral system of competition polices will benefit in case of extraterritorial scope which goes beyond various borders. However, agreeing to the statement made by Hong Kong, China and Singapore, it stated that it would be better if members are not obliged to adopt competition laws. Norway to this added that economies must adapt their laws according to the changing times. Even the EU sided with Hong Kong, China, Singapore, and Chile in this case.[806] Most of the WTO members agreed that it would be better if members where not obliged to adopt national competition laws.

For a multilateral binding competition polices or agreements, one of the key concerns is competition co-operation enforcements. International co-operation has proved to be hurdle in competition cases with extra-territorial scope.

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[803] 'WT/WGTCP/M/9 Report on the meeting of 10-11 June 1999' </docs.wto.org/>. Para 46

[804] WT/WGTCP/M/12 Report on the meeting of 2-3 October 2000' </docs.wto.org/>. Para 45

[805] WT/WGTCP/M/15 Report on the meeting of 5-6 July 2001' </docs.wto.org/>. Para 36

[806] WT/WGTCP/M/15 Report on the meeting of 5-6 July 2001' </docs.wto.org/> Paras 37, 38, 39.

The OECD has been involved to provide countries with guidelines and recommendations since the Working party No. 3 8WP on enforcement was created in 1964.[807] This chapter will focus on the need for strong co-operation in competition enforcement and will propose ideas on how countries can facilitate co-operation enforcement in competition by adopting regional agreements with specific commitments.

5.6.1. The need for strong international co-operation in competition enforcement.

Due to international trade, there are many anti-competitive practices which affect more than one jurisdiction, co-operation is required among countries which are affected by such practices. Currently there are many bilateral and regional trade and competition agreement which lay down requisites of co-operation between competition authorities in multijurisdictional cases. As discussed in the chapter on international institutions and competition laws, OECD, ICN and UNCTAD all provide with guidelines on co-operation, and it is important to have co-operation between competition authorities.

As discussed in chapter related to WGTCP, it can be seen that economies were not convinced that co-operation should be binding in the multilateral framework.

The WGTCP report of 2002 has discussed the term *"co-operation"* and it refers to several types of different activities such as technical assistance, co-operation to notification and sharing of information which may include at policy level and on specific case basis. Initially the benefit of cooperation was limited to competition law related conflicts which occasionally arose between different jurisdictions, in the recent years we have seen an increase of transnational competition law cases. Bilateral agreements in these regards have helped economies to set standard guideline to determine the scope of cooperation.

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[807] OECD, 'Challenges Of-Operation in Competition Law Enforcement'. <https://www.oecd.org/daf/competition/Challenges-Competition-Internat-Coop-2014.pdf>

According to the experience of United States and Canada,[808] the second generation entered between the parties is binding in nature and it has helped competition agencies of the jurisdictions involved in such agreements cooperate on various cases. [809] For example, the United States and Canada have cooperated in many criminal cartel investigations which also included executing several search warrants that involved one authority searching for the other. The US also have many mergers related reviews with the assistance of the EU. The US and Canada cooperation has led to many investigations such as the plastic dinnerware case, graphite electrodes and vitamin cartel investigation. In total the US fines in these cases have exceeded 1.3 US billion dollars. [810]

In the case of South Africa, the representatives stated that the voluntary cooperation has worked for them. Firstly, it has led to a greater understanding of the competition issues which in turn has led to strengthening the enforcement mechanism. And most importantly, it has helped them to learn how other jurisdictions handle cases of a similar nature. In the case of South Africa, voluntary cooperation did not require a formal agreement, and nevertheless involved engaging in the exchange of information by making phone calls, e-mail exchange, meeting colleagues etc. South Africa exchanged non-confidential information with Norway, Australia, the United States, the European Commission, India, Kenya, Zambia and Zimbabwe. [811]

During the WGCTP, South Africa has requested other countries to set up their competition authorities, with the purpose to foster cooperation between different agencies, and further mentioned that it will assist newly established authorities by sending their own officials to train and help them. Tanzania also supported comments made by South Africa and stated that South Africa has extensively helped them develop their competition authority. [812]

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[808] Treaty between the Government of Canada and the Government of the United States of America on Mutual Legal Assistance in Criminal Matters E101638 - CTS 1990 No.19

[809] 'WT/WGTCP/W/192 modalities for voluntary cooperation' 2002 </docs.wto.org/>. Para 12

[810] Policy roundtable Improving International Co-operation in Cartel Investigations 2012, <https://www.oecd.org/daf/competition/ImprovingInternationalCooperationInCartelInvestigations2012.pdf> p.42

[811] 'WT/WGTCP/M/18 report on the meeting of 1-2 July 2002 </docs.wto.org/>. Para 72

[812] 'WT/WGTCP/M/18 report on the meeting of 1-2 July 2002 </docs.wto.org/>. Para 71,72,73

Both US and South Africa believe in and have felt the benefits of cooperation in issues related to competition policies. The US are more inclined towards a formal agreement, while South Africa, has a preference to rely on voluntary cooperation. The Nordic countries are a good example of gradually shifting from voluntary cooperation in 1980s to setting up an informal guideline in 2000 and then moving to establishing formal agreement among themselves in 2001.

There is a need for cooperation among competition authorities/agencies in various jurisdictions. The whole process of cooperation suits best on economies which share trade and most of whose businesses are set up, for instance in case of US and Canada or US and EU. Also, the process of co-operation suits when the legal system is shared, or the jurisdiction is based in the same geographical, political area, for example in the case of South Africa and Tanzania; Tanzania states that that South Africa has extensively helped them develop their competition authority.[813]

The latest OECD/ICN report on international co-operation in competition enforcement 2021 sheds light on international co-operation and competition enforcement. OECD and ICN have been involved and focused on international co-operation in competition enforcement since 2012. They have collaborated to produce reports on co-operation enforcement by providing countries and members with survey. In their latest published report in 2021[814] which is based on the survey conducted in 2019, it received responses from 62 members, all of them ICN members and OECD members and participants.[815]

The survey has accumulated important data on frequency of international enforcement co-operation, legal bases for co-operation, the value of international enforcement co-operation for authorities, limitation and challenges, notification, comity and co-ordination,

[813] 'WT/WGTCP/M/18 report on the meeting of 1-2 July 2002 </docs.wto.org/>. Para 71,72,73

[814] 21st January 2021

[815] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competitionenforcement-2021.htm

investigative assistance. The data has included information sharing, confidentiality waivers, regional enforcement.[816]

The report mentions factors which are key drivers for improving and increasing international co-operation for the last two decades, the need and improvement is due to the increase in the number of countries adopting competition laws; this has resulted into an increase of competition authorities and its competence. Globalization and economic interdependence are important factors.

The last point which plays a huge role in improving and increasing the international co-operation is the development of international digital economy. [817]

International co-operation in competition enforcement has been enhanced in many levels since 2012 and it may have different meanings and cover a certain range of activities between competition authorities. It can be bi-lateral, regional or multilateral. For the purpose of the survey `international co-operation´ was defined as:

> *"co-operation between international enforcement agencies in specific enforcement cases, i.e., merger, cartel, unilateral conduct/abuse of dominance, and other (e.g., non-cartel agreement) cases. This questionnaire does not concern general co-operation on matters of policy, capacity-building, etc.; only international co-operation in the detection, investigation, prosecution or sanctioning of a specific anti-competitive behaviour or the investigation or review of mergers is covered. The extent of international co-operation may vary from case to case, ranging from less extensive co-operation (for example, keeping each other informed on the stages of the investigation or having general discussions on substantive issues) to more*

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[816] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competitionenforcement-2021.htm.

[817] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competitionenforcement-2021.htm.

extensive co-operation, such as parallel investigations, investigatory assistance … and more enhanced co-operation."[818]

For the international co-operation in competition enforcement information sharing is a crucial aspect, the respondents of the survey mentioned that sharing information can make a difference in the outcome of an investigation. One of the main problems which has been encountered by most of the members is sharing and handling of confidential information. For the competition authorities of the EU members, the European competition networks works well for sharing confidential information. Many competition authorities say that they know the importance of sharing confidential information for benefiting an investigation, however there are many legal barriers preventing them.[819]

Sharing confidential information is a very sensitive matter and parties will be confident to share it when jurisdictions are clear of what aspects are covered under confidential information and they are provided certainty that the information exchanged would be protected once shared. The criteria used by jurisdictions to define confidentiality include the nature of the information (business secrets, commercially sensitive information, personal data or information), or risk that the information may cause a party or third-party harm (for instance in cases where disclosing information me release the identity of the information provider). There are lots of other factors such as how the information is obtained, or for what purpose the information is collected. What an authority considers confidential can differ from jurisdiction to jurisdiction (for instance, how a particular jurisdiction defines information as being confidential may vary, the definition of trade secret can have narrow or a broader meaning depending on the legal regime of a particular economy).[820]

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[818] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in competitionenforcement-2021.htm pg. 61, (para 86)

[819] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in- competitionenforcement-2021.htm pg. 163

[820] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in- competitionenforcement-2021.htm pg. 166,167

The OECD in its 2014 report recommended that countries need to:

> *"consider promoting the adoption of legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information ('information gateways')."* [821]
>
> The recommendation focuses on the information gateways, which can help members to deal with the confidential information in a useful and secure manner. For the enforcement of co-operation between members it is important to establish sufficient safeguards to protect the information exchanged.[822]

The international enforcement co-operation can take many forms and consist of range of activities and there are different types of agreements such as:

5.6.1.1. Informal and formal co-operation

Informal co-operation is easy to process. It is mainly case specific and can be achieved simply by informing of the progress of cases of mutual interest, discussion on exchange of public information and discussion of investigative strategy. In case of formal co-operation, it consists of various ways in which parties can co-operate and it contains some written or legal formalities. The response to the survey states that the formal co-operation is more effective, it can be in the form of bi-lateral or regional co-operation agreement etc. [823]

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[821] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in- competitionenforcement-2021.htm. Annex C. 2014 OECD recommendation. Recommendation of the OECD Council Concerning International Co-operation on Competition Investigations and Proceedings. pg. 226.

[822] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in- competitionenforcement-2021.htm pg. 167

[823] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competitionenforcement-2021.htm pg. 62, (para 91,92,93,94,95,96)

5.6.1.2. First generation and second-generation co-operation

First and second-generation co-operation agreements are types of formal co-operation agreements. Since 2012, countries have seen an increase of first-generation agreements. First generation agreements provide for the exchange of non-confidential or confidential information that can be shared with the consent of the information sources. While second generation agreements are binding in nature, they consist of provisions allowing the competition arthurites to share confidential information in a clear and indictive manner with the prior consent form the source of information. The use of second-generation agreements is relatively new and there are nearly seven of such agreements.[824] These agreements can be of different types; the binding agreements can be entered either between the governments or between agencies. Matters addressed in these agreements include the scope of assistance, protection of confidential information shared, handlining privileged information, how to use information received by authorities, procedures for requesting, procedure for fulfilling the request and limitations or exclusion related to certain categories. [825]

Among the various agreements such as bi-lateral, multilateral etc. the agreements which are enforced among regions have shown the most intensive and successful enforcement co-operation. According to the survey by OECD and ICN in 2019, 76 percent of countries have participated in one or the other regional competition agreements.

The sharing activities range from sharing information regarding status of investigation to remedies coordination.

The reasons that regional agreements are a success, in accordance to the responses submitted for the survey of 2019, are:

- *coherent application and development of regional law (62%)*
- *strong legal basis, including for exchange of information (60%)*

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[824] Australia-Japan, Paragraph; Canada-Japan, Paragraph; Canada-New Zealand, Paragraphs; New Zealand-Australia; EU-Switzerland; US-Australia; Nordic Alliance.

[825] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in- competitionenforcement-2021.htm pg. 237

- *strong network of contacts (57%)*
- *convergence of national laws/procedures (43%)*
- *high relevance of co-operation (similar companies and cases) (36%)*
- *economic similarities and shared history of development (31%)*
- *capacity building (7%)*
- *cultural, geographical and language similarities (5%).”*[826]

During the survey, the OECD also included some questions seeking the views on future work for OECD and ICN. Three main types of co-operation were in high priority, which included, first, the enhanced co-operation tools which would help reduce the overall costs with the investigation or proceeding by multiple competition authorities.

Second, bi-lateral agreements on information exchange and, among others and lastly, a model provision which would allow exchange of confidential information between authorities without the need to obtain prior consent from the source information.[827]

5.6.2. The need for a second-generation agreement on regional co-operation in competition enforcement.

Countries want access to enhanced co-operation tools, agreements on information exchange and model provisions for exchange of confidential agreement to attain these measures, it is necessary to have second generation agreements on co-operations between blocs of countries. Like the MoUs which are in place under the umbrella of OECD, now there is a need for second generation MoUs which will allow the reciprocal exchange of confidential information among parties to this MoU. These agreements will facilitate and enhance the competition co-operation enforcement among its members.

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[826] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competitionenforcement-2021.htm pg. 179

[827] OECD/ICN (2021), OECD/ICN Report on International Co-operation in Competition Enforcement http://www.oecd.org/competition/oecd-icn-report-on-international-cooperation-in-competitionenforcement-2021.htm pg. 184. Table 20.1 Future work for the OECD, by priority score, 2019.

As discussed earlier the success of regional co-operation agreements, and even of regional trade agreements show that a binding second generation regional co-operation agreement could prove to be beneficial in the long run. WGCTP reports have shown that countries are not in favour of binding multilateral competition laws; but a regional competition agreement on co-operation enforcement would benefit the member countries.

The idea would be that countries belonging in the same region with good trade relations could conclude a binding competition co-operation enforcement agreement which can include main points such as, general co-operation matters on policy, capacity building, investigation, prosecution or sanctioning of a specific anti-competitive behaviour, reviews of mergers, confidentiality, sharing information, notification etc. These matters would be applicable to all kinds of competition cases such as mergers, cartels, abuse of dominant position etc.

The doctrine of comity and the principle of reciprocity, will play an important role in the implementation of such agreements; as they form the base of the legal principle which states that jurisdictions may recognize and give effects to judicial decrees and decisions rendered in other jurisdictions, unless their recognition is incompatible with public policy.

Comity is a legal principle in international law which states that if a country takes other countries important interests into account when they conduct its law enforcement activities, in the other country is doing the same. It brings in an effect of the unilateral assertion of extraterritorial jurisdiction.[828]

It is based on a simple process where one country respects another state law in cases of extraterritorial scope and the other country does the same. [829]Thus, in case of the regional co-operation agreement of one or more countries would make way for exchange

[828] 'Provisions on negative comity, competition co-operation and enforcement of international co-operation between competition agencies' <https://www.oecd.org/daf/competition/mou-inventory-provisions-on-negative-comity.pdf>.

[829] John Kuhn Bleimaier, 'The doctrine of comity in private international law' <https://heinonline.org/HOL/LandingPage?handle=hein.journals/cathl24&div=37&id=&page=>.

of confidential information on cases with extraterritorial effect and the other country would acknowledge that fact and also do so, thus proving beneficial to all.

The Multilateral Mutual Assistance and Cooperation Agreement for Competition Authorities (MMAC) was signed on 2nd September 2020, which consists of MoUs and model agreements set out for improving cooperation on competition investigations between the Australian Competition and Consumer Commission (ACCC), the Competition Bureau of Canada (CBC), the New Zealand Commerce Commission (NZCC), the Department of Justice (USDOJ) and Federal Trade Commission of the United States of America (USFTC) and the Competition and Markets Authority UK(CMA).[830]

The MMAC was drafted by keeping in mind the importance of co-operation for the enforcement of competition law:

> *"Recognising that the Participants can benefit by sharing their experience in developing, applying, and enforcing Competition Laws and competition policies, the Participants intend to cooperate and provide assistance, including by:*
>
> a) *exchanging information on the development of competition issues, policies and laws;*
>
> b) *exchanging experience on competition advocacy and outreach, including to consumers, industry, and government;*
>
> c) *developing agency capacity and effectiveness by providing advice or training in areas of mutual interest, including through the exchange of officials and through experience-sharing events;*
>
> d) *sharing best practices by exchanging information and experiences on matters of mutual interest, including enforcement methods and priorities; and*

[830] 'Multilateral Mutual Assistance and Cooperation Framework between the CMA, ACCC, CBC, NZCC, USDOJ and USFTC' (2020) <https://www.gov.uk/government>.

e) collaborating on projects of mutual interest, including via establishing working groups to consider specific issues."[831]

The signatory to this agreement has had prior experience of sharing confidential information and helping with investigation in competition cases, for example as previously discussed in the Vitamin cartel case. This agreement consists of a model agreement which can be used by signatories, as foundation for information sharing and investigative assistance agreements. This is based on the principle of reciprocity and it outlines various process for requesting such information's. [832]

Till date nothing has come out of this agreement. However, this type of agreement if implemented and enforced properly among blocs of countries can prove to be beneficial.

The above signatories are all developed counties, if such agreements are enforced among developed and developing countries. It can help countries to enhance their co-operation enforcement.

In cases of anti-competitive practices which impact multiple jurisdictions, the core problems are investigations, co-operation among agencies and extra-territorial scope of the domestic laws of countries; and in cases of domestic competition laws, developing countries need stronger laws and enforcement mechanisms. These kinds of second-generation agreements along with the help of older and experienced competition authorities to younger competition authorities can help international trade to flourish in a competitive environment, it is important that competition authorities help each other to investigate and mentor younger competition authorities. In the section below we will discuss in detail on how a mentoring program can benefit and enhance competition laws and co-operation among developing economies.

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[831] 'The multilateral mutual assistance and cooperation agreement for competition authority's memorandum of understanding' (2020) <https://assets.publishing.service.gov.uk>. pg. 2 para 3, 3.1

[832] 'The multilateral mutual assistance and cooperation agreement for competition authority's memorandum of understanding'' (2020) <https://assets.publishing.service.gov.uk>. pg. 3 para 4 (The model agreement can be found in the Annexure A)

5.6.3. A mentoring program

In an ICN questionnaire (2003) on capacity building among the competition agencies of developing and transitioning economies, the response of 37 competition agencies [833] was to implement training programs to enhance the knowledge and experience of young competition agencies. Similar responses emerged from the ICN (2006) study, where the response in relation to the issues faced by young competition agencies was the limitation of experienced professionals.

In 2010 in the `sixth United Nations conference to review all aspects of the set of multilaterally agreed equitable principles and rules for the control of restrictive business practices´ the UN, called upon UNCTAD to provide developing countries with an enhanced technical assistance for capacity building in the area of competition law and policy. [834] Since then, UNCTAD has provided technical assistance on competition law and policy in many national, regional and sub-regional levels by conducting intensive training on competition law and policy for officials of competition authorities, and public bodies at national level. At a regional level, UNCTAD has assisted in the drafting and implementation of regional competition legislations. [835]

For an effective enforcement of competition law, UNCTAD has assisted many countries with the adoption, revision and/or implementation of national competition and legislations. Some of these countries are Albania, Cambodia, Cabo Verde, Ethiopia, Philippines, Viet Nam, Zimbabwe, Ukraine etc.[836]

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[833] Australia, Botswana, Brazil, Bulgaria, CARICOM, Columbia, Croatia, Cyprus, Czech Republic, European Union, El Salvador, Estonia, Finland, Germany, Hong Kong, Hungary, India, Indonesia, Italy, Jamaica, Japan, Kenya, Korea, Latvia, Malaysia, the Netherlands, Norway, Poland, Singapore, South Africa, Sweden, Taiwan, Trinidad & Tobago, Turkey, United Kingdom, and United States of America.

[834] TD/RBP/CONF.7/L.16, 'Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices' (2010).

[835] TD/B/C. I/CLP/43, 'UNCTAD Capacity-Building and Technical Assistance on Competition Law and Policy'. (2017)

[836] TD/B/C. I/CLP/43, 'UNCTAD Capacity-Building and Technical Assistance on Competition Law and Policy'. (2017)

In Latin America, since 2003 the Competition and Consumer Protection for Latin America (COMPAL) has been effective for the technical cooperation and capacity building programs in the field of competition and consumer protection for 17 countries.[837] This programme has been conducted with the support of the state secretariate for economic affairs of Switzerland, it has donated for the programme since 2004. [838] COMPAL has been active in Latin America and has worked for the enforcement of effective competition law via three phases; phase I and phase II proved to be beneficial and in 2015, they continued to the phase III where the focus was to make an effort in the consolidation of acquired capacity building and enhance regional cooperation.[839]

Further, in the area of capacity building in 2015 with the help of the Government of Sweden, UNCTAD developed a programme in Middle East, and North Africa Region (MENA). This program was to strengthen regional economic integration, anti-corruption, good governance and gender equality by strengthening market, by improving competition and consumer policies.[840] The programme had a diagnostic phase in 2015, with an aim to establish a monitoring and evaluation system, validation of various approaches, budgets on several projects. The programme was implemented in 2016, where UNCTAD organized activities such as study visits to competition authority of Austria and France, for addressing topics related to agency structure, information sharing, economic analysis in abuse of dominant position cases, leniency program, dawn raids and advocacy etc. Apart from study visits, it also launched regional training center for competition law and policy in Tunis and Tunisia.[841] To foster regional cooperation in competition law enforcement, it facilitated the twinning arrangements between the

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[837] Argentina, Bolivia, Chile, Colombia, Costa Rica, Dominican Republic, Ecuador, El Salvador, Guatemala, Honduras, Mexico, Nicaragua, Paraguay, Peru, and Uruguay.

[838] 'The Competition and Consumer Protection for Latin America (COMPAL)' <https://unctadcompal.org/acerca-del-compal/>.

[839] 'The Competition and Consumer Protection for Latin America (COMPAL)' <https://unctadcompal.org/acerca-del-compal/>.

[840] UNCTAD MENA Programme 1st Annual Review Meeting < https://unctad.org/es/node/25929>

[841] TD/B/C. I/CLP/43, 'UNCTAD Capacity-Building and Technical Assistance on Competition Law and Policy'. (2017) pg. 8, 9, 20 Para 39 to 45.

competition authorities of Egypt and the Ministry of Industry and Trade and Competition Council of Tunisia and the Lebanese Ministry of Economy and Trade. [842]

The UNCTAD has played a very important role in enhancing capacity building and training various competition authorities across several jurisdictions; the aim was to enhance trade and development by strengthening competition polices. The focus was to take the developing countries interest into account to curb anticompetitive practices, that may harm trade in the country. [843]

In the area of capacity building and technical assistance by member states and other international organizations, competition authority of Italy has provided assistance to competition agencies of Albania, Algeria, Bulgaria, Croatia, Malta and Romania. The Federal Cartel office of Germany provided assistance to the competition arthurites of Egypt, experts contributed to the drafting of guidelines on abuse of dominance.[844]

CNMC provided assistance to Guatemala, Morocco, the Competition council of the Republic of Moldova by conducting training programme, study visits etc. The Federal Trade Commission of the USA; has assisted globally[845] with its experience. [846]

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[842] UNCTAD MENA Programme 1st Annual Review Meeting < https://unctad.org/es/node/25929>

[843] UNCTAD, 'Capacity-Building on Competition Law and Policy for Development' (UNCTAD 2008) <https://unctad.org/system/files/official document/ditcclp20077_en.pdf> accessed 30 March 2022.

[844] TD/B/C. I/CLP/43, 'UNCTAD_Capacity-Building and Technical Assistance on Competition Law and Policy'. (2017) (para 40-50)

[845] Assistance consists of the secondment of resident advisers, a training programme on mergers, antitrust and intellectual property, competition issues on retail gasoline, settlements and disruptive innovation, procedural fairness, training of trainers on investigative skills and a training workshop on abuse of dominance and leniency. In this regard, the following developing and emerging countries benefited from assistance: Argentina, Barbados, Botswana, Brazil, Bulgaria, China, Colombia, the Dominican Republic, El Salvador, Honduras, Hungary, India, Indonesia, Mexico, Pakistan, Peru, the Republic of Moldova, Singapore, South Africa, Turkey, Ukraine, United Arab Emirates, the United Republic of Tanzania, Viet Nam and Zambia. (TD/B/C. I/CLP/43) (para 51)

[846] TD/B/C. I/CLP/43, 'UNCTAD_Capacity-Building and Technical Assistance on Competition Law and Policy'. (2017) (para 40-50)

Ukraine immensely benefited by the capacity building programme, with the project being funded by EU and the Agency of International development of the USA. In 2016, one lawyer and one economist from the FTC of the USA and one lawyer form competition bureau of Canada worked in competition authority of Ukraine for a long-term adviser to strengthen the capacity program on competition law and policy. [847]

> "The *objectives of these projects were the following:*
>
> a) *To create a state aid monitoring system in Ukraine and share international experience in this field.*
> b) *To enhance investigation capacities, enforcement of competition law, conduct of market studies and assessment of horizontal mergers.*
> c) *Implementation of a competition impact assessment in Ukraine.*
> d) *Harmonization of the public procurement system in Ukraine with European Union standard" [848]*

Many international organizations have conducted several programs to assist and train economies, especially the developing economies to enhance their competition law.

For instance, COMESA and International Finance Corporation of the World Bank Group agreed to collaborate on anti-cartel project which aim to screen markets for risks of international cartels. It conducted legal analysis with the COMESA members stated to combat cartels.

ICN has a training on demand project, where it provides with a comprehensive curriculum training materials on a virtual platform for competition law officials. It consists of training modules, lecture videos, reading materials by expert academics. [849]

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[847] TD/B/C. I/CLP/43, 'UNCTAD_Capacity-Building and Technical Assistance on Competition Law and Policy'. (2017)

[848] TD/B/C. I/CLP/43, 'UNCTAD_Capacity-Building and Technical Assistance on Competition Law and Policy'. (2017) (para 54)

[849] 'Training On Demand - ICN' (*ICN*, 2022) <https://www.internationalcompetitionnetwork.org/training/>

As it has been widely acknowledged that free and fair competition is an important pillar of a market economy, many international and regional institutions with the intent to unlock the potential of the enforcement and implementation of competition law have exposed economies to several pro-competitive measures. Also, capacity building among the pro-competitive measures has proved to be useful.

However, in cases of young agencies and developing economies even though they are fully aware of the benefits of competition policy and law, they sometimes are not in a position to prioritise competition reforms. This may occur due to various challenges they face because of resource constraint, political matters, corruption etc. Developing economies exhibit high levels of economic and political inequalities, some of these economies have regimes where the businesses use their political powers to restrict trade and competition.[850]

Proving and investigating a particular case is restricting competition can be particularly difficult and costly. In case of cartels, the prosecutors can prosecute individuals included in the formation of collusive agreements if they have hard evidence against them for the violation of the competition laws. Investigation and false prosecutions can lead to unintentional social costs. For an effective implementation of competition laws, competition authorities require accurate metrics and market data. The price asymmetric and price marginal cost gaps can also reflect distinct commercial practices which involve differentiated products.[851]

The lack of proper data also raised problems which can lead to inaccurate results. Also, in many developing countries local legal institutions and bureaucratic capacity may be lacking.[852] Since culture vary among the developing economies, there is reliance on informal institutions, which includes, beliefs, morals, norms, attitude, codes of conduct,

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[850] Umut Aydin and Tim Buthe, 'Competition law & policy in developing countries: explaining variations in outcomes; exploring possibilities and limits' (2016) 79 1, 1.

[851] AE Rodriguez and Ashok Menon, 'The causes of competition agency ineffectiveness in developing countries' (2016) 79 37, 37–67 <https://www.jstor.org/stable/45019870>.

[852] Umut Aydin and Tim Buthe, 'Competition law & policy in developing countries: explaining variations in outcomes; exploring possibilities and limits' (2016) 79 1, 1.

conventions, habits and culture in general.[853] We have seen this in the case of Malaysia and its drafting of competition law. Also, conglomerates, large groups or business have comparatively higher influences in developing economies than compared to developed economies: these groups can impart both pro-competition benefits and anti-competition effects.

The functioning of institutions in developed and developing countries work on different level as the market structure of these economies function very different manner, thus, such factors must be taken while considering capacity building workshops. The workshops, training and study visits have benefited. But what developing economies need is a ground level work and a hands-on practical approach.

In the case of Bangladesh Competition Commission (BBC) which came into force in 2011 under the Ministry of Commerce; it was not functional till 2015 and all competition related cases were handled by the WTO cell of the Ministry of Commerce, which commented that it will finish staffing the BCC. [854]

In 2018, the Bangladesh Telecommunication Regulatory Commission (BTRC) implemented the Significant Market Power (SMP)[855] to enhance competition in the telecom market.

The countries leading telecom provider Grameenphone (GP) become the first to be given the SMP status. On February 2019, BRTC restricted GP's advertisements, package offer, and call rates due to its dominant position (GP has more than 46% of the market share, which meets the BRTC criteria).

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[853] Constanze Dobler, The impact of formal and informal institutions on economic growth (Peter Lang International Academic Publishers 2011) pg. 61 <http://www.oapen.org/record/1002685>.

[854] U.S Department of State: Bureau of economic and business affairs, 'Bangladesh Development Update: Apr. 2015: Bangladesh' (2015) 7 <https://2009-2017.state.gov/e/eb/rls/othr/ics/2015/241475.htm>.

[855] **Significant Market Power (SMP) Project:** SMP regulation is a process through which pure competitive condition is maintained in the market. Here, the large operators do not get chance for monopoly business. On the other hand, new & small-scale operators get the opportunity for providing their customer service in a friendly atmosphere. ITU is at the final stage for introducing the SMP regulation related draft guidelines. Everyone is opening that this step by BTRC will play a role for ensuring a competitive condition in the telecom sector of Bangladesh.

GP challenged the directive in March, the High Courts in its December judgement[856] stated that BTRC did not follow the proper procedure to impose restrictions on GP and directed BTRC to review the conditions. Since the 2019 judgement the telecom regulators have introduced two soft regulatory restrictions, but this has not led to any significant development or any significant impact due to the pandemic. The telecom regulators have been working on the SMP issue since 2011 and it came into force in 2018, however due to lack of procedural accuracy and now the pandemic the directive has not been effective to its full potential.[857]

Capacity building trainings, workshops are indeed helpful. But for countries which are relatively new to the competition law and policy and have week infrastructure need an on-the ground practical effort.

In case of Philippines, it had competition policies scattered over different laws and regulations. In 2003 during the joint negotiation for the trade agreement between Japan-Philippines, the Philippines showed reservation on liberalizing trade and investment, given they did not have strong competition laws. The Japanese counterpart expressed their willingness to assist the Philippines in preparing and formulating strong competition laws with the help of advocacy and educational campaign.[858] Under Article 13 of the Philippine-Japan Economic Partnership ("PJEPA"), Implementing Agreement, the parties have recognised the need to work together for their common interest in technical cooperation activities related to competition law and enforcement policy. The Japan Fair Trade Commission (JFTC) shared its experience among the fellow competition authorities in the ASEAN region in a course held in Tokyo in 2017, where it emphasised the need for young competition authorities have a lot to learn from older competition authorities and their experience.[859]

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[856] Grameenphone Limited vs Bangladesh Telecommunication Regulatory Commission (BTRC) [2019] High Court Division, 14 SCOB [2020] HCD Writ Petition No 1774 Of 2017 (High Court Division). (Para 95-101)

[857] Mohammad Asrarul Haque, 'Grameenphone Limited Restrictions on Grameenphone Ltd. as an SMP Operator' EBL Securities Ltd.

[858] 'Japan-Philippine Economic Partnership Agreement: Joint Coordinating Team Report'. Pg. 21

[859] '5 Lessons from Japan's antitrust agency on enforcement, advocacy, resilience' [2017] Philippine Competition Bulletin <https://phcc.gov.ph/wp-content/uploads/2018/03/0305-December-Newsletter-interactive.pdf>

The Philippines Competition Act (PCA) was passed in 2015, it has had many successes since its enforcement.[860]

> "The law that created the PCC is a 'game changer' as far as the Philippines is concerned. Now that the PCC is fully operational, it's a thumbs up go for the anti-trust body to go after nefarious, insidious activities of criminals in business suits."[861]

The Japan International Cooperation Agency (JICA) launched a phase II of its capacity building program on competition policy in 2016 with the Department of Justice (DOJ) to help boost the country's trade through competition policy reforms. It trained 64 sector regulators and 20 judges in the Philippines, the Phase I had already trained 304 professionals between 2010-2013 (this was before the PCA came into force). The JICA Philippines Chief representative Takahiro Sasaki states that:

> *"The project is one of the steps we implement to create a level playing field, attract more investments, and create jobs in the Philippines. Through policy support initiatives, we look forward to helping the Philippines become more globally competitive"*[862]

JFTC has been involved with the promotion of cooperation and enforcement of competition law in Philippines since the start of the joint trade agreement between the countries, this was to enhance trade by having strong competition laws in both the countries. PCC has had supports from other countries such as the USA, EU and other international institutions, Japan has mentored Philippines and helped enhance its competition law before it had a PCA.

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[860] '5 Lessons from Japan's antitrust agency on enforcement, advocacy, resilience' [2017] Philippine Competition Bulletin <https://phcc.gov.ph/wp-content/uploads/2018/03/0305-December-Newsletter-interactive.pdf>

[861] EU Competitiveness Report as cited by Marichu A. Villanueva, "Thumbs up for Philippines Competition law" (Philippine Star, December 4, 2017)

[862] 'JICA Supports PH Competition Policy, Trains Gov't Staff | JICA Philippines Office | Countries & Regions | JICA' (Jica.go.jp, 2013) <https://www.jica.go.jp/philippine/english/office/topics/news/130902.html> accessed 5 April 2022.

The practical knowledge acquired by older competition authorities is very useful for younger competition agencies. As seen from above, there are many capacity building programs, training courses, on-demand videos and course materials (ICN) etc, all of which have been helpful to the members who have taken part in such programs, however these programs focus more on an academic approach.

While the enforcement of competition law in developing countries can be difficult and complicated process, a way to ease this process is to have older competition authorities' mentor younger competition authorities. We have seen previously from the Bangladesh example; it has acquired knowledge from various international institutions but in practicality it still needs development.

The mentoring program will guarantee a more practical approach under an umbrella institution (e.g., UNCTAD, OECD or ICN); as these institutes already have established many capacity building programs. The mentoring program can focus on the needs and requirement of younger competition authorities, each of the younger competition authority can choose or be allotted a competition authority with an expertise in competition law to mentor it for a certain duration.

For instance, in case of Ukraine in 2016, one economist and one lawyer from Federal trade commission of the USA and one lawyer from Competition Bureau of Canada worked in the competition authority of Ukraine as a long-term adviser of the programme to strengthen capacity of Ukraine to apply competition law and policy. The mentoring program will be a transparent space i.e., all jurisdictions will be aware of which agency is helping the other and the younger authorities can publish their achievements and how a particular agency has helped them throughout the mentorship program.

The burden of mentoring will not always fall on developed economy, but economies such as Argentina can lend a hand to other Latin American economies. The parameters of such program will consist of trade relationship between the mentor and mentee; similar regional or geographical areas can be taken into account while choosing mentors.

The language can be a barrier for administrative and judicial processes, thus preferably if the mentor and mentee have same language of operations, it can certainly lead to an ease of functionality.

Overall, the mentoring or mentorship program can help younger competition authorities to develop and implement competition laws at a grass root level with the help of the experiences of an older competition authority.

6. CONCLUSION

The magnifying impact of privatization, globalization and trade liberalization has led many countries to adopt and strengthen their competition laws. In the thesis, after an in-depth analysis of several economies, it can be seen that in many countries which have recently adopted competition laws, they face difficulties while implementing and enforcing such laws; especially in cases where there is a transnational dimension.

Countries having limited resources, with a scattered legal system and bureaucratic burdens, feel heavy competition strain. Initially, the focus of competition laws of countries, especially that of developing economies, was to cater the needs of the domestic market. However, the rapid increase in internationalization has made it necessary for these economies to address the change and accommodate international competition issues into their legal systems.

The current investigation examines an array of developing economies and, as it can be seen, the market structure of these economies is very diverse. Some economies discussed, such as Bangladesh, Ghana, Guinea, Nigeria, Pakistan, Seychelles or Togo have very limited experience when it comes to competition law enforcement. In other cases, such as Angola, Ethiopia, Egypt, Indonesia or Malaysia, the competition law enforcement is on the verge of development and still needs a push from other experienced competition authorities. In case of competition authorities from Argentina, Brazil, India, South Africa, they have overcome several challenges, especially in cases dealing with transnational practices having anticompetitive effect; and have learned from their past experiences.

The market structure of these economies makes them clearly vulnerable to restrictive trade practices. Many developing countries may have a small domestic market, so there is a limit as to how much competition they can handle at a given time. The minimum efficiency scale dictates how few selected firms within the domestic market can operate efficiently. Other reasons which make them prone to such harm are weak legal structures, lack of infrastructure, poverty, corruption and political pressure; all these factors play an important role in the market.

Limited capacity of handling trade restrictive practices due to the lack of competition law enforcement and implementation has led to an increase in prices of goods and services, thus harming the consumer and the economy. According to the COMESA commission, retail prices of key products such as rice, white sugar, chicken, bread, milk, etc., have seen a hike of 24 per cent in African countries above other economies around the world. Trading malpractices have led to an increase in the prices of goods and services in general by between 25 per cent to 30 per cent. [863]

On an international level, efforts have been made by institutions such as WTO, OECD, UNCTAD and ICN to strengthen international competition rules, regulations and guidelines. These efforts have proved to be useful for many economies, such as Brazil, Egypt, sub-Saharan Africa, Philippines etc. Apart from such guidelines, there are several training programs to help developing countries. This has been discussed in the chapter of mentoring program, on an in-depth analysis of these training programs. It seems clear that these programs work in a scattered manner, so to obtain more benefit, these kinds of initiatives must be coordinated and brought under a uniform institutional umbrella.

The thesis has explained and analysed the effects of transposing of competition law and drafting competition law for developing economies. After analysing the experiences of several economies, it can be seen that transposing competition policies works for some economies, while drafting a competition framework *ad hoc* system works for other economies. In any case, however, what is really crucial for the success and material effect of any competition rules is an efficient enforcement mechanism and infrastructure. Thus, in any given legal system it is equally important to have a well and efficiently drafted laws and regulations but at the same time, proper enforcement capabilities.

The enforcement and implementation of these competition laws, especially in cases of transnational practices or repercussions, has proved to be difficult, as it can be seen in the Potash cartel case and the Soda Ash cartel cases.

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[863] 'COMESA begins crackdown on rogue companies' (The East African, 2021) <https://www.theeastafrican.co.ke/tea/news/east-africa/comesa-begins-crackdown-on-rogue-companies-1427108>

Thus, this thesis proposes two recommendations to combat issues faced by developing countries in terms of developing, implementing and enhancing their competition rules, regulations, and strengthening their competition authorities in accordance with the current global needs and also their domestic market needs.

First, there is clearly a need for strong international co-operation for competition enforcement. This has been shown in practice by the transnational effects of restrictive trade practices. At a regional level, a second-generation agreement with this purpose is required, as it will help enhancing and enforcing competition laws, thus giving such co-operation mechanisms a more binding effect among the regional countries. This will in turn help increase trade and balance it with a healthy competition.

The second recommendation made and analysed in this thesis is a mentoring program. In this program, experienced competition authorities will help train and provide useful resources to countries and economies with younger competition authorities. The mentoring program will be a transparent space, i.e., all jurisdictions will be aware of which agency is helping the other and the younger authorities can publish their achievements and how a particular agency has helped them throughout the mentorship program. There are several examples of how this strategy may benefit developing countries, which have been discussed in the chapter; for instance, Philippines has greatly benefited with the training, seminars and aid provided by the Japanese competition authority.

It is obvious that every economy requires a strong competition law enforcement and implementation mechanisms. However, it is upon every economy to prioritize strengthening their own competition laws and regulations. Current reality provides strong evidence of the fact that this goal can be much better achieved with the support from international institutions, and through cooperation between national competition authorities.

This is particularly true for developing countries and their economies, as they are highly exposed to the effects of practices and conducts taking place beyond their borders, and they can clearly benefit from the knowledge and experience accrued by competition authorities of developed countries.

The key to flourish trade and benefit economy, consumers, corporations and business is to have a healthy relationship between trade and competition laws. International trade has impacted every economy and governmental agencies across the globe are trying to implement laws to meet these ever-changing needs.

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