Competition Law and the Possibility of Private Transnational Governance

by

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Bachelor of Laws, Hanoi Law University, 2004
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Abstract

Under economic globalization, anti-competitive acts transcend national borders and become a challenge for competition law as traditionally conceived. Most countries have been dealing with cross-border competition problems by using two basic methods: unilaterally extending national competition law's jurisdiction to acts conducted in foreign territory and cooperating in enforcing competition law. However, while the unilateral enforcement of competition law harms international comity, international cooperation in this area is constrained by conflicting national interests. Given such limits of statist mechanisms to deal with global competition problems, this dissertation adopts a transnational legal perspective to examine whether multi-national corporations ("MNCs") can help states govern cross-border competition problems. This dissertation argues that MNCs can play a role in the regulation and enforcement of competition law in cross-border transactions through the private transnational application of contractor codes of conduct. When an MNC internalizes competition laws of countries as standards for its behaviours, the corporation can provide a mechanism to project those national laws at transnational level by exercising its private power in a socially responsible way. In doing so MNCs can provide a form of regulation and enforcement of competition laws in an international context that national states are not likely to be able to provide in the foreseeable future.

Table of Contents

List of Abbreviations

AMA	[Japanese] Antimonopoly Act
CRT	Cathode Ray Tubes
CSR	Corporate Social Responsibility
DIAC	Draft International Antitrust Code
DOJ	[American] Department of Justice
FSIA	[American] Foreign Sovereign Immunities Act
FTAIA	[American] Foreign Trade Antitrust Improvements Act
ICN	International Competition Network
JFTC	Japan Fair Trade Commission
MITI	[Japanese] Ministry of International Trade and Industry
MNC	Multi-National Corporations
NGO	Non-Governmental Organizations
OECD	Organization for Economic Cooperation and Development
OPEC	Organization of Petroleum Exporting Countries
UN	United Nations
UNCTAD	United Nations Conference on Trade and Development
VCA	Vietnam Competition Authority
WTO	World Trade Organization

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Chapter 1

Introduction

1. RESEARCH BACKGROUND, RESEARCH QUESTION, AND THESIS

In 2009, the Japan Fair Trade Commission ("JFTC") issued a cease and desist order and a surcharge payment order against an international cartel that fixed the price of Cathode Ray Tubes ("CRTs") imported into Japan.[1] Japanese CRT television manufacturers required their overseas manufacturing subsidiaries to enter into an agreement that set minimum target prices for specified CRTs.[2] Although the manufacturers and their subsidiaries did not sell CRTs directly to customers in Japan, CRT television sets, which included a CRT, were sold to customers in Japan.[3] The JFTC concluded that although the agreement was entered into outside of Japan, the *Antimonopoly Act of Japan*[4] could be applied because competition inside Japan was substantially restrained.[5]

The JFTC's decision in this case is impractical and controversial. It is impractical because while many countries that prohibit cartels, many countries make an exception allowing for export cartels. The consequence of this in the context of the Japanese CRT example the law in the jurisdiction where the export cartel operated might not prohibit the export cartel and the export cartel might, therefore, be allowed to continue to operate unless Japan applied its law extraterritorially. It is controversial because while some countries project their domestic laws into other jurisdictions, some strongly oppose this projection. Some countries assert that it is necessary to extend the jurisdiction of competition law to acts conducted abroad, especially export cartels, since limiting competition law within the state

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[1] Japan Fair Trade Commission, *Cease and Desist Order and Surcharge Payment Orders against Manufacturers of Cathode Ray Tubes for Televisions*, News release (2009).
[2] *Ibid*.
[3] Ryunosuke Ushijima, "Price-fixing conspiracy on cathode ray tubes ('CRT') for television sets", (6 November 2009), online: *AntitrustAsia*.
[4] *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*, 14 April 1947, No 54 [*Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*].
[5] Takanori Abe & Kaoru Ochiai, "Japan: The JFTC Applies Antimonopoly Act Beyond Borders for The First Time", *Managing Intellectual Property* (28 October 2015).

territory may encourage transnational illegal transactions that are transcending the state borders in the context of globalization. Extraterritorial application of competition law, however, is strongly opposed by countries that support the territorial principle of international law.[6] The conflicts of interest among countries make global competition governance unable to keep up with the rise of transnational anticompetitive business practices. The controversy of the extraterritorial jurisdiction of competition law exists not only in Japan but also in other jurisdictions.

This dissertation, therefore, analyzes the role of competition law in dealing with cross-border challenges from national, international and transnational perspectives.[7] From national and international perspectives, most countries have been dealing with cross-border competition problems by using two basic methods: unilaterally extending the jurisdiction of national competition law to acts conducted in foreign territory and cooperating in enforcing competition law. However, while the unilateral enforcement of competition law harms international comity, international cooperation in this area is constrained by conflicting national interests. Therefore, many of the transnational challenges of competition law that emerge from the global economic order and, more specifically, the nature of global value chains and international commerce, cannot be addressed through state law.

Given such limits of statist mechanisms to deal with global competition problems, this dissertation examines whether multi-national corporations ("MNCs") can help countries govern cross-border competition problems. While many corporations strive to maximize profit within the constraints of law and some make society-oriented business decisions as a strategy to maximize profits, some corporations plausibly make business decisions that reflect what they think they should do in the public interest even if the decisions are not profitable. Although this dissertation does not assume that MNCs will go beyond profit

[6] According to the territorial principle, a country is obliged to respect the territory and the sovereignty of other countries. It leaves a country free to make and enforce its law against any entities, including foreigners, in its territory. See Anthony Aust, *Handbook of International Law*, 1st ed (New York: Cambridge University Press, 2005) at 44.

[7] The national perspective examines the competition law of a country within its territory. The international perspective analyzes competition law with regards to international agreements, international cooperation, and international customary law. The transnational perspective studies the role of private actors in making and enforcing competition rules at a global level.

maximization, it suggests that corporations might be seen not only as problem generators but also as possible problem solvers.

This dissertation, therefore, focuses on the question of how multinational corporations can help states govern global competition problems. This dissertation argues that MNCs can play a role in the enforcement of competition law in cross-border transactions through the private transnational application of contractor codes of conduct. In doing so MNCs can provide a form of regulation and enforcement of competition laws in an international context that national states are not likely to be able to provide in the foreseeable future.

2. DISSERTATION ROADMAP

To defend this overall claim, this dissertation is divided into six chapters. After this introduction, Chapter 2 explains that competition laws in various countries share similar objectives that serve to protect the interests of society and vulnerable stakeholders such as consumers and small business from the aggregation of excessive market power. Competition laws across countries provide corporations with widely-shared obligations such as notifying mergers, not abusing of a dominant position, and not participating in cartels or prohibited mergers. However, in spite of the similarities in objectives, there can be conflicts of interest between different countries in the enforcement of competition law.

Chapter 3 identifies two sources of these conflicts of interest between countries. First, some countries provide exemptions for export cartels that are supposed to serve socio-political objectives of competition law. Legalizing export cartels allows a country's corporations to make profits at the expense of consumers and producers in other countries. These regulations create conflicts of interest between countries and result in countries that enforce competition law extraterritorially as a unilateral measure to deal with cross-border competition cases. Second conflicts arise due to different approaches to the extraterritorial application of competition law. Some countries strongly oppose the extraterritorial application of competition law, some consider international comity and apply this measure with certain limits, while others enforce competition law extraterritorially without any clear limits. In addition, some countries employ a double standard in the extraterritorial application of competition law. These different approaches to the extraterritorial application of

competition law impair states' efforts to deal with cross-border cases. Because of the conflicts of interest between different countries in the enforcement of competition law, countries need to cooperate in dealing with cross-border competition cases.

Chapter 4 examines problems with international cooperation in competition law. The analysis indicates that countries have not been able to achieve a reliable and binding international mechanism for dealing with transnational competition cases for three reasons. First, self-interested concerns on the part of some countries over the unfair distribution of interests and over the cost of such an agreement have been too strong to overcome. Second, pursuing international cooperation is costly. A third constraint on an international agreement on competition law has had to do with two technical issues that World Trade Organization ("WTO") members are encountering. The WTO's national treatment and the most-favoured-nation principles could constrain enforcement by a member country's competition authority, especially in transnational merger cases. In addition, setting up a dispute settlement mechanism for an agreement on competition law would be a difficult task for WTO member countries. This chapter also shows that international cooperation in competition law relies on national competition regimes and soft international cooperation. Such cooperation, however, is insufficient to deal with transnational competition challenges.

The previous three chapters suggest that state-centric mechanisms are not likely to deal with transnational competition challenges of the global society. Chapter 5 focuses on a private mechanism as a possible solution for transnational competition law. It is, in the modern context, arguably in the interests of MNCs to adopt and enforce general competition law objectives in an international context following those objectives even where a transaction does not violate competition laws in states where the transaction takes place but that has adverse competitive effects in other jurisdictions. Chapter 5 also suggests a mechanism in which MNCs might also come to internalize common competition law objectives and promote compliance with them in an international context even where they do not necessarily lead to higher profits for the MNC.

By doing so, MNCs contribute to the global governance of competition with a mechanism that has the three following fundamental attributes. First, private transnational rules relying on MNCs' economic power can effectively deal with certain cross-border competition problems without creating significant jurisdictional conflicts. Second, the

formation and enforcement of private transnational rules does not replace state law or diminish state regulatory authority or result in private hegemony because each MNC creates and enforces a set of rules but also is subject to rules generated and enforced by other firms. This dissertation, however, does not rest on the empirical claim that private transnational governance requires a critical mass of participating corporations to be effective. Rather, it advances a claim about the plausibility of private transnational governance by showing how MNCs could, by internalizing some norms within national legal orders, provide a useful supplement to state enforcement given the constraints on statist mechanisms dealing with cross-border competition problems as chapters 3 and 4 highlight. Third, MNCs' private transnational rules overcome concerns about the unfair distribution of financial and administrative burdens of enforcement, which is the main restraint of international cooperation among states. Chapter 6 concludes with a summary of the argument, contributions of this dissertation to the literature on corporate governance and transnational law, and the limits of this dissertation. It also suggests further studies in some areas of law based on the argument of this research.

3. METHODOLOGICAL APPROACH

This dissertation employs two methods: reviewing the literature and interpretive study. First, reviewing previous literature is an important method of this research because it helps to consolidate the existing knowledge concerning the research question. The literature review provides the supporting and opposing arguments for the proposed thesis. On the other hand, reviewing previous discussions also points out omissions in the literature that this research seeks to remedy.

Second, by conducting an interpretive study, this research analyzes non-literature texts such as cases, practices, and documents issued by corporations. Chapters 2 and 3 analyze several cases decided by Canadian and American courts to determine how certain rules are established in these two common law countries. These chapters also analyze decisions made by the Japanese and Vietnamese competition authorities to discuss the enforcement of competition law in these two countries.

In addition to case studies, the research examines a few MNC codes of conduct to show how transnational private rules are formed and how they work in practice. The main argument of this dissertation focuses on the internal aspect of law, especially the attitudes of corporations toward obligations set by law. It explores the process by which laws may become standards for corporate behaviour. Examining documents issued by corporations, therefore, helps in understanding the internalization of law by corporations.

4. THE SCOPE OF THE RESEARCH

This dissertation focuses on competition law. However, this study may be relevant to other areas of law such as criminal law, anti-bribery law, environmental law, and labour law. The relation to other areas of law is important because it provides comparative and contrasting arguments for an analysis of competition law. For example, in a country where competition law has never been applied extraterritorially, the discussion about the experience of the extraterritorial application of criminal law may provide some indication of how competition law might be applied in the future. Likewise, the literature on corporate social responsibility has mostly ignored competition law, instead focusing on environmental law and labour law. Therefore, relating to (but not focusing on) this literature will indicate how private transnational rules work in those areas of law and whether it can be applied in the competition law area.

In addition to limiting the main discussion to competition law, this study also narrows the geographical scope to four countries, namely, Canada, Japan, the United States, and Vietnam, although the dissertation will also consider the problem at the international level. The dissertation focuses on these four countries to demonstrate the diversity of competition law across countries and to show that an international competition law framework is not viable. The four countries represent a large number of competition regimes in the world for five reasons. First, Canada, Japan and the U.S. are developed countries with powerful competition regimes while Vietnam is a developing country of which the competition law and authorities are young. Second, Canada and the U.S. are western economies while Japan and Vietnam are Asian ones. Third, Canada and the U.S. share the same common law traditions while Japan and Vietnam are civil law countries. Fourth, in terms of the

extraterritorial application of competition law, Canada strictly adopts the territorial principle in enforcing competition law, the U.S. leads in enforcing competition law extraterritorially, Japan is a country that takes a double-standard approach, and Vietnam is following an effects doctrine without having a clear approach. Finally, the four countries are members of the WTO.

In this dissertation, the concepts of "corporation" and "multinational corporation" refer to a wide range of enterprises including incorporated companies and other organizational forms such as partnership, trust, and unincorporated association. Before discussing competition law from an international and a transnational perspective, Chapter 2 examines the objectives of competition law from a national perspective.

Chapter 2

Objectives of Competition Law[1]

1. INTRODUCTION

Over 127 countries have adopted competition law, and 120 countries have established a competition authority.[2] The competition laws of these countries focus on three major concerns: anticompetitive agreements, abuse of a dominant position, and mergers.[3] International institutions such as the United Nations Conference on Trade and Development ("UNCTAD"), the Organization for Economic Cooperation and Development ("OECD"), and the International Competition Network ("ICN") provide fora for countries to discuss competition law and policy.[4] These fora seek a common understanding among countries as to the objectives of competition law and its enforcement.

This chapter discusses the economic objectives of competition law. Overall, this chapter shows that competition laws of different countries may have some different economic objectives but at a national level there are also some widely-shared general principles of competition law that serve to protect the interests of society and vulnerable stakeholders, such as consumers and small business as part of the protection of effective competition, from

[1] This chapter was partly published as a journal article entitled "Should American Antitrust Laws Protect only American Consumers?" in the volume 4, issue 1, 2017 of American Journal of Trade and Policy.

[2] The Organisation for Economic Co-operation and Development, *Challenges of International Co-operation in Competition Law Enforcement* (OECD, 2014) at 26. See also Rijit Sengupta & Cornelius Dube, *Competition Policy Enforcement Experiences from Developing Countries and Implications for Investment* (Paris, France, 2008) at 6; and The International Competition Network, *Statement of Achievements* (International Competition Network) at 1.

[3] Some competition laws consist of unfair trade practices that, however, are not mentioned in this paper.

[4] For example, The Organisation for Economic Co-operation and Development, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (OECD, 2005). See also The International Competition Network, *Co-operation between Competition Agencies in Cartel Investigations* (Moscow, Russia: ICN, 2007); and The United Nations Conference on Trade and Development, *Informal Cooperation among Competition Agencies in Specific Cases*, TD/B/C.I/CLP/29 (Geneva, Switzerland: UNCTAD, 2014).

the aggregation of excessive market power.[5] The study of economic objectives of competition law has an important role in this dissertation for two reasons. First, it examines the functions of competition law at a national level that are different from those of competition law at an international level as Chapter 3 and Chapter 4 discuss. According to Chapter 3, competition laws of some countries allow for their corporations to exploit foreign consumers and producers in international markets. Chapter 4 shows that competition law at an international level may serve to liberalize global markets. Second, the study of economic objectives of competition law suggests that these objectives can be internalized by socially responsible corporations and enforced by multinational corporations at a transnational level as Chapter 5 discusses.

This chapter has six sections and a conclusion. The second section studies the economic objectives of competition law. The subsequent four sections analyze respectively the objectives of competition law in four jurisdictions, Canada, the United States, Japan, and Vietnam. Competition laws in these countries were adopted in different historical, political and economic contexts. Competition laws of Canada and Japan set out their objectives, but those of the U.S. and Vietnam do not articulate any objectives. The enforcement of competition laws in these four countries shows that these laws have one or several economic objectives: the promotion of consumer welfare, the protection of effective competition, and the promotion of social welfare.

2. ECONOMIC OBJECTIVES OF COMPETITION LAW

At the most general level, competition law of different countries prohibits the same anticompetitive business practices. They also share similar objectives including economic objectives. Economic objectives of competition law serve "to increase the material welfare of society through the instrument of interfirm rivalry."[6] According to the World Bank and the OECD, the most common objective of competition law is the maintenance of a competitive process, free competition, or the protection or promotion of effective

[5] Martyn Taylor, *International Competition Law: A New Dimension for the WTO?* (New York: Cambridge University Press, 2006) at 20.

[6] Joseph F Brodley, "The Economic Goals of Antitrust: Efficiency, Consumer Welfare, and Technoclogical Progress" (1987) 62 New York University Law Review 1020 at 1023.

competition.[7] A survey taken by the OECD suggests that in some countries competition law is expected to promote economic efficiency, economic welfare, or social welfare, or to provide consumers with better prices and higher product quality while other competition law regimes seek to protect competition so as to promote allocative efficiency.[8] In general, competition law consists of one or several economic objectives that promote consumer welfare, promote effective competition, and enhance economic efficiency.

2.1. Promoting Consumer Welfare

Promoting consumer welfare is widely considered an objective of competition law.[9] Consumer welfare is "the maximisation of consumer surplus, which is the part of total surplus given to consumers."[10] A competition law regime promoting consumer welfare would take a consumer welfare standard in analyzing competition cases.[11]

The consumer welfare standard focuses on the surplus allocated to consumers and ignores wealth going to sellers.[12] This means a business practice is illegal if it harms

[7] The World Bank & The Organisation for Economic Co-operation and Development, *A Framework for the Design and Implementation of Competition Law and Policy* (U.S: The World Bank and OECD, 1998) at 2.

[8] The Organisation for Economic Co-operation and Development, *The Objectives of Competition Law and Policy*, CCNM/GF/COMP(2003)3 (OECD, 2003) at 9. Economic efficiency refers to a decision or event that increases the total value of all economically measurable assets in the society or total social wealth. Economic efficiency consists of three components: productive efficiency, dynamic efficiency, and allocative efficiency. Productive efficiency is achieved when goods are produced using the most cost-effective combination of productive resources available under existing technology. Dynamic efficiency (or innovative efficiency) is achieved through the invention, development, and diffusion of new products and production processes that increase social wealth. Allocative efficiency is achieved when the existing stock of goods and productive outputs are allocated through a price system to those buyers who value them most, in terms of willingness to pay or willingness to forego other consumption. See Brodley, *supra* note 6 at 1025.

[9] The Organisation for Economic Co-operation and Development, *supra* note 8 at 9. See also Herbert Hovenkamp, "Implementing Antitrust's Welfare Goals Symposium: The Goals of Antitrust" (2012) 81 Fordham Law Review 2471 at 2477; Robert H Bork, *The Antitrust Paradox: A Policy at War with Itself* (New York: Free Press, 1978) at 51.

[10] Kati Cseres, "The Controversies of the Consumer Welfare Standard" (2007) 3:2 The Competition Law Review 121 at 124. See also other similar definitions of consumer welfare at RS Khemani & DM Shapiro, *Glossary of Industrial Organisation Economics and Competition Law* (OECD, 1993) at 29; and Brodley, *supra* note 6 at 1033.

[11] Thomas O Barnett, "Substantial Lessening of Competition - The Section 7 Standard" (2005) 2005 Columbia Business Law Review 293 at 296.

[12] Hovenkamp, *supra* note 9 at 2472.

consumers regardless of the significance of its offsetting gains to sellers and society in general.[13] The primary role of the consumer welfare standard is to provide the frame of reference for determining liability under competition rules.[14] This standard sets the criteria for the assessment and measurement of the anti- and pro-competitive effects of business practices.[15]

It has been suggested that promoting consumer welfare should be the primary objective of competition law because the consumer welfare test is easier to administer than other approaches.[16] The consumer welfare test allows a minor injury to consumers to outweigh significant efficiency gains.[17] Scholars point out some benefits of the consumer welfare standard. First, it gives businesspersons fair warning because a consumer welfare objective makes competition law simple and predictable.[18] Second, the consumer welfare standard vests political and legislative decisions in legislatures instead of the courts.[19] Given that a competition law using the consumer welfare standard clearly defines illegal business transactions, this standard provides courts with an objective criterion to distinguish between legal and illegal business transactions, rather than making a decision based on subjective benchmarks.[20] Third, because of its predictability and clarity, this standard maintains the integrity of the legislative process.[21] The legislature must keep subsequent laws in line with the consumer welfare objective.[22]

[13] Steven C Salop, "Question: What Is the Real and Proper Antitrust Welfare Standard? Answer: The True Consumer Welfare Standard" (2010) 22:3 Loyola Consumer Law Review 336 at 336. See also Hovenkamp, *supra* note 9 at 2473.
[14] Cseres, *supra* note 10 at 136.
[15] *Ibid*.
[16] For example, Hovenkamp, *supra* note 9 at 2477. See also Bork, *supra* note 9 at 51.
[17] Hovenkamp, *supra* note 9 at 2473. See also Salop, *supra* note 13 at 353.
[18] Bork, *supra* note 9 at 81.
[19] See more explanation in *ibid* at 82–83.
[20] *Ibid* at 86.
[21] *Ibid* at 83–84.
[22] *Ibid*.

2.2. Promoting Effective Competition

The second objective of competition law is to promote competition.[23] Some scholars discuss this objective as the protection of consumer's choice[24] or the protection of small business interests.[25] By protecting the co-existence of many firms in a market, competition law makes the market competitive and thus provides consumers with a wide range of options.[26]

Many scholars assert that illegal business practices are those that distort "the supply of options by imposing restrictions on the variety of prices and products that the free market would offer."[27] For example, a price-fixing agreement deprives consumers of the right to choose better prices,[28] or an illegal merger restricts consumers' choice in terms of product variety, quality and price.[29] Similarly, predatory pricing, which seems to benefit consumers in the short run, may reduce consumer choice by eliminating competition from incumbent and potential suppliers.[30]

In addition to depriving consumers of better choices, a market with fewer firms is deemed to produce dynamic inefficiencies, which also results in fewer choices for consumers due to the lack of innovation.[31] Competition law, therefore, protects competition and maintains the variety of consumer options in the marketplace.[32] It has been, however, asserted that maintaining a large number of competitors in a market "would inevitably reduce consumer and total welfare by shifting the focus of antitrust analysis from efficiency to more easily observed but misleading proxies for consumer welfare, to wit, the number of firms on

[23] The Organisation for Economic Co-operation and Development, *supra* note 8 at 9.
[24] Robert H Lande & Neil W Averitt, "Consumer Choice: The Practical Reason for Both Antitrust and Consumer Protection Law" (1998) 10:1 Loyola Consumer Law Review 44.
[25] Barak Orbach, "How Antitrust Lost Its Goal" (2013) 81 Fordham Law Review 2253 at 2267.
[26] Lande & Averitt, *supra* note 24 at 44.
[27] *Ibid* at 47. See also Joshua D Wright & Douglas H Ginsburg, "The Goals of Antitrust: Welfare Trumps Choice" (2012) 81 Fordham Law Review 2405 at 2409.
[28] Lande & Averitt, *supra* note 24 at 47.
[29] *Ibid*.
[30] *Ibid* at 48.
[31] Wright & Ginsburg, *supra* note 27 at 2413.
[32] Lande & Averitt, *supra* note 24 at 48.

offer in a market."[33] These scholars argue for the third objective of competition law as discussed in subsection 2.3.

2.3. Enhancing Economic Efficiency

Some scholars believe that enhancing economic efficiency should be the direct goal of competition law because this objective helps competition law enhance the overall economic welfare of society which ultimately benefits consumers including consumers in the relevant market and consumers in other markets.[34] Promoting efficiency as a primary goal of competition law is also supported by the Chicago School of antitrust law, which asserts that "a policy that produces greater gains to business than losses to consumers is considered to be efficient."[35]

Advocates of this approach argue that promoting consumer welfare should not be a direct objective of competition law because the consumer welfare standard merely considers how economic welfare should be allocated between different social groups without considering how much economic welfare of society is produced.[36] One author also doubts the promotion of competition as a direct objective of competition law because a competitive market consisting of a large number of small firms may provide consumers with more choices and make price closer to cost, but it can also result in high cost due to reduced productive efficiency.[37] Promoting economic efficiency, therefore, is regarded as the ultimate objective of competition law while promoting competition and protecting consumer welfare are means by which the ultimate objective is achieved.[38]

The ensuing sections discuss competition law and its enforcement in four countries: Canada, the U.S., Japan, and Vietnam. These countries are compared to show that although the competition laws of these countries do not always set out their objectives clearly, they all

[33] Wright & Ginsburg, *supra* note 27 at 2422.
[34] Cseres, *supra* note 10 at 127. See also Brodley, *supra* note 6 at 1021; and Kenneth Heyer, "Welfare Standards and Merger Analysis: Why not the Best?" (2012) 8 Competition Policy International 146 at 150–151.
[35] Cseres, *supra* note 10 at 125.
[36] For example, *ibid* at 127.
[37] Hovenkamp, *supra* note 9 at 2471.
[38] Brodley, *supra* note 6 at 1023.

serve to protect the interests of society and vulnerable stakeholders such as consumers and small business from the aggregation of excessive market power. The discussion does not provide a detailed description of competition law in these countries. Each section also provides a brief history of competition law in these countries to illustrate the objectives of their competition laws.

3. THE CANADIAN COMPETITION ACT

Canada was among the first countries in the world to enact competition law.[39] In 1889, the Canadian Parliament passed *An Act for the Prevention and Suppression of Combinations Formed in Restraint of Trade*.[40] After a century of being amended and changed, the *Competition Act*[41] of 1986 is the foundation of the current competition regime of Canada.[42] In addition to the *Competition Act*, the enactment of the *Competition Tribunal Act*[43] also strengthens the enforcement of competition law in Canada especially with a special civil court, the Competition Tribunal.[44] The latest amendment to the *Competition Act* of Canada was on 01 May 2018.[45]

The purpose of the Canadian *Competition Act* is,

> to maintain and encourage competition in Canada in order to promote the efficiency and adaptability of the Canadian economy, in order to expand opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, in order to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy and in order to provide consumers with competitive prices and product choices.[46]

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[39] Canadian Competition Bureau, *Competition Law in a Global and Innovative Economy - A Canadian Perspective* (New Delhi, India, 2013).
[40] S.C. 1889, c. 41.
[41] Canadian *Combines Investigation Act*, SC, 1986, c 26 [*Combines Investigation Act*].
[42] Michael J Trebilcock et al, eds, *The Law and Economics of Canadian Competition Policy* (Toronto: University of Toronto Press, 2003) at 22. See also Government of Canada Competition Policy Review Panel, *Sharpening Canada's Competitive Edge* (2007) at 24.
[43] Canadian *Competition Tribunal Act*, RSC, 1985, c 19 (2nd Supp) [*Competition Tribunal Act*].
[44] The Organisation for Economic Co-operation and Development, *Canada Maintaining Leadership Through Innovation* (OECD, 2002) at 76.
[45] Canadian *Competition Act*, 6 June 2018, SC, 2018, c 8 [*Competition Act*].
[46] *Competition Act*, RSC, 1985, c C-34 [*Competition Act*], s 1.1, as amended.

The main objective of the Canadian *Competition Act* is maintaining and encouraging competition in Canada. However, this objective serves three other ends, which are different economic objectives: (i) to provide consumers with competitive prices and product choices, (ii) to ensure that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and (iii) promoting the efficiency and adaptability of the Canadian economy. According to the Competition Bureau of Canada, "efficiency" includes both allocative and productive conceptions of efficiency, and "adaptability" refers to dynamic efficiency.[47]

Since the objectives of the *Act* are clearly stated without any priority, they are equally important.[48] These objectives are closely related. For example, expanding opportunities for Canadian participation in world markets is linked to efficiency and adaptability.[49] For the Competition Bureau of Canada, "the mandate of the Competition Bureau is to ensure that Canadian businesses and consumers prosper in a competitive and innovative marketplace."[50]

The equality among various objectives of the *Act* has also been accepted by the Competition Tribunal and the Federal Court of Appeal. In *Superior Propane*[51] the Commissioner of Competition brought an application pursuant to section 92[52] of the *Competition Act* for actions against the merger of Superior Propane Inc. ("Superior") and ICG Propane Inc. ("ICG").[53] The Commissioner alleged that the merger would create a dominant national propane marketer, and in several markets, a dominant local propane marketer.[54] Superior and ICG were direct competitors in the same geographic and product markets through their operation of propane distribution systems and in the wholesale supply of propane to agents and dealers.[55]

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[47] According to the Competition Bureau, "the benefit of 'adaptability' recognizes the importance of dynamic efficiency." Competition Bureau, *supra* note 39 at section entitled "Evolution of Canadian Competition Law". See the definition of "dynamic efficiency" in *supra* note 8.
[48] *Canada (Commissioner of Competition) v Superior Propane Inc*, [2000] 2000 Comp Trib 15 , para 410. See also *Canada (Commissioner of Competition) v Superior Propane Inc*, [2001] 2001 FCA 104 , para 140.
[49] Competition Bureau, *supra* note 39 at section entitled "Evolution of Canadian Competition Law".
[50] *Ibid* at section entitled "Evolution of Canadian Competition Law".
[51] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, *supra* note 48.
[52] Canadian *Competition Act*, *supra* note 46, s 92.
[53] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, *supra* note 48, para 1.
[54] *Ibid*, para 5.
[55] *Ibid*.

The respondents argued that section 96(1) allows for a substantial lessening of competition as long as it is outweighed by the efficiencies produced by the merger.[56] They contended that "section 96 is not subordinate to the purpose clause of section 1.1… where there is a conflict between a purpose clause statement and a substantive provision, the latter must prevail."[57] This argument might suggest that, in their opinion, promoting efficiency should be prioritized over other objectives and should be the main objective of the *Competition Act*, at least in the merger control area.

The Commissioner submitted that the purpose of the *Act* is "to achieve the four objectives identified in section 1.1. …, no hierarchy is established among those 'potentially conflicting' objectives."[58] The Commissioner argued that section 96 does not apply to mergers producing monopoly.[59] He submitted that "monopoly can never be offset or 'neutralized' by efficiency gains regardless of how substantial they are."[60] Therefore, the efficiency defence provided by section 96 should not apply to a merger eliminating competition.[61]

The Competition Tribunal ("the Tribunal") agreed with the Commissioner that "the true goal specified in the purpose clause is the maintenance and encouragement of competition. It is noteworthy that the Act does not give the Tribunal the powers to achieve the objectives individually."[62] The Tribunal wrote that

> the listing of objectives of competition policy simply presents the rationale for maintaining and encouraging competition. No hierarchy among the listed objectives is indicated and hence no meaning can be taken from the order in which the listed objectives of competition policy appear in the purpose clause. Under the purpose clause, all of the objectives flow from competition.[63]

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[56] *Ibid* at 389.
[57] *Ibid*, para 405.
[58] *Ibid*, para 404. Four objectives are: (1) promoting the efficiency and adaptability of the Canadian economy, (2) expanding opportunities for Canadian participation in world markets while at the same time recognizing the role of foreign competition in Canada, (3) ensuring that small and medium-sized enterprises have an equitable opportunity to participate in the Canadian economy, and (4) providing consumers with competitive prices and product choices. Canadian *Competition Act*, *supra* note 46, s 1.1.
[59] *Canada (Commissioner of Competition) v. Superior Propane Inc.*, *supra* note 48, para 414.
[60] *Ibid*.
[61] *Ibid*, para 416.
[62] *Ibid*, para 408.
[63] *Ibid*, para 410.

The Commissioner then appealed to the Federal Court of Appeal.[64] The Court of Appeal shared the same point of view about the equality of various objectives of the *Competition Act* by saying that

> section 1.1 suggests that an interpretation of "effects" should not focus exclusively on one of the objectives of promoting competition, namely, promoting the efficiency and adaptability of the economy. Rather, the "effects" to be considered under section 96 should also include the other statutory objectives to be served by the encouragement of competition that an anti-competitive merger may frustrate, such as the ability of medium and small businesses to participate in the economy, and the availability to consumers of a choice of goods at competitive prices.[65]

The Federal Court of Appeal instructed the Tribunal that "whatever standard is selected … must be more reflective than the total surplus standard of the different objectives of the *Competition Act*."[66] The Federal Court of Appeal made the same point in *Canada Pipe* that "[a]ll of these purposes must be reflected in the methodology adopted by the Tribunal to assess the existence of an actual or likely substantial lessening of competition…"[67]

4. THE UNITED STATES ANTITRUST LAWS

The U.S. Congress passed the *Sherman Act* in 1890.[68] In 1914, Congress enacted the *Federal Trade Commission Act*[69] and the *Clayton Act*.[70] These statues are the principal antitrust laws of the U.S.[71]

The U.S. competition laws are known as "antitrust" because trusts were amongst the methods used to combine in ways that were in restraint of trade.[72] According to Senator Sherman, the Bill stemmed from the fact that

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[64] *Canada (Commissioner of Competition) v. Superior Propane Inc*, *supra* note 48.
[65] *Ibid*, para 88.
[66] *Ibid*, para 140.
[67] *Canada (Commissioner of Competition) v Canada Pipe Co*, [2006] 2 FCR 3 (Federal Court of Appeal), para 48.
[68] American *Sherman Act*, 1890, 15 USC §§ 1-7 [*Sherman Act*].
[69] American *Federal Trade Commission Act*, 1914, 15 USC §§41-58 [*Federal Trade Commission Act*].
[70] American *Clayton Act*, 1914, 15 USC §§ 12-27, 29 USC §§ 52-53 [*Clayton Act*].
[71] Federal Trade Commission, "The Antitrust Laws", online: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.
[72] See also Orbach, *supra* note 25 at 2254.

> associated enterprise and capital [were] not satisfied with partnerships and corporations competing with each other, and [had] invented a new form of combination commonly called trusts, that [sought] to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president.[73]

Regulating combinations including those in forms of trusts that were in restraint of trade involved securing competition that would result in "low prices, better conditions of supply, and prosperity opportunities."[74]

Unlike the Canadian *Competition Act*, the *Sherman Act* does not provide any clear objectives for the U.S. competition law. The Bill that introduced the *Sherman Act* in the United States Senate in the first session of the 51st Congress said,

> [b]e it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That all arrangements, contracts, agreements, trusts, or combinations between persons or corporations made with a view, or which tend, to prevent full and free competition …., and all arrangements, contracts, agreements, trusts, or combinations between persons or corporations designed, or which tend, to advance the cost to the consumer of any such articles, are hereby declared to be against public policy, unlawful, and void.[75]

The phrases "to prevent full and free competition" and "to advance the cost to the consumer" suggest that promoting competition and protecting consumer welfare are two objectives of the bill put before Senate. The Senate redrafted the Bill four months later replacing these keywords by the phrase "in restraint of trade or commerce", which is used in the *Sherman Act* now.[76] The Senate Committee on the Judiciary, however, did not provide a report to explain the redrafted version of the Bill.[77] Likewise, neither the *Clayton Act* nor the *Federal Trade Commission Act* articulate goals. The legislative history of the *Sherman Act* shows that the words "to prevent full and free competition" and "to advance the cost to the consumer"

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[73] *Senate Debate* (51st Cong., 1st Sess., 1890) at 21 Cong. Rec. 2457. This document is reprinted in Earl W Kintner, ed, *The Legislative History of the Federal Antitrust Laws and Related Statutes* (New York: Chelsea House Publishers, 1978) at 115.
[74] Orbach, *supra* note 25 at 2262.
[75] Senate Bills, *A Bill to Declare Unlawful Trusts and Combinations in Restraint of Trade and Production* (In the Senate of The United States, 51st Congress, 1st Session, 1889) at 69.
[76] The Senate Committee on the Judiciary, *S.1 as Reported by the Senate Committee on the Judiciary* (1890). This document is reprinted in Kintner, *supra* note 73 at 275.
[77] The Senate Committee on the Judiciary, *supra* note 76.

were expressly rejected and that none of the principal U.S. antitrust laws articulates an objective. Thus, the courts have emphasized different goals and scholars have debated whether the main objective of the *Sherman Act* should be to promote free competition, economic efficiency, or consumer welfare.[78]

4.1. The Protection of "Unfettered" Competition

Some courts, scholars and practitioners in the U.S. recognize that protecting competition should be the objective of the American antitrust laws.[79] They perceive that protecting small businesses from harmful trusts was a means to protect the economy.[80] Thus, they thought that protecting competition meant keeping the number of rivals high and their size small.[81]

The belief that keeping the number of competitors high and their size small and unfettered by restraints is what "protecting competition" meant in the historical context in which the *Sherman Act* was debated in the U.S. in 1890.[82] Legislators were concerned about restraints of trade or commerce, small firm competitiveness, and excessive market power.[83] Mr. Justice Peckham delivered the opinion of the U.S. Supreme Court in *United States v. Trans-Missouri Freight Ass'n* that antitrust laws protect "the small dealers and worthy men" from being driven out of the relevant markets.[84] Justice Black wrote in *Northern Pacific Railway Co. v. U.S.* in 1958 that

> the Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving *free and unfettered competition* as the rule of trade… But even were that premise open to question, the policy unequivocally laid down by the Act is competition.[85]

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[78] Herbert Hovenkamp, *Federal Antitrust Policy: The Law of Competition and Its Practice*, 4 edition ed (St. Paul, MN: West, 2011), ss 2.1-2.2.
[79] For example, Orbach, *supra* note 25 at 2267. See also William E Kovacic & Carl Shapiro, "Antitrust Policy: A Century of Economic and Legal Thinking" (2000) 14:1 The Journal of Economic Perspectives 43 at 44; and *Northern Pac Ry Co v US*, [1958] 356 US 1 at 4.
[80] Orbach, *supra* note 25 at 2267.
[81] Wright & Ginsburg, *supra* note 27 at 101. See also *Brown Shoe Co, Inc v United States*, [1962] 370 US 294 at 344.
[82] Orbach, *supra* note 25 at 2262.
[83] *Ibid*.
[84] *United States v Trans-Missouri Freight Ass'n*, [1897] 166 US 290 at 323.
[85] *Northern Pac. Ry. Co. v. U.S.*, *supra* note 79 at 4. (Emphasis added)

Justice Warren also observed in *Brown Shoe Co, Inc v United States* that

> it is competition, not competitors, which the [Sherman] Act protects… We cannot fail to recognize Congress' desire to promote competition through the protection of viable, small, locally owned business. Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets. It resolved these competing considerations in favor of decentralization. We must give effect to that decision.[86]

This suggests that protecting competition was interpreted to mean protecting the number of competitors in markets or to remove barriers to the number increasing—a process that may result in inefficiencies due to the lack of economies of scale.[87]

Economists, even at that time, were afraid that "the law would impede attainment of superior efficiency promised by new forms of industrial organization."[88] However, the U.S. Supreme Court in *U.S. v Topco Assoc.* continued to interpret restraints by small buyers' intra-brand competition that would enhance inter-brand competition to be illegal because the restraints were contrary to the unfettered competition goal of the *Sherman Act*. The Court said,

> antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedom. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete … If a decision is to be made to sacrifice competition in one portion of the economy for greater competition in another portion, this … is a decision that must be made by Congress and not by private forces or by the courts.[89]

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[86] *Brown Shoe Co., Inc. v. United States*, *supra* note 81 at 344.
[87] "Economies of scale" refers to "the factors which make it possible for larger organizations or countries to produce goods or services more cheaply than smaller ones." See John Black, Nigar Hashimzade & Gareth Myles, *Economies of scale*, 5th ed (Oxford University Press, 2017).
[88] Kovacic & Shapiro, *supra* note 79 at 44.
[89] *United States v Topco Assocs, Inc*, [1972] 405 US 596 at 610–611.

4.2. The Promotion of Efficiency

Some literature on American antitrust law insists that it should give the greatest emphasis to achieving economic efficiency.[90] The following four reasons are given for this. First, the *Sherman Act* is an extension of the common law, which pursues economic efficiency.[91] Second, no "consumerist" group was available to lobby the Congress when it passed the *Act* in 1890.[92] Third, the *Sherman Act* is enforced by the judiciary, not administrative agencies that may be influenced by interests groups.[93] Fourth, taking efficiency as the objective of the antitrust laws may result in higher product quality with lower price and better competitiveness for American firms in international markets.[94] The U.S. Supreme Court also discussed in *Connell Const Co, Inc v Plumbers and Steamfitters Local Union No 100* that "competition based on efficiency is a positive value that the antitrust laws strive to protect."[95] The Court, however, did not provide further explanation for this objective of the antitrust laws.

4.3. The Promotion of Consumer Welfare

Some scholars argue that the primary objective of the U.S. antitrust laws is the promotion of consumer welfare.[96] Viewing antitrust as a means to protect "a state of competition, freedom from restraints of trade, low prices, better conditions of supply, and prosperity opportunities" is consistent with the objective of promoting consumer welfare because it ultimately provides consumers with low prices and better conditions of supply.[97] Robert Lande has argued that while Congress passed the antitrust laws to achieve economic objectives, the main concern was about protecting consumers from being deprived of wealth

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[90] Andrew N Kleit, *Beyond the Rhetoric: An Inquiry into the Goal of the Sherman Act* (FTC Bureau of Economics, 1992) at 1. See also William E Kovacic & William AW Neilson, *Advisory Report on Approaches to Competition Policy in Vietnam* (WB and CIEM, 1997) at 4.
[91] Kleit, *supra* note 90 at 30.
[92] *Ibid*.
[93] *Ibid*.
[94] Kovacic & Neilson, *supra* note 90 at 4.
[95] *Connell Const Co, Inc v Plumbers and Steamfitters Local Union No 100*, [1975] 421 US 616 at 623.
[96] Hovenkamp, *supra* note 9 at 2477. See also Bork, *supra* note 9 at 51.
[97] Orbach, *supra* note 25 at 2262.

by firms with market power.[98] Similarly, Carl Shapiro considers the promotion of consumer welfare to be the ultimate objective of the American antitrust laws writing that "[t]he goal of antitrust is to ensure that firms compete to serve the needs of consumers, as reflected by their market demand for goods and services, even when vigorous competition is contrary to the interests of powerful and entrenched suppliers."[99] He asserts that the enforcement of competition law serves to drive the market to consumer preferences.[100]

The legislative history, governmental documents, and some court decisions show that the objective of U.S. antitrust law is to promote consumer welfare. First, the Senate debate suggests that in 1890 Senate aimed to protect consumers when they drafted the *Sherman Act*. According to Senator George,

> the right of action against the persons in the combination is given to the party damnified. Who is this party injured, when, as prescribed in the bill, there has been an advance in the price by the combination? The answer is found in the bill itself in the words, 'intended to advance the cost to the consumer of any such articles.' *The consumer is the party 'damnified or injured*.' … Who are the consumers? The people of the United States as individuals; whatever each individual consumes, or his family, marks the amount of his interest in the price advanced by the combination.[101]

Senator Sherman's explanation also indicates that the *Act* was designed to protect consumer interests from selfish behaviour of illegal combinations. He said,

> the bill, as I would have it, has for its single object to invoke the aid of the courts of the United States to deal with the combinations described in the first section ... [An illegal combination] can control the market, raise or lower prices, as will best promote its selfish interests … The law of selfishness, uncontrolled by competition, compels it to *disregard the interest of the consumer*…. It is this kind of combination we have to deal with now.[102]

The House Judiciary Committee had the same opinion about the objective of the *Sherman Act*. They announced that the law would not interfere with efficiencies or harm consumers but would protect consumers from monopoly.[103] In addition, Robert Bork wrote that "a *per*

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[98] Robert H Lande, "Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged" (1982) 34:1 Hasting Law Journal 65 at 68.
[99] Carl Shapiro, *Competition Policy in Distressed Industries* (U.S: ABA Antitrust Symposium, 2009) at Introduction.
[100] *Ibid*.
[101] *Senate Debate (51st Cong., 1st Sess., 1890), supra* note 73 at 21 Cong. Rec. 1767-1768. (Emphasis added)
[102] *Ibid* at 21 Cong. Rec. 2457. (Emphasis added)
[103] Bork, *supra* note 9.

se rule against cartels is inconsistent with values other than consumer welfare because it permits no other value to interfere with competitive pricing."[104]

The U.S. government also considers the promotion of consumer welfare as an objective of the *Sherman Act*. In an *amicus curiae* brief supporting the petitioner in *Reiter v. Sonotone Corp*, the U.S. government wrote that "[t]he primary purpose of the *Sherman Act* was consumer protection."[105]

The objective promoting consumer welfare can also be found in the Horizontal Merger Guidelines issued by the U.S. Department of Justice and the FTC (the Guidelines).[106] The agencies also credit efficiencies besides assessing adverse competitive effects of a merger. The agencies "will not challenge a merger if cognizable efficiencies[107] are of a character and magnitude such that the merger is not likely to be anti-competitive in any relevant market."[108] The Agencies, however, emphasizes the promotion of consumer welfare in their merger review. The guidelines suggest that

> [t]he greater the potential adverse competitive effect of a merger, the greater must be the cognizable efficiencies, and the more they must be passed through to customers, for the Agencies to conclude that the merger will not have an anticompetitive effect in the relevant market ... In adhering to this approach, the Agencies are mindful that the antitrust laws give competition, not internal operational efficiency, *primacy in protecting customers*.[109]

Some decisions of the U.S. Supreme Court also suggest that promoting consumer welfare is an objective of the *Sherman Act*. In *Reiter v Sonotone Corp* in 1979, Justice Rehnquist cited Bork's opinion that "Congress designed the *Sherman Act* as a 'consumer welfare prescription.'"[110] He held that "the essence of the antitrust laws is to ensure fair price

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[104] *Ibid* at 62. Horizontal cartels are, for example, price-fixing agreements, market allocation, production restriction, or bid rigging. The *per se* approach is applied only to horizontal cartels. Other violations of antitrust laws are considered by the rule of reason, which takes into account efficiency reasons.

[105] Brief for the United States as Amicus Curiae Supporting Petitioners in *Reiter v Sonotone Corp*, [1979] 442 US 330 at 12 (1979 WL 213494 [U.S.].

[106] See also Hovenkamp, *supra* note 9 at 2477.

[107] Cognizable efficiencies refer to merger-specific efficiencies that have been verified and do not arise from anticompetitive reductions in output or service. See US Department of Justice & Federal Trade Commission, *Horizontal Merger Guidelines* (2010) at 30.

[108] *Ibid*.

[109] *Ibid* at 31. (Emphasis added)

[110] *Reiter v Sonotone Corp*, [1979] 442 US 330 at 343.

competition in an open market."[111] This means an objective of antitrust laws is to benefit consumers by fair prices. This opinion was cited by nineteen cases including *Gelboim v. Bank of America Corp* decided on 23 May 2016.[112]

5. THE JAPANESE ANTIMONOPOLY ACT

Similar to the Canadian *Competition Act*, the *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade* of Japan (AMA) does not specify a hierarchy for the AMA's objectives. Article 1 of the AMA states that

> [t]he purpose of this Act is to promote fair and free competition, stimulate the creative initiative of enterprises, encourage business activity, heighten the level of employment and actual national income, and thereby promote the democratic and wholesome development of the national economy as well as secure the interests of general consumers by prohibiting private monopolization, unreasonable restraint of trade and unfair trade practices, preventing excessive concentration of economic power and eliminating unreasonable restraints on production, sale, price, technology, etc., and all other unjust restrictions on business activity through combinations, agreements, etc.[113]

The primary objective of the AMA, however, is not widely accepted. Research on "the original drafts of Japan's antitrust legislation and connected memoranda" reveals that the primary objective of the AMA was to increase market access.[114] The *Act* was designed to prohibit exclusionary conduct.[115] The legislature's concern was not to prevent price-increasing behaviour but "to democratize the markets and provide all with the opportunity to compete."[116] Shuya Hayashi asserts that the ultimate goal of the AMA is to protect fair and free competition because the *Act* prohibits cartels and monopolies that lead to an excessive concentration of market power.[117] Michael Wise has analyzed the judgment of the Japanese

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[111] *Ibid* at 342.
[112] *Gelboim v Bank of America Corp*, [2016] 823 F3d 759 (2nd Cir).
[113] *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*, 14 April 1947, No 54 [*Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*] at Article 1.
[114] Harry First, "Antitrust in Japan: The Original Intent" (2000) 9:1 Pacific Rim Law & Policy Journal 1 at 2–4.
[115] *Ibid* at 4.
[116] *Ibid*.
[117] Shuya Hayashi, "The Goals of Japanese Competition Law" in Josef Drexl, Laurence Idol & Joel Monéger, eds, *Economic Theory and Competition Law* (Portland, U.S.: Edward Elgar Publishing, 2009) at 50, 60 and 62.

Supreme Court in the Oil Cartel case on 24 February 1984 and observed that the Court considered promoting "democratic and wholesome development of the national economy" and promoting consumer welfare as the ultimate purposes of the AMA.[118]

The two ultimate purposes of the AMA pointed out by the Supreme Court in the Oil Cartel case, however, are inconsistent to some extent. While promoting "consumer welfare" allows a minor injury to consumers to outweigh significant efficiency gains,[119] enhancing the democratic and wholesome development of the national economy may ignore consumers in the particular market if the business transaction in question enhances the overall economic welfare of society.[120] Wise asserts that the promotion of democratic and wholesome development of the national economy is likely to be the major objective of the AMA because "not only Japanese businesses, but Japanese consumers, are reportedly willing to pay higher prices, believing that the non-competitive system that produces them is somehow more stable, secure, and fair than a competitive market would be."[121] In addition to Article 1 and the Japanese Supreme Court's opinion, the objectives of the AMA can also, as discussed below, be inferred from articles that regulate unreasonable restraint of trade and merger control.

5.1. Objectives of the AMA in The Regulation of Unreasonable Restraints of Trade

Unreasonable restraints of trade were condemned as illegal *per se* under Article 4 of the AMA in 1947. This article, however, was repealed by the amendment in 1953.[122] According to Article 2(6) and Article 3 of the AMA, unreasonable restraints of trade are not *illegal per se*. Article 2(6) provides that

> the term 'unreasonable restraint of trade' as used in this Act means such business activities, by which any enterprise, by contract, agreement or any other means irrespective of its name, in concert with other enterprises, mutually restrict or conduct

[118] Michael Wise, "Review of Competition Law and Policy in Japan" (1999) 1:3 OECD Journal of Competition Law and Policy 71 at 4.
[119] Hovenkamp, *supra* note 9 at 2473. See also Salop, *supra* note 13 at 353.
[120] Cseres, *supra* note 10 at 125. See also Brodley, *supra* note 6 at 1021.
[121] Wise, *supra* note 118 at 7.
[122] Mitsuo Matsushita, "The Antimonopoly Law of Japan" in Edward M Graham & David J Richardson, eds, *Global Competition Policy* (Washington, U.S.: Institute for International Economics, 1997) at 152.

> their business activities in such a manner as to fix, maintain or increase prices, or to limit production, technology, products, facilities or counterparties, thereby causing, contrary to the public interest, a substantial restraint of competition in any particular field of trade.[123]

This means that unreasonable restraints of trade such as price-fixing agreements or production restrictions are not illegal unless they are contrary to the public interest and involve a substantial restraint of competition. There are three different interpretations of "public interest".[124] The first way of understanding "public interest", which is supported by the Japan Fair Trade Commission ("JFTC"), is to equate "public interest" with "free competition".[125] "Contrary to the public interest" therefore means a substantial restraint of competition. The second interpretation, which is supported by the *Keidanren* (Federation of Economic Organizations of Japan), argues that "public interest means a variety of factors such as the interests of consumers and the growth and stability of the national economy".[126] This means an unreasonable restraint of trade is not illegal "even if it restrains competition as long as it is useful in meeting other meaningful economic objectives."[127] The third way of understanding "public interest", which was developed by the Supreme Court in the Oil Cartel Case in 1984, compromises the previous two approaches.[128] It views that public interest means "free competition in principle, but there are exceptional situations in which an agreement that substantially restrains competition is necessary to meet a valid objective".[129] According to the Supreme Court, when the benefit of an agreement outweighs its restraint of competition such an agreement is not contrary to the public interest and consequently not unlawful.[130]

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[123] *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*, *supra* note 113 at Article 2(6).
[124] Matsushita, *supra* note 122 at 171.
[125] *Ibid*.
[126] *Ibid* at 172.
[127] *Ibid*.
[128] *Ibid*.
[129] *Ibid*.
[130] *Ibid*.

5.2. The Objectives of the AMA in Merger Regulations

The AMA's merger regulations vest in the JFTC strong powers to review mergers. Article 15(2) provides that "[e]very company that intends to become a party to a merger … shall, pursuant to the provisions of the Rules of the Fair Trade Commission, notify the Fair Trade Commission in advance of its merger plan ..."[131] The latest version of the *Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination* (Guidelines) was revised by the JFTC in 2011. According to the Guidelines the JFTC analyzes the likelihood of a merger to substantially restrain competition and its possible efficiency. The JFTC considers a merger's productive and dynamic efficiencies by focusing on its potential "economies of scale, integration of production facilities, specialization of factories, reduction in transportation costs or efficiency in research and development."[132]

Unlike the regulation of unreasonable restraints of trade, the Japanese merger regulations seem to promote consumer welfare. The Guidelines provide that "the outcome of improvements in efficiency through the business combination *must be returned to users* through reduced prices of products and services, improved quality, the supply of new products, or efficiencies in research and development."[133] A merger's efficiency, therefore, must not be achieved at the expense of consumers.

6. THE COMPETITION LAW OF VIETNAM

The *Competition Law* of Vietnam was enacted in 2004 and was implemented starting 1 July 2005 through the Vietnam Competition Authority ("VCA"). This law does not state its objectives or goals but it indicates its function by saying, "this law provides for acts that restrict competition, unfair competition practices, order and procedures for settling competition cases, and measures to handle violations of competition legislation."[134] This means that the law aims to protect society from acts that restrict competition or involve unfair

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[131] *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan, supra* note 113 at Article 15(2).
[132] Japan Fair Trade Commission, *Guidelines to Application of the Antimonopoly Act Concerning Review of Business Combination* (JFTC, 2004) at 30.
[133] *Ibid* at 30–31. (Emphasis added)
[134] Vietnamese *Competition Law*, 3 December 2004, 27/2004/QH11 [*Competition Law*] at Article 1.

competitive practices.[135] Article 3.3 defines acts that restrict competition as those that are "performed by enterprises to reduce, distort and prevent competition in the market, including agreements that restrict competition, abuse a dominant position, abuse of the monopoly position, and economic concentration."[136] This definition may suggest that the *Competition Law* of Vietnam aims to promote effective competition.

In addition, Article 10 and the enforcement of Article 19 of the Vietnamese *Competition Law* suggest that the promotion of consumer welfare is also an objective of the law.[137] The *Competition Law* of Vietnam proscribes certain types of cartels and economic concentration.[138] The *Competition Law*, however, provides exemptions for prohibited agreements and mergers.[139] According to Article 10.1, agreements that are not *per se* illegal may be exempted for a certain period if "they benefit consumers with lower prices" and meet one of six conditions.[140] An agreement is deemed as illegal and is not exempted if it does not benefit consumers with lower prices regardless of the significance of the agreement's efficiencies. Article 10, therefore, suggests that the promotion of consumer welfare is an objective of the *Competition Law* of Vietnam.[141]

According to Article 19 of the *Competition Law*, a prohibited economic concentration may be considered for exemption in the following cases: (i) one or more of the participants in the economic concentration is/are in danger of dissolution or bankruptcy, or (ii) the

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[135] This discussion excludes unfair competition practices and focuses only on acts that restrict competition.

[136] Vietnamese *Competition Law*, *supra* note 134 at Article 3.3.

[137] I conducted informal interviews with scholars, lawyers and officials in Vietnam in January 2017 and found that most of the interviewees answered that the objectives of the Competition Law are not clear while some high-ranking officials in the VCA assert that the ultimate objective of the law is to protect consumers.

[138] Vietnamese *Competition Law*, *supra* note 134 at articles 8, 9, and 18.

[139] Vietnamese Competition Law, *ibid* at articles 10 and 19. There are no exemptions provided for the *per se* illegal agreements set out in articles 8.6, 8.7, and 8.8. See Vietnamese Competition Law, *ibid* at articles 8 and 9.

[140] Vietnamese *Competition Law*, *supra* note 134 at Article 9. The conditions are "a. Rationalizing the organizational structure, business model, raising business efficiency; b. Promoting technical and technological advances, raising goods and service quality; c. Promoting the uniform application of quality standards and technical norms of products of different kinds; d. Harmonizing business, goods delivery and payment conditions, which have no connection with prices and price factors; e. Enhancing the competitiveness of small- and medium-sized enterprises; f. Enhancing the competitiveness of Vietnamese enterprises on the international market." *Ibid* at Article 10.1.

[141] See the discussion of consumer welfare as a goal of competition law at Hovenkamp, *supra* note 9 at 2473. See also Salop, *supra* note 13 at 353.

economic concentration expands exports or contributes to socioeconomic development and technical and technological advancement.[142] Although benefiting consumers with lower prices is not a prerequisite for an exemption provided by Article 19 as it is under Article 10, the practice of the VCA suggests that promoting consumer welfare is a strict requirement for a prohibited merger to be entitled to an exemption. The merger between Banknet and Smartlink ("*Banknet"*) showed that the VCA prioritized the objective that protects consumer welfare.

Banknet[143] and Smartlink[144] were two companies providing financial switching services[145] in Vietnam. The merging firms together possessed a 100% market share of the financial switching market in Vietnam.[146] In 2013, the companies proposed merging Smartlink into Banknet and establishing the Integrated Financial Switching Center of Vietnam.[147] Article 18 of the *Competition Law*, however, prohibited this economic concentration because the combined market share of participating firms exceeded 50% of the relevant market.[148] The firms argued that their economic concentration should be permitted under Article 19 of the *Competition Law* because it would contribute to socio-economic development, technical and technological advance.[149]

In this case, the VCA's role was to analyze the merger's efficiencies and effects on competition.[150] The potential for harm to competition appeared to be in the new entity's potential for exclusionary conduct. Because the owners of Banknet and Smartlink were commercial banks,[151] the merger could have distorted competition in markets such as electronic payment or interbank connection.[152] For example, the owners of Banknet or

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[142] See Vietnamese *Competition Law*, *supra* note 134 at Article 19.
[143] "Banknetvn Portal", online: <http://www.banknetvn.com.vn/sites/english/Trang/default.aspx>.
[144] "Smartlink Card., JSC", online: <http://www.smartlink.com.vn/Home/Default.aspx>.
[145] Financial switching services enable customer to execute transactions at all automated teller machine ("ATM") and point of sale ("POS"). See more at http://www.banknetvn.com.vn/sites/english/products-and-services/Trang/default.aspx.
[146] Thanh Phan, "The Banknetvn and Smartlink Merger Exemption: The First Merger Case to Take the Effects-Based Approach in Vietnam" (2015) 2 International Antitrust Bulletin 22 at 22.
[147] *Ibid*.
[148] *Ibid*.
[149] Vietnamese *Competition Law*, *supra* note 134 at Article 19.2.
[150] Phan, *supra* note 146 at 23.
[151] See more about Banknet in *supra* note 143. See more about Smartlink in *supra* note 144.
[152] Phan, *supra* note 146 at 23.

Smartlink could have restricted competition by a new commercial bank by limiting access or setting unfavourable conditions for the newcomer that attempted to access their network.

The VCA's analysis then turned to the merger's efficiencies by focusing on productive and dynamic efficiencies. The VCA considered whether the merger would benefit direct or indirect clients and contribute to technical and technological advance.[153] First, the merger saved cost for clients of participating parties by up to VND 13 billion (CAD 720,000) per year.[154] Before the merger, there were two co-existing networks. Therefore, if a commercial bank of a network wanted to connect with the other network, it would conduct the transaction through the inter-network connection. This process was time-consuming and sometimes caused technical problems for their clients. Some commercial banks solved this problem by concurrently being a member of both networks and paid the cost for both memberships. With the merger, all commercial banks of the former two networks could connect directly with each other without paying the double fee.

Second, the merger improved indirect consumer transactions. As mentioned above, the inter-network connection between banks using different networks added to the processing time; sometimes such interconnections were suspended due to a network malfunction.[155] The post-merger firm eliminated the dual system by setting one of the networks as permanent and the other as backup. This solution made the interconnection between banks easier, faster, and more reliable than it was when there were two networks.[156]

Third and finally, the post-merger integrated system led to savings of up to VND 55 billion (CAD 3.08 million) per year because the premerger companies had overlapping expenses such as software licenses, costs for operating a data centre, or maintenance.[157] The savings would be re-invested in updating technology and service quality. The VCA also highlighted this point in its report and suggested that the Prime Minister impose an obligation on the new entity to update technology to enhance the service quality as a prerequisite for the merger exemption.[158]

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[153] *Ibid*.
[154] *Ibid*.
[155] *Ibid*.
[156] *Ibid*.
[157] *Ibid*.
[158] *Ibid*.

The VCA proposed that the Prime Minister issue a decision providing an exemption for the merger, but it designed a post-merger controlling mechanism that minimized the ability of the post-merger firm to engage in exclusionary conduct.[159] Under conditions set by the decision, the post-merger company was obliged to guarantee the right of commercial banks and companies to access the network and financial switching service under a principle of non-discrimination.[160] Moreover, the terms and conditions of contracts to access the network or to provide financial switching services had to be registered with the VCA and the authorities governing the financial switching industry to eliminate unfair conditions for clients.[161] The post-merger controlling mechanism also required the company to innovate and contribute to technical and technological advance by setting up a plan to apply and update technology to ensure the quality of the network and service.[162]

The *Banknet* case, therefore, indicates that the *Competition Law* of Vietnam provides exemptions for anticompetitive mergers that enhance productive and dynamic efficiencies. Such exemptions, however, are strictly monitored to ensure that efficiencies are not produced at consumers' expense but to promote consumer welfare and enhance competition.

7. CONCLUSION

Competition laws across countries have similar objectives that promote consumer welfare, protect effective competition, and promote social welfare. Except for Canada, which generally considers various objectives to be equally important, it is debatable in Japan, the U.S. and Vietnam as to which economic objective is the primary one. At a national level, competition laws of these four countries serve to protect the interests of society and vulnerable stakeholders such as consumers and small business from the aggregation of excessive market power. Competition laws of these countries provide corporations with similar obligations such as notifying mergers, not abusing a dominant position, and not participating in cartels or prohibited mergers. Competition law, therefore, plays a positive role at a national level. In global society, however, competition law does not always aim to

[159] *Ibid*.
[160] *Ibid* at 24.
[161] *Ibid*.
[162] *Ibid*.

achieve these objectives. At the global level there can be conflicts of interests between different countries in some aspects of competition law. The next chapter discusses two aspects that may make competition law between countries conflict: exemptions for export cartels and extraterritorial application of competition law.

Chapter 3

Conflicts of Interests between Countries in Some Aspects of Competition Law[1]

1. INTRODUCTION

Chapter 2 suggests that, despite their differences, competition laws across countries share at least some similar objectives. Chapter 3 examines two aspects that make the enforcement of competition law between countries conflict at a global level. First, some countries provide exemptions for export cartels that may have adverse competitive effects on other countries.[2] Legalizing export cartels allows a country to promote domestic social welfare at the expense of consumers and producers in other countries.[3] This deepens the conflict among countries and impairs international cooperation in dealing with transnational competition cases.

Second, given that some countries legalize export cartels, many countries unilaterally enforce their competition law against acts conducted in other countries that have adverse competitive effects in the first country. The extraterritorial application of competition law, however, can potentially harm international comity.[4] This chapter shows that a number of

[1] This chapter was partly published as a journal article entitled "The Legality of Extraterritorial Application of Competition Law and the Need to Adopt a Unified Approach" in the Louisiana Law Review, Volume 77 issue 2, 2016.

[2] Conflict refers to any situation where a competition law institution or court in one state decides or takes a position that leads to significant criticism or opposing positions in one or more other states. See: David J Gerber, *Global Competition: Law, Markets, and Globalization* (New York: Oxford University Press, 2010) at 91. See also D Daniel Sokol, "What Do We Really Know About Export Cartels and What is the Appropriate Solution?" (2008) 4 Journal of Competition Law and Economics 967 at 967; and Janusz A Ordover, "Conflicts of Jurisdiction: Antitrust and Industrial Policy" (1987) 50:3 Law and Contemporary Problems 165 at 165.

[3] "Export cartels" are cartels formed solely for the purpose of engaging in export trade. See A Paul Victor, "Export Cartels: An Idea Whose Time Has Passed" (1991) 60:2 Antitrust Law Journal 571 at 571.

[4] There are two types of comity. Negative or traditional comity refers to "a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests." Positive comity involves "a request by one country that another country undertakes enforcement activities in order to remedy an allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country." See The Organisation for Economic

countries have adopted extraterritorial application of competition law as a unilateral measure to deal with cross-border competition cases. These measures are not necessarily contrary to international law. Countries, however, take different approaches to the extraterritorial application of competition law. Some strongly oppose this measure, others consider international comity and apply the measure within certain limits, yet others apply it without any clear limits. In addition, some countries adopt a double standard on the extraterritorial application of competition law.[5] These different approaches to the extraterritorial application of competition law deepen conflicts among countries in dealing with cross-border competition cases.

This chapter analyzes competition laws of Canada, the U.S., Japan, and Vietnam. An analysis of Canada and the United States illustrates the approaches of two common law countries and highlights the differences between the two. An analysis of Japanese and Vietnamese competition laws outlines the approaches of two non-common law countries. The discussion of Vietnam serves as an example of one developing country's competition law. The use of these countries is not intended to be exhaustive of different approaches to competition law, but to show the complications that might arise where different countries take different approaches to export cartels and extraterritoriality.

This chapter has four sections and a conclusion. The second section examines exemptions for export cartels—the first aspect that makes competition laws between countries conflict—in Canada, the U.S., Japan, and Vietnam. It shows that except for Japan, the other three countries explicitly allow export cartels if such cartels do not have adverse competitive effects on the domestic market. The third section, which discusses the international law perspective of the extraterritorial application of competition law, suggests that such an application does not always violate international law but may create conflicts among countries. Section four surveys the approaches to the extraterritorial application of competition law of Canada, the U.S., Japan, and Vietnam. Since the limit of international law on the extraterritorial application of competition law is unclear, countries adopt this measure in different ways.

Co-operation and Development, *Challenges of International Co-operation in Competition Law Enforcement* (OECD, 2014) at 13.

[5] The Japanese government enforces its competition law extraterritorially but also resists the extraterritorial application of foreign competition law in Japan. See subsection 4.3.

2. EXEMPTIONS FOR EXPORT CARTELS

At the global level, some competition authorities may not consider an export cartel created by its domestic firms anticompetitive if the cartel aims at foreign markets and does not have any adverse effect on the domestic market.[6] In an export cartel, because producers are in a country and consumers are in other countries, consumer surplus transferred to producers makes the exporting country better off while making importing countries worse off.[7] Exemptions for export cartels, therefore, make competition laws of the countries in question conflict.[8] This section examines competition law exemptions for export cartels in Canada, the U.S., Japan, and Vietnam and how they create conflicts of interests between some countries at the global level.

2.1. Exemptions for Export Cartels in Canada

In addition to objectives that protect consumers and small and medium-sized enterprises and promote efficiency,[9] the *Competition Act* of Canada also provides some limits on the prohibitions of cartels. Section 45(1) of the *Competition Act* prohibits cartels such as price fixing, market allocation and production restriction cartels.[10] Section 45(5), however, provides that

> no person shall be convicted of an offence under subsection (1) in respect of a conspiracy, agreement or arrangement that relates only to the export of products from Canada, unless the conspiracy, agreement or arrangement
> (a) has resulted in or is likely to result in a reduction or limitation of the real value of exports of a product;

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[6] For example, Vietnamese *Competition Law*, 3 December 2004, 27/2004/QH11 [*Competition Law*] at Article 10. See also American *Webb-Pomerene Act*, 1918, 15 USC §§ 61-66 [*Webb-Pomerene Act*].
[7] Paul Stephan, "Global Governance, Antitrust, and the Limits of International Cooperation" (2005) 38:1 Cornell International Law Journal 173 at 198.
[8] Ulrich Immenga, "Export Cartels and Voluntary Export Restraints between Trade and Competition Policy" (1995) 4:1 Pacific Rim Law & Policy Journal 93 at 126. See also Florian Becker, "The Case of Export Cartel Exemptions: Between Competition and Protectionism" (2007) 3:1 Jnl of Competition Law & Economics 97 at 114.
[9] See Chapter 2 section 3.
[10] Canadian *Competition Act*, RSC, 1985, c C-34 [*Competition Act*], s 45(1), as amended.

> (b) has restricted or is likely to restrict any person from entering into or expanding the business of exporting products from Canada; or
> (c) is in respect only of the supply of services that facilitate the export of products from Canada.[11]

Section 45(5), therefore, excludes export cartels from the prohibition of section 45(1) because "the agreement must relate only to the export of products from Canada and not … the supply of products to Canadian markets" and "enhance export trade by facilitating export agreements between competing firms."[12]

Section 45(5) is likely to provoke conflicts between Canada and importing countries. Such cartels allow Canadian firms to make profits at the cost of consumers in other countries and are *per se* illegal in some jurisdictions such as the United States. Since many countries adopt extraterritorial applications of their competition laws against foreign export cartels, Canadian export cartels may be charged by the affected countries' competition authorities.[13]

2.2. Exemptions for Export Cartels in the United States

Like the Canadian *Competition Act*, the U.S. antitrust laws also provide certain limits on the prohibition of cartels. In 1918, the U.S. Congress enacted the *Webb-Pomerene Act*[14] which promotes American export trade through the legalization of export associations. It provides that

> [n]othing contained in the Sherman Act shall be construed as declaring to be illegal an association entered into for the sole purpose of engaging in export trade and actually engaged solely in such export trade, or an agreement made or act done in the course of export trade by such association, provided such association, agreement, or act is not in restraint of trade within the United States, and is not in restraint of the export trade of any domestic competitor of such association…[15]

The *Webb-Pomerene Act* was enacted for three reasons. First, American exporters, especially small and medium-sized enterprises, were unable to compete with foreign state-

[11] *Ibid*, s 45(5).
[12] Competition Bureau of Canada, "Competitor Collaboration Guidelines", (23 December 2009), online: <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/03177.html>, s 2.6.3.
[13] See section 4.
[14] American *Webb-Pomerene Act*, *supra* note 6.
[15] *Ibid* at §62.

supported cartels.[16] Second, while at that time associations for the promotion of export business were permitted by some developed countries of the world, they were mostly denied by the *Sherman Act*.[17] Third, since U.S. exporters had to face import cartels in some foreign markets, associations made by American firms would, therefore, make them better off in foreign markets by preventing competition among them.[18] In general, the purpose of the *Webb-Pomerene Act* was to promote the productive efficiency of American firms by allowing them to cooperate for the purpose of carrying on export trade.

Given that the *Webb-Pomerene Act* was intended to promote cooperation among American exporters, this *Act* is supposed to legalize export cartels.[19] An association or an agreement made for the purpose of export trade by such an association is not prohibited if it is not in restraint of trade within the United States and is not in restraint of the export trade of any domestic competitor. Therefore, a horizontal cartel may not be prohibited if it is made solely to facilitate export trade.

The legislative history also suggested that the *Webb-Pomerene Act* was made to promote exports even when exempted associations or agreements may have adverse competitive effects on foreign markets. Justice Marshall analyzed the opinions of Senator Pomerene and Senator Webb on this point in *United States v. Concentrated Phosphate Exp. Ass'n* (*Concentrated Phosphate*).[20] Senator Pomerene said,

> we have not reached that high plane of business morals which will permit us to extend the same privileges to the peoples of the earth outside of the United States that we extend to those within the United States ... I would be willing that there should be a combination between anybody or anything for the purpose of capturing the trade of the world, if they do not punish the people of the United States in doing it.[21]

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[16] Eliot Jones, "The Webb-Pomerene Act" (1920) 28:9 Journal of Political Economy 754 at 754. See also Immenga, *supra* note 8 at 97.
[17] Jones, *supra* note 16 at 755.
[18] *Ibid* at 757. For example, logistics providers in the importing country may make cartels to charge American exporters an unreasonably high logistics fee or the importers may fix a low purchasing price for products from American exporters.
[19] See Valerie Y Suslow & Margaret C Levenstein, "The Changing International Status of Export Cartel Exemptions" (2005) 20:4 American University International Law Review 785. See also Immenga, *supra* note 8; and Florian Wagner-von Papp, "Competition Law and Extraterritoriality" in Ariel Ezrachi, ed, *Research Handbook on International Competition Law* (Northampton, Massachusetts, U.S.: Edward Elgar, 2012).
[20] *U S v Concentrated Phosphate Export Ass'n*, [1968] 393 US 199.
[21] *Ibid* at 207–208.

Concentrated Phosphate also was the first case in which the U.S. Supreme Court expressed an opinion on the *Webb-Pomerene Act*.[22] Justice Marshall wrote "[i]t is clear what Congress was doing; it thought it could increase American exports by depriving foreigners of the benefits of competition among American firms, without in any significant way injuring American consumers."[23]

In 1982, the U.S. Congress passed the *Export Trading Company Act*[24] the purpose of which is "to increase United States exports of products and services by encouraging more efficient provision of export trade services to United States producers and suppliers, in particular by … modifying the application of the antitrust laws to certain export trade."[25] The *Act* allows the Secretary of Commerce to issue certificates of review and advise and assist any person with respect to applying for certificates of review.[26] A certificate of review shall be issued under section 303(a) of the *Export Trading Company Act* to any applicant whose export business will,

> (1) result in neither a substantial lessening of competition or restraint of trade within the United States nor a substantial restraint of the export trade of any competitor of the applicant,
> (2) not unreasonably enhance, stabilize, or depress prices within the United States of the goods, wares, merchandise, or services of the class exported by the applicant,
> (3) not constitute unfair methods of competition against competitors engaged in the export of goods, wares, merchandise, or services of the class exported by the applicant, and
> (4) not include any act that may reasonably be expected to result in the sale for consumption or resale within the United States of the goods, wares, merchandise, or services exported by the applicant.[27]

The *Export Trading Company Act* also provides protection from civil or criminal antitrust actions for persons holding a certificate of review.[28] Thus, if the person to whom a certificate of review is issued complies with the standards of section 303(a), that person will

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[22] *Ibid* at 206.
[23] *Ibid* at 208.
[24] American *Export Trading Company Act*, 1982, 15 USC §§4001-4016 [*Export Trading Company Act*].
[25] *Ibid*, s 4001(b).
[26] *Ibid*, s 4011.
[27] *Ibid*, s 4013(a).
[28] *Ibid*, s 4016(a).

be exempted from the antitrust laws even when the transaction in question may have adverse competitive effects on foreign markets.[29]

The *Webb-Pomerene Act* and the *Export Trading Company Act*, however, show that American antitrust laws do not aim to prevent cartels that take place in the U.S. and have adverse competitive effects on foreign consumers and corporations.[30] While many countries oppose exemptions for export cartels, the United States is one of the leading defenders of this mechanism.[31] These statutes, therefore, may result in a conflict between the U.S. antitrust regime and the competition laws of foreign countries.

2.3. Exemptions for Export Cartels in Japan

After the World War II, Japan was under control of the Supreme Commander Allied Powers (the Allied forces).[32] The Allied forces sought to dissolve the *zaibatsu* as an effort to democratize the Japanese economy.[33] Under the pressure of the U.S.-led Allied force, Japan passed the *Antimonopoly Act* ("AMA") in 1947.[34] This law was considered the introduction of American free-market principles in Japan.[35]

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[29] *Ibid*, s 4013(a).

[30] See discussion of Senator George in *Senate Debate* (51st Cong., 1st Sess., 1890) at 21 Cong. Rec. 1767-1768.

[31] World Trade Organization, *Working Group on the Interaction between Trade and Competition Policy*, WT/WGTCP/M/21 (WTO, 2003), para 37. See also Suslow & Levenstein, *supra* note 19 at 798.

[32] Shuya Hayashi, "The Goals of Japanese Competition Law" in Josef Drexl, Laurence Idol & Joel Monéger, eds, *Economic Theory and Competition Law* (Portland, U.S.: Edward Elgar Publishing, 2009) at 58.

[33] Mikio Sumiya, ed, *A History of Japanese Trade and Industry Policy* (Oxford, U.K.: Oxford University Press, 2000) at 22. See also Hayashi, *supra* note 32 at 58. "*Zaibatsu"* refers to conglomerates among financial institutions and manufacturing corporations in Japan. They were key Japanese corporations producing military material. See Sumiya, *supra* note at 22.

[34] *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*, 14 April 1947, No 54 [*Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*]. See about American pressures in Alex Y Seita & Jiro Tamura, "The Historical Background of Japan's Antimonopoly Law" (1994) 1994:1 University of Illinois Law Review 115 at 122. See also Ajit Singh, *Competition and Competition Policy in Emerging Markets: International and Development Dimensions* (United Nations and Center for International Development Harvard University, 2002) at 17; and Akinori Uesugi, "Japanese Antimonopoly Policy - Its Past and Future" (1981) 50:3 Antitrust Law Journal 709 at 709; and WTO, *Study on Issues Relating to a Possible Multilateral Framework on Competition Policy*, WT/WGTCP/W/228 (WTO, 2003) at 31.

[35] Uesugi, *supra* note 34 at 709.

Business persons, politicians, and government bureaucrats in Japan thought the AMA was not suitable for Japan since the concept of antimonopoly was contrary to the traditional belief of the time that favoured economies of scale.[36] After Japan gained independence from the Allied forces in 1951, the AMA was amended in 1953 to make it less strict to cartels and anticompetitive mergers.[37] This change of the AMA stemmed from the desire to achieve "a smooth and rapid recovery from the war-devastated economy, for promotion of infant industry, to pursue industrial rationalization, or even for increased international competitiveness."[38] The supposed goal of Japanese economic policy after World War II was development and growth and competition was considered an effective method for developing the economy.[39] One of the objectives of the Ministry of International Trade and Industry ("MITI") was to ensure a high rate of profitability and investment in Japanese industry.[40] The MITI was therefore always concerned with questions of "ruinous competition" leading to reduced profits and a lower propensity to invest.[41] At that time, the MITI practically dominated the Japan Fair Trade Commission ("JFTC") and encouraged the formation of cartels and mergers in a variety of industries, particularly during the 1950s and 1960s.[42]

In addition to the amendment of the AMA, several laws were enacted in the 1950s and 1960s to provide immunity from the AMA for certain business practices. For example, the *Export and Import Transactions Law* permitted the formation of export and import associations, the *Marine Transportation Law* allowed for the creation of shipping alliances, and the *Medium and Small Business Organizations Law* permitted trade associations composed of small enterprises to engage in restrictive activities.[43] The *Law concerning Liquor Business Associations and Measures for Securing Revenue from Liquor Tax* provided

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[36] Seita & Tamura, *supra* note 34 at 122. See also Uesugi, *supra* note 34 at 709.
[37] *Treaty of Peace with Japan*, 8 September 1951, No 1832 [*Treaty of Peace with Japan*]. See also Uesugi, *supra* note 34 at 709.
[38] Uesugi, *supra* note 34 at 710.
[39] Michael Wise, "Review of Competition Law and Policy in Japan" (1999) 1:3 OECD Journal of Competition Law and Policy 71 at 75.
[40] Singh, *supra* note 34 at 17.
[41] *Ibid.*
[42] WTO, *supra* note 34 at 31. See also Uesugi, *supra* note 34 at 711–713.
[43] Mitsuo Matsushita, "The Antimonopoly Law of Japan" in Edward M Graham & David J Richardson, eds, *Global Competition Policy* (Washington, U.S.: Institute for International Economics, 1997) at 153. See also Iwakazu Takahashi, *Anti-Monopoly Act Exemptions in Japan* (The Specific Work shop between the Drafting Committee on Competition Law of Vietnam and the Japan Fair Trade Commission, 2003) at 5–7.

exemptions for the rationalization cartels in the liquor retail industry.[44] The *Law Concerning Coordination and Improvement of Hygienically Related Businesses* allowed for small and medium-sized business cartels to prevent excessive competition.[45] Moreover, some ministries, especially the MITI, provided "administrative guidance" to restrict production volumes or investment, or to influence prices to achieve its own policy objectives.[46] The JFTC strongly opposed such guidance because it facilitated cartels.

The role of the AMA and the JFTC's power, however, recovered due to the sharp increase in consumer prices and the oil shock in 1973.[47] This economic crisis caused Japan to consider the AMA an effective tool to deal with high prices and price cartels.[48] The AMA was amended in 1977 by introducing administrative surcharges.[49] Ministries then had less power to provide exemptions for cartels.[50] The Tokyo High Court made a notable decision in *Petroleum Association v. Japan* in 1980 against the MITI's administrative guidance.[51] The case addressed the legality of administrative guidance and ruled that MITI officials may be liable for *Antimonopoly Act* violations.[52] Japan abolished export cartels in 1999.[53]

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[44] Matsushita, *supra* note 43 at 153. See also Takahashi, *supra* note 43 at 5–7. "Rationalization cartels" refer to cartels authorized by MITI allowing a group of firms or a trade association to enhance their productivity. See United States International Trade Commission, *Phase I, Japan's Distribution System and Options for Improving U.S. Access: Report to the House Committee on Ways and Means on Investigation no. 332-283 under Section 332(g) of the Tariff Act of 1930* (United States International Trade Commission Publication, 1990) at 63.
[45] Matsushita, *supra* note 43 at 153. See also Takahashi, *supra* note 43 at 5–7.
[46] Uesugi, *supra* note 34 at 711. See also Singh, *supra* note 34 at 17.
Matsushita, *supra* note 43 at 173.
[47] Matsushita, *supra* note 43 at 153.
[48] *Ibid*. See also Hayashi, *supra* note 32 at 61.
[49] Matsushita, *supra* note 43 at 154.
[50] *Ibid* at 175.
[51] Uesugi, *supra* note 34 at 715.
[52] *Ibid*.
[53] WTO Trade Policy Review Body, *More Deregulation and Structural Reforms Should Help Japan Stimulate Domestic Demand and Encourage Market Access*, PRESS/TPRB/69 (WTO, 1998), para 9. See also Hayashi, *supra* note 32 at 64.

2.4. Exemptions for Export Cartels in Vietnam

Like Canada and the U.S., Vietnam also provides exemptions for export cartels. Article 10 of the *Competition Law* sets out that agreements described in paragraphs 1 to 5 of Article 9 are not *per se* illegal if they benefit consumers with lower prices and enhance "the competitiveness of Vietnamese enterprises in the international market".[54] This article suggests that the *Competition Law* provides exemptions for export cartels. Although the exempted cartels are not allowed to harm Vietnamese consumers, they may have adverse competitive effects on foreign markets in the form of export cartels. The exemptions for export cartels may result in conflicts between the competition laws of Vietnam and other countries.

In practice, some Vietnamese companies engaged in a form of export cartel. Fixing the price of exported rice is an example. The price of rice in the international market is unstable and competitive. Vietnamese firms must compete with foreign rivals. Vietnamese rice-export firms are, however, required to follow a floor price set by the Vietnam Food Association under the approval of state authorities.

Setting a floor price of exported rice is a form of price-fixing cartel. Under Article 19 of the *Decree 109/2010/NĐ-CP* on exported rice, the Ministry of Finance, in collaboration with the Ministry of Industry and Trade, the Ministry of Agriculture and Rural Development, the People's Committee of provinces that produce rice, and the Vietnam Food Association, set out guidelines for setting the floor price of exported rice.[55] In accordance with *Decree 109/2010/NĐ-CP*, the Ministry of Finance issued Circular *89/2011/TT-BTC* specifying the formula for calculating floor prices for exported rice.[56]

This pricing policy aims to protect farmers and agriculture-related industries. Rice farming employs many farmers who are vulnerable in comparison with rice-trading companies since they are unable to forecast the demand of the rice market and must bear all

[54] *Competition Law, supra* note 6 at Article 10.
[55] Vietnamese *Decree 109/2010/NĐ-CP on Exported Rice*, 4 November 2010 [*Decree 109/2010/NĐ-CP on Exported Rice*] at Article 19.
[56] Vietnamese *Circular 89/2011/TT-BTC of the Ministry of Finance on Specifying the Formula for Calculating the Floor Price for Exported Rice*, 17 June 2011 [*Circular 89/2011/TT-BTC of the Ministry of Finance on Specifying the Formula for Calculating the Floor Price for Exported Rice*].

the risks before harvest. Without a floor price, rice-trading companies would engage in fierce competition to win export contracts. Such competition would reduce the buying price for rice harvests and harm Vietnamese farmers. In addition, rice-trading companies in Vietnam are subject to the government's food security policy. To secure the supply of rice in emergency cases, Article 12 of the *Decree 109/2010/NĐ-CP* on exported rice requires an exporting company to stockpile at least 10 percent of the volume of rice it has exported in the previous six months.[57] This policy ensures that the Vietnamese government, through rice-trading companies, has enough stock to use in emergencies such as domestic natural disasters or for international aid. However, implementing this policy often depletes the resources of rice-trading companies since rice stockpiling requires warehouses equipped to maintain the quality of stock, and requires firms to have a strong financial capacity to buy and store a huge amount of rice for a certain period.

Due to this policy, trading firms need to follow the floor price of exported rice to recoup those costs. The floor price is not meant to exploit consumers but to ensure that trading firms can make a profit after following government policies. Without a floor price, stiff competition would force trading firms to refuse to comply with the society-oriented policies or to withdraw from the rice market.

In practice, however, setting a floor price does not work as it should. Because the floor price set by the Vietnam Food Association does not come with sanctions against the cheaters, some trading companies do not comply and instead bid to export rice. Due to the low export price, such exporting companies abuse their purchasing power in the domestic market to reduce the price at which they buy rice from farmers. Aside from being unable to protect the farmers and the farming industries, this policy may be in violation of the competition law of countries to which the rice is exported.

Similarly, the Vietnam Association of Seafood Exporters and Producers has proposed setting a floor price for exported catfish in response to a heavy anti-dumping duty imposed by the U.S. and the EU on Vietnamese catfish.[58] A floor price is, therefore, imposed to prevent dumping prices and benefit exporting companies. The association has also asserted

[57] Vietnamese *Decree 109/2010/NĐ-CP on Exported Rice*, *supra* note 55 at Article 12.
[58] Thuy Ngoc, "Saving Catfish in the U.S. by Floor Price", *Vietnam Association of Seafood Exporters and Producers* (13 July 2012), online: <http://vasep.com.vn/Tin-Tuc/1018_20225/Cuu-ca-tra-tai-thi-truong-My-bang-gia-san.htm>.

that a floor price for exported catfish is necessary to prevent a price war among Vietnamese firms and to benefit firms that raise catfish.[59]

2.5. A Comparative Analysis

Except for Japan, competition laws of Canada, the U.S., and Vietnam explicitly provide exemptions for export cartels. These laws similarly distinguish between a domestic-oriented and an export cartel. For example, a price fixing agreement is strictly prohibited if it harms domestic consumers or other domestic producers or exporters.[60] But such a price fixing agreement is not illegal if it merely targets foreign markets and does not harm the domestic market in any way.

Exemptions for export cartels, however, make the enforcement of competition law across countries conflict at the global level. For example, a price fixing cartel conducted in Canada is *per se* illegal in Canada and the U.S. if has adverse competitive effects on the markets of two countries. The enforcement of the Canadian *Competition Act*, which aims to protect Canadian consumers, also helps to prevent the cartel from harming American consumers. Such a cartel, however, is not prohibited in Canada if it has adverse competitive effects on only American markets. This makes it difficult for the U.S. to protect its consumers from the cartel because American competition authorities have limited jurisdiction to prevent cartels conducted entirely in Canadian territory.

Since some countries provide exemptions for export cartels, some enforce their competition law extraterritorially. Section three discusses the international law foundation of the extraterritorial application of law and section four examines different approaches to this enforcement in the competition law area.

[59] *Ibid.*

[60] A price fixing agreement is illegal under the Competition Law of Vietnam if the combined market share of cartel members is of 30% or more in the relevant market. See Vietnamese *Competition Law*, *supra* note 6 at Article 9.2.

3. THE INTERNATIONAL LAW FOUNDATION OF THE EXTRATERRITORIAL APPLICATION OF LAW

At the international level, self-help is a predominant strategy for a state when its interests are threatened.[61] In the competition law area, many countries employ this strategy to cope with the increase of cross-border competition violations and the explicit exemptions provided by several countries for export cartels.[62] The extraterritorial application of competition law is a unilateral effort of a country to extend its jurisdiction to acts conducted in other countries that have adverse competitive effects on the first country. This section examines the international law foundation of the extraterritorial application of law.

3.1. The Relation Between Territory and Jurisdiction

The territory of a country is an important element of international law in determining the sovereignty of the country. A country is obliged to respect the territory and the sovereignty of other countries.[63] The territorial principle is universally recognized in international law.[64] This principle allows a country to freely make and enforce its law against any entities, including foreign entities, in its territory.[65] This principle also proscribes the enforcement of a country's legislation in another country without reliance on a treaty.[66] This principle fits with legal positivism, which assumes that "sovereignty means ultimate authority in a given territory."[67]

The territorial principle, however, indicates a rigid link between law and territory, making the principle unsuitable when considering the development of technology and international trade. For example, a price-fixing cartel might be conducted in one country but

[61] Peter Malanczuk & Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law*, 7th rev. ed (London, U.K.: Routledge, 1997) at 3.
[62] The Organisation for Economic Co-operation and Development, *supra* note 4 at 24 and 29. See more about export cartels in section 2.
[63] John H Currie, *Public International Law*, 2nd ed (Toronto: Irwin Law, 2008) at 335.
[64] Malanczuk & Akehurst, *supra* note 61 at 75–76.
[65] Anthony Aust, *Handbook of International Law*, 1st ed (New York: Cambridge University Press, 2005) at 44.
[66] *Ibid* at 45.
[67] Turan Kayaoğlu, *Legal Imperialism: Sovereignty and Extraterritoriality in Japan, the Ottoman Empire, and China*, reprint edition ed (Cambridge, U.K.: Cambridge University Press, 2014) at 192.

have consequences in many other territories. The next subsection discusses the effects doctrine, which is an exception to the territorial principle that allows affected countries to exercise jurisdiction over certain acts that occur abroad.

3.2. The Effects Doctrine

According to the effects doctrine, a country may enforce its competition law against an anticompetitive business practice that took place completely abroad if the conduct has a substantial effect on its territory.[68] The effects doctrine was accepted by the International Court of Justice in the landmark *SS Lotus* case.[69]

In 1927, the ICJ discussed a notable conflict between France and Turkey in the *SS Lotus* case.[70] In a milestone decision concerning the extraterritorial application of competition law, the ICJ changed the international law approach to the application of national law to violations conducted abroad.[71]

On 2 August 1926, a collision occurred between the French mail steamer Lotus and the Turkish collier Boz-Kourt in the open sea.[72] The Boz-Kourt sank, and eight Turkish citizens died.[73] Lieutenant Demons, a French citizen who was the watch officer on board the Lotus, was arrested by the Turkish police and prosecuted by the public prosecutor of Stamboul.[74] Demons argued that the Turkish courts had no jurisdiction, but the Turkish court dismissed his objection and sentenced him to imprisonment for 80 days and a fine of 22 pounds.[75]

The French government protested the arrest of Demons and sought to transfer the case from the Turkish courts to the French courts.[76] The Turkish and French governments then

[68] Aust, *supra* note 65 at 47.
[69] *SS Lotus (France v Turkey)*, [1927] Series A No.10 Judgment No.9 PICJ Publication (PCIJ) at 19.
[70] *Ibid* at 10. At that time the Court was named the Permanent Court of International Justice. See more http://www.icj-cij.org/pcij/
[71] Although the ICJ's judgements are not precedents (i.e., the ICJ does not follow a principle of *stare decisis*), they are still subsidiary means for the determination of rules of law. See *Statute of the International Court of Justice* [*Statute of the International Court of Justice*] at articles 38 and 59.
[72] *S.S. Lotus (France v. Turkey)*, *supra* note 69 at 10.
[73] *Ibid*.
[74] *Ibid* at 10–11.
[75] *Ibid* at 11.
[76] *Ibid*.

agreed to bring the question of jurisdiction to the Permanent Court of International Justice.[77] One of the questions the Court had to decide was whether Turkey "acted in conflict with the principles of international law."[78]

The French government asked the ICJ to rule that the "jurisdiction to entertain criminal proceedings against the officer of the watch of a French ship, in connection with the collision which occurred on the high seas between that vessel and a Turkish ship, belongs exclusively to the French Courts."[79] The Turkish government simply asked the ICJ to grant jurisdiction to the Turkish courts.[80]

The French government argued that international law does not allow a state to take proceedings with regard to offences committed by foreigners abroad simply by reason of the victim's nationality when the offence was committed on board the French vessel.[81] On the other hand, the Turkish government argued that "no principle of international criminal law exists which would debar Turkey from exercising the jurisdiction which she clearly possesses to entertain an action for damages, [and thus] that [the] country has jurisdiction to institute criminal proceedings."[82]

The Court observed that "the first and foremost restriction imposed by international law upon a State is that—failing the existence of a permissive rule to the contrary—it may not exercise its power in any form in the territory of another State."[83] This means that a state cannot exercise its jurisdiction outside its territory without the permission of an international rule. The Court, however, wrote that "[i]t does not . . . follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law."[84] The ICJ then proceeded to ascertain the possible international rule that prohibits Turkey from prosecuting Demons. It observed that

> consequently, once it is admitted that the effects of the offence were produced on the Turkish vessel, it becomes impossible to hold that there is a rule of international law

[77] *Ibid* at 5.
[78] *Ibid.*
[79] *Ibid* at 6..
[80] *Ibid* at 8.
[81] *Ibid* at 22.
[82] *Ibid* at 9.
[83] *Ibid* at 18.
[84] *Ibid* at 19.

> which prohibits Turkey from prosecuting Lieutenant Demons because of the fact that the author of the offence was on board the French ship.[85]

In response to the French government's assertion of exclusive jurisdiction over French territory, the ICJ said that

> if, therefore, a guilty act committed on the high seas produces its effects on a vessel flying another flag or in foreign territory, the same principles must be applied as if the territories of two different States were concerned, and the conclusion must therefore be drawn that there is no rule of international law prohibiting the State to which the ship on which the effects of the offence have taken place belongs, from regarding the offence as having been committed in its territory and prosecuting, accordingly, the delinquent.[86]

The *Lotus* judgment provides three notable points concerning the extraterritorial application of a state's public law. First, a state can apply its law extraterritorially unless constrained by an international rule.[87] The ICJ's approach contradicts the argument of countries that oppose the application, particularly the French government's position that a state can apply its law extraterritorially only when the state can cite an international rule that allows such an application.[88] This rule means that the extraterritorial application of a nation's public law is a natural right of states—not a right that derives from the permission of any international treaty. The ICJ emphasized that "all that can be required of a State is that it should not overstep the limits which international law places upon its jurisdiction; within these limits, its title to exercise jurisdiction rests in its sovereignty."[89]

Second, the judgment makes a clear distinction between prescriptive, adjudicative, and enforcement jurisdictions over an act conducted abroad. Prescriptive jurisdiction refers to the power to prescribe rules regulating foreign conduct.[90] Adjudicative jurisdiction is the power to subject foreign parties to judicial process.[91] Finally, enforcement jurisdiction is the jurisdiction to enforce law abroad.[92] Thus, according to the ICJ's judgment, states are relatively free to make laws that regulate foreign conduct because the prescriptive jurisdiction

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[85] *Ibid* at 23.
[86] *Ibid* at 25.
[87] *Ibid.*
[88] *Ibid* at 6.
[89] *Ibid* at 19.
[90] Anthony J Colangelo, "What is Extraterritorial Jurisdiction?" (2014) 99:6 Cornell Law Review 1303 at 1303–1304.
[91] *Ibid.*
[92] *Ibid.*

is conducted within a country's territory. Likewise, since the adjudicative jurisdiction is mostly exercised within the territory of the country that made the law, it is not prohibited by the *Lotus* judgment. The enforcement jurisdiction is more limited because the exercise of this jurisdiction may violate the territorial principle. Enforcement jurisdiction is only allowed if it is conducted within the territory of the country that made the law.[93]

However, these three jurisdictions are inseparable, and the limit to enforcement jurisdiction also influences the scope of the prescriptive and adjudicative jurisdictions. In the competition law area, without the cooperation or approval of the country where the conduct occurred, a country cannot obtain the information needed to enforce its competition laws extraterritorially. Consequently, although a country may have prescriptive and adjudicative jurisdiction within its territory, its authority to address a breach of its competition laws in a foreign country can be difficult. Therefore, the exercise of prescriptive and adjudicative jurisdictions is not unlimited.

The third notable point on the extraterritorial application of a state's public law made in *Lotus* relates to the effect of foreign conduct on the country whose laws were violated. This rule can be regarded as a limit set by international law on the freedom of a country to exercise jurisdiction within its territory with respect to conduct that occurred in a foreign country. According to the ICJ, "it might be observed that the effect is a factor of outstanding importance in offences such as manslaughter, which are punished precisely in consideration of their effects rather than of the subjective intention of the delinquent."[94] From the private actor's perspective, the ICJ's judgment imposes an obligation on entities residing in a country to comply not only with the laws of that country but with applicable foreign laws as well. In competition law, MNCs are likely to be aware of this obligation because their business decisions made in one country might have adverse effects in other countries. An MNC that fails to consider the application of the competition laws of countries affected by its business decisions might find itself subject to unpredicted foreign competition law judgments.

[93] *See S.S. Lotus (France v. Turkey)*, *supra* note 69 at 5.
[94] *Ibid* at 19.

4. DIFFERENT APPROACHES TO THE EXTRATERRITORIAL APPLICATION OF COMPETITION LAW

The ICJ ruling in *Lotus* allows a state to exercise its jurisdiction with respect to acts occurring in foreign countries. As a result of the ICJ's decision, the effects doctrine is internalized by a number of countries in the area of competition law.[95] While some countries take different approaches to applying this doctrine, some strongly oppose such an application. This section examines the approaches to the extraterritorial application of competition law of Canada, the U.S., Japan, and Vietnam.

4.1. A Canadian Approach

Canada takes a restrictive view of the territorial doctrine and is concerned about the negative effects of the extraterritorial application of competition law, especially by U.S. courts. It has been acknowledged that the Canadian economy is especially vulnerable to the unwarranted exercise of extraterritorial jurisdiction.[96]

4.1.1. The opposition of Canada to the exercise of foreign jurisdiction in Canadian territory

In response to the adverse effects of the overuse of foreign extraterritoriality, the Parliament of Canada and Canadian provincial legislatures have enacted several statutes to block the extraterritorial application of competition law by foreign governments.[97] First, under the Ontario *Business Records Protection Act*, the Attorney General may obtain a court order prohibiting a person from removing a business record[98] of any business carried on in Ontario pursuant to an order made by a foreign authority.[99] The taking of such a business

[95] Aust, *supra* note 65 at 47.
[96] Allan E Gotlieb, "Extraterritoriality: A Canadian Perspective" (1983) 5:3 Northwestern Journal of International Law & Business 449 at 457.
[97] George N Addy, Chris Margison & Ryan Doig, *National Sovereignty and The Enforcement of Competition Law: Striking the Right Balance* (Hull, Quebec, 2004) at 5.
[98] According to section 1 of the Ontario *Business Records Protection Act*, business records include "any account, balance sheet, profit and loss statement or inventory or any resume or digest thereof or any other record, statement, report, or material." Ontario *Business Records Protection Act*, RSO 1990, c B-19 [*Business Records Protection Act*], s 1.
[99] *Ibid*.

record is only legal if it is consistent with the company's legal practice or is allowed by "any law of Ontario or of the Parliament of Canada."[100] The Québec *Business Concerns Record Act* sets out the same rule.[101] Ignoring the relationship between Ontario or Québec and other Canadian provinces, this regulation serves to strengthen the territorial principle and weaken the extraterritorial application of competition law of other countries within Canadian territory. In Canada, the unilateral order of an authority in a foreign jurisdiction outside Ontario or Québec is regarded as the exercise of jurisdiction by a foreign country, and according to the principle in *Lotus*, this type of order is prohibited by international law. Therefore, Canadian law, unable to impose a duty on foreign authorities, prohibits Canadian entities from complying with a foreign authority's unilateral order for documents.

These blocking provisions are consistent with the judgment in *Lotus*. Requesting a foreign-based company to submit a document without the approval of the country of conduct is an exercise of power in the territory of another state. Such a request, therefore, is inconsistent with international law. Moreover, the obligation not to transfer a business record, as provided by the business records legislation, allows Ontario-or-Quebec-based companies to deter the extraterritorial application of competition law. Accordingly, any foreign authority that wants to legally obtain business records from Ontario or Québec must comply with procedures allowed by the laws of these provinces or the parliament of Canada.

The Ontario and Québec blocking provisions are also consistent with part III of the *Competition Act* of Canada providing for mutual legal assistance. These provisions enhance Canadian sovereignty in multi-jurisdictional competition cases. According to section 30.03 of the *Competition Act* of Canada, a foreign state that has entered into a mutual assistance agreement[102] can make a request for assistance pursuant to the agreement.[103] This section authorizes the minister of justice to handle such requests.[104] If the minister of justice approves the request for a search and seizure, the minister of justice shall provide the commissioner with any documents or information necessary to apply for a search warrant.[105]

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[100] *Ibid*.
[101] Québec *Business Concerns Record Act*, RSQ 1977, c D-12 [*Business Concerns Record Act*], s 3(d).
[102] Canadian *Competition Act*, *supra* note 10, ss 75, 76, 77.
[103] *Ibid*, s 30.03.
[104] *Ibid*.
[105] *Ibid*, s 30.05.

Federal legislation also protects Canada from the potential negative effects of the extraterritorial application of competition law and helps strengthen Canadian sovereignty. For example, section 8 of the *Foreign Extraterritorial Measures Act* provides that where the recognition or enforcement of a foreign tribunal's judgment in Canada has or is likely to have adverse effects on Canadian interests or sovereignty, the Attorney General of Canada may "declare that the judgment shall not be recognized or enforceable in any manner in Canada" or, in the case of a money judgement, may decrease the amount owed.[106] In addition, section 9(1) empowers a Canadian citizen to sue for and recover from a person in whose favour the abovementioned foreign judgment is given.[107] Thus besides allowing the Attorney General to declare a foreign judgment unenforceable in Canada, the act provides measures for the Canadian resident to recover the damages and expenses incurred in relation to such a judgment.[108] Section 9(2) allows the court to order the seizure and sale of any property in which the person against whom the judgment made under section 9(1) is rendered.[109]

In addition to legislation, the Canadian government has resisted the extraterritorial application of competition law on an individual level. In *Hartford Fire Insurance v. California,*[110] heard by the U.S. Supreme Court in 1992, the Canadian government submitted an amicus curiae brief in support of a petitioner.[111] Canada was "concerned with the exercise of U.S. extraterritorial jurisdiction where it directly conflicts with the exercise of Canada's territorial jurisdiction."[112] The Canadian government first argued against the extraterritorial exercise of the *Sherman Act*[113] by asserting that "[c]ustomary international law, which has been adopted as U.S. law, precludes one state's exercise of economic regulatory jurisdiction over acts occurring in the territory of another state where such exercise would cause a substantial conflict."[114] The Canadian government then argued, using the presumption

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[106] Canadian *Foreign Extraterritorial Measures Act*, RSC 1985, c F-29 [*Foreign Extraterritorial Measures Act*], s 8.
[107] *Ibid*, s 9(1).
[108] *Ibid*, s 9(2).
[109] *Ibid*.
[110] *Hartford Fire Insurance Co v California*, [1993] 509 US 764.
[111] Brief of amicus curiae the Government of Canada in *Hartford Fire Insurance Co v California*, [1993] 509 US 764.
[112] *Ibid* at 7.
[113] American *Sherman Act*, 1890, 15 USC §§ 1-7 [*Sherman Act*], ss 1–2.
[114] Brief of amicus curiae the Government of Canada in *Hartford Fire Insurance Co. v. California*, *supra* note 111 at 7.

against the extraterritorial jurisdiction of the *Sherman Act*, that "[n]either the plain language nor the legislative history of the *Sherman Act* demonstrates a congressional intent to apply it extraterritorially so as to conflict with and undermine another sovereign's territorial laws."[115] The final argument made by the Canadian government was that the *Foreign Trade Antitrust Improvements Act* of 1982, which amended the *Sherman Act*, does not express an intent to override the territorial preference in situations of legal conflict under U.S. and international law.[116] This case, in addition to legislation, illustrates Canada's opposition to the extraterritorial application of competition law in Canada.

4.1.2. Extraterritorial jurisdiction of the Canadian Competition Act

The extraterritorial jurisdiction of the Canadian *Competition Act* is not clearly stated. Sections that define violations of the act—for example, conspiracies between competitors,[117] bid-rigging,[118] deceptive marketing practices,[119] restrictive trade practices,[120] or mergers[121]—use words such as "person," "every person," "everyone," or "any person" to describe the subject of the conduct. These words refer to individuals and corporations in general, regardless of nationality or place of residence.[122] Without clear language or a clear statement of territorial jurisdiction, it is difficult to determine whether the act applies to conduct that occurs outside of Canadian territory.

Section 46, pertaining to foreign directives, seems to relate to acts occurring outside of Canada that have effects in Canada. This section provides,

> [a]ny corporation, wherever incorporated, that carries on business in Canada and that implements, in whole or in part in Canada, a directive, instruction, intimation of policy or other communication to the corporation or any person from a person in a country other than Canada who is in a position to direct or influence the policies of the corporation, which communication is for the purpose of giving effect to a conspiracy, combination, agreement or arrangement entered into outside Canada that, if entered into in Canada, would have been in contravention of section 45, is, whether or not any director or officer

[115] *Ibid* at 11.
[116] American *Foreign Trade Antitrust Improvements Act*, 1982, 15 USC §6a [*Foreign Trade Antitrust Improvements Act*].
[117] *Competition Act*, *supra* note 10, ss 45, 90.1.
[118] *Ibid*, s 47.
[119] *Ibid*, s 74.01.
[120] *Ibid*, ss 74, 75, 76, 77, 78, 79.
[121] *Ibid*, s 91.
[122] Canadian *Interpretation Act*, RSC, 1985, c I-21 [*Interpretation Act*], s 35(1).

> of the corporation in Canada has knowledge of the conspiracy, combination, agreement or arrangement, guilty of an indictable offence and liable on conviction to a fine in the discretion of the court.[123]

According to the plain language of this section, the alleged person is liable under this section only if the person "carries on business in Canada,"[124] but the *Competition Act* does not define what it means to "carry on business in Canada." Therefore, the possible interpretation of the extraterritorial application depends on guidance defining this phrase.

If "carry on business in Canada" means having a permanent establishment in Canada, section 46 of the *Competition Act* does not have extraterritorial application. According to the *Convention between Canada and the United States of America With Respect to Taxes on Income and on Capital*, "the term 'permanent establishment' means a fixed place of business through which the business of a resident of a Contracting State is wholly or partly carried on."[125] This Convention also provides that, "[t]he term 'permanent establishment' shall include especially: (a) A place of management; (b) A branch; (c) An office; (d) A factory; (e) A workshop; and (f) A mine, an oil or gas well, a quarry or any other place of extraction of natural resources."[126]

Canadian tax law indicates that "carry on business in Canada" might have a broader meaning than having a permanent establishment in Canada. Section 253(b) of the *Income Tax Act* provides that

> where in a taxation year a person who is a non-resident person . . . solicits orders or offers anything for sale in Canada through an agent or servant, whether the contract or transaction is to be completed inside or outside Canada or partly in and partly outside Canada . . . the person shall be deemed, in respect of the activity or disposition, to have been carrying on business in Canada in the year.[127]

In *Maya Forestales S.A. v The Queen*, the Tax Court of Canada, commenting on this section of the *Income Tax Act*, observed that "it is quite clear that Parliament's intent in creating the presumption was to subject non-resident persons to Canadian tax provided they

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[123] Canadian *Competition Act*, *supra* note 10, s 46.
[124] *Ibid*.
[125] *Convention between Canada and the United States of America With Respect to Taxes on Income and on Capital*, 26 September 1980 [*Convention between Canada and the United States of America With Respect to Taxes on Income and on Capital*] at Article V(1).
[126] *Ibid* at Article V(2).
[127] Canadian *Income Tax Act*, RSC, 1985, c 1 (5th Supp) [*Income Tax Act*], s 253(b).

carry out a minimum amount of commercial activity within Canada's borders."[128] The court then concluded that "the purpose of section 253 is to extend Canada's tax jurisdiction to non-resident persons based on certain activities that they carry out within Canada's borders."[129] The tax court's judgement in *Maya Forestales* means that a person is considered carrying on business in Canada only if that person at least conducts a commercial activity within Canadian territory. In this situation, section 46 of the *Competition Act* does not have extraterritorial jurisdiction. However, given the development of technology, an offer, an order, or a commercial activity might be made from a foreign country to Canadian buyers online. Therefore, with online activity, the phrase "carry on business in Canada" might be interpreted more broadly. If the phrase included business activities that are conducted outside Canadian territory, but affects Canada, section 46 would have extraterritorial jurisdiction.

Additionally, section 109 and section 110 on merger notification may provide a clearer rule concerning the extraterritorial application of the *Competition Act*. These sections require participants to a merger to submit a merger notification to the Competition Bureau if the merger meets certain criteria. Parties to mergers who have more than 400 million dollars in aggregate assets or aggregate gross revenue from sales in, from, or into Canada at a predetermined time are subject to merger notification requirements under the *Competition Act*.[130] Section 110 provides a transaction size threshold for different types of mergers. The threshold relies, among other things, on the aggregate value of the assets of participating parties together with their affiliates in Canada.[131]

These regulations indicate that the *Competition Act* of Canada might have extraterritorial jurisdiction. Under sections 109 and 110, the act may regulate mergers conducted outside Canadian territory that affect Canada through a corporation that carries on an operating business in Canada. For example, suppose A and B are U.S. companies, and A acquires B in the U.S. A and B may have to send notification of the merger to the Canadian commissioner if the parties meet the size criteria set out in section 109 and the assets of B1, a Canadian affiliate controlled by B, exceed CAD 700 million.[132] This acquisition is

[128] *Maya Forestales SA v The Queen*, 2005 TCC 66, para 34.
[129] *Ibid*, para 36.
[130] Canadian *Competition Act*, *supra* note 10, s 109(1).
[131] *Ibid*, s 109(3).
[132] See *ibid*, s 110(7)(8).

conducted by U.S. companies within the territory of the U.S., and B1 is a Canadian company which does not participate in the acquisition. The acquisition has effects on the Canadian market because the decisions of B1 might be influenced by the post-merger companies. Sections 109 and 110, therefore, mean that the *Competition Act* to some extent might have extraterritorial jurisdiction.[133]

The Competition Bureau, however, does not enforce the *Competition Act* unilaterally in cross-border merger cases. The Bureau provided in a submission to the Organization for Economic Co-operation and Development ("OECD") that the Bureau often seeks extensive cooperation with foreign competition authorities in reviewing transnational mergers.[134] The Bureau is also willing to coordinate with foreign counterparts when a cross-border merger is likely to have adverse competitive effects in the related countries.[135] The Bureau asserts that consistent and coordinated remedies help avoid potential friction stemming from situations where a remedy in one jurisdiction may not be acceptable in another and can lead to more efficient and effective resolutions than would be attained through independent enforcement action.[136]

Although the Supreme Court of Canada has not heard any competition case concerning the question of the extraterritorial jurisdiction of the *Competition Act*, its approach to the extraterritorial jurisdiction of Canada reflected in criminal cases is cautious. The Court's opinion in criminal cases suggests its potential approach to the extraterritorial jurisdiction of the Canadian *Competition Act*. The Supreme Court of Canada, in general, scrutinizes the territorial principle and international comity while deciding the jurisdiction of Canadian courts in cross-border cases. In 2007, the Court emphasized in *R v. Hape* that Canadian law cannot be enforced in another state's territory without the other state's consent.[137] This is a

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[133] The McMillan LLP takes the same point of view that "foreign-to-foreign mergers might be subject to substantive review wherever they occur, if competitive effects occur within Canada from the transaction." See A Neil Campbell, James B Musgrove & Mark Opashinov, "Merger Control 2012 - Anti-trust/Competition Law - Canada", (4 May 2012), online: *Mondaq* <http://www.mondaq.com/canada/x/176220/Trade+Regulation+Practices/Getting+the+Deal+Through+Merger+Control+2012>.

[134] Government of Canada, *Competition Bureau Submission to the OECD Competition Committee Roundtable on Remedies in Cross-Border Merger Cases* (2013), para 6.

[135] *Ibid*, para 7.

[136] *Ibid*.

[137] *R v Hape*, [2007] 2 SCR 292 (SCC) at 294.

strict approach to the extraterritorial jurisdiction of Canadian law. In 1985, Justice La Forest wrote in *Libman v. The Queen* that

> The territorial principle in criminal law was developed by the courts to respond to two practical considerations, first, that a country has generally little direct concern for the actions of malefactors abroad; and secondly, that other states may legitimately take umbrage if a country attempts to regulate matters taking place wholly or substantially within their territories. For these reasons the courts adopted a presumption against the application of laws beyond the realm …[138]

The Court also acknowledged the necessity of the extraterritorial jurisdiction of law.[139] It observed that confining national criminal law to national territory would have provided an easy escape for international criminals.[140] Justice La Forest asserted that "[t]his country has a legitimate interest in prosecuting persons for activities that take place abroad but have an unlawful consequence here."[141] He also laid out the substantial links principle, providing that courts should "consider the substantial links that connected the crime to that jurisdiction" when determining whether a crime should be prosecuted in a particular area.[142]

Thus, the opinions on the exercise of extraterritorial jurisdiction of the Canadian Supreme Court seem to be strict and consistent over time. As a general rule, Canadian laws cannot be enforced in another country's territory, but they can have extraterritorial jurisdiction in some specific situations. The justification for the Canadian courts to exercise its jurisdiction extraterritorially is the "unlawful consequence"[143] or "real and substantial link"[144] between the act occurring abroad and Canada.

However, among the cross-border cases Canadian courts have heard, there is no reported case involving an offence by a foreigner in a foreign territory that has an adverse effect on Canada. The substantial links principle, therefore, has not brought about any controversy over the jurisdiction of a Canadian court like that of the effects doctrine in *Lotus*. Even in *Libman*, where a significant portion of the offence involved conduct in Canada even

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[138] *Libman v The Queen*, [1985] 2 SCR 178 (SCC), para 65.
[139] *Ibid*.
[140] *Ibid*.
[141] *Ibid*, para 67.
[142] *Ibid*, para 21.
[143] *Ibid*, para 67.
[144] *Ibid* at 74.

though the victims were harmed abroad, the link between the crime and Canada was obviously substantial.[145]

In 1997, the Ontario Court of Appeal in *R. v. O.B.*[146] dealt with the question of "whether a Canadian court has jurisdiction to try the appellant for an offence committed entirely in the United States."[147] In this case, the appellant was charged with "touching his granddaughter's body for a sexual purpose" in his transport truck during a trip from Canada to the U.S.[148] The offence was conducted entirely in the United States territory.[149] Justice Abella observed that

> [t]he offence was one which in every respect occurred outside Canada, albeit in a Canadian vehicle on a trip from Canada with two Canadians in it. Other than in s. 7, the Criminal Code does not purport to assume original jurisdiction over criminal activity in foreign territories simply because the activity was carried on by Canadians in a Canadian vehicle. There must be more than Canadian residence or vehicular ownership; there must be a significant link between Canada and the formulation, initiation, or commission of the offence. There is no such link here with respect to any part of the offence. [150]

Justice Abella then concluded that the Canadian court had no jurisdiction to try the appellant.[151] This decision by the appellate court suggests that the nationality of the violator alone is not a sufficiently substantial link to give a Canadian court jurisdiction.

In sum, Canada consistently favours a largely territorial approach to the enforcement of the *Competition Act*. The Supreme Court, however, allows extraterritorial jurisdiction in criminal cases where the acts in question have substantial links to Canada.[152] Although "substantial links" is not well defined, it requires more than the mere involvement of a Canadian citizen. Therefore, the extraterritorial application of the *Competition Act* is still uncertain; sections 109 and 110, however, provide the best support for extraterritorial application, as the Competition Bureau and courts have the power under these sections to require notification of mergers that take place abroad by foreign corporations if the mergers meet certain criteria.[153] If Canada chooses to enforce extraterritorial jurisdiction of the

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[145] *Ibid*, para 72.
[146] *R v B (O)*, [1997] CarswellOnt 1740 (Ontario Court of Appeal).
[147] *Ibid*, para 1.
[148] *Ibid*, para 2.
[149] *Ibid*, para 1.
[150] *Ibid*, para 12.
[151] *Ibid*, para 13.
[152] *Libman v. The Queen*, *supra* note 138, para 65.
[153] Canadian *Competition Act*, *supra* note 10, s 109(1).

Competition Act in the future, it should reconsider the blocking statutes and the *Foreign Extraterritorial Measures Act*,[154] as these statutes conflict with the *Competition Act*'s extraterritorial jurisdiction and thus create a double standard on the extraterritorial application of competition law in Canada.

4.2. An American Approach

Unlike Canada, the U.S. vigorously exercises extraterritorial jurisdiction in antitrust law.[155] However, there are divergent opinions and practices related to the extraterritorial jurisdiction of antitrust law in the United States. This divergence stems from the unclear statement of the law. This section analyzes the U.S. approach to the extraterritorial application of competition law, especially how U.S. courts limit the effects doctrine by considering foreign country interests, international comity, and sovereign immunity. This section also discusses the application of foreign competition law in U.S. territory.

4.2.1. The territorial principle and presumption against the extraterritorial jurisdiction of the Sherman Act

U.S. antitrust law includes a number of statutes, with the three primary statutes being the *Sherman Act*, the *Clayton Act*, and the *Federal Trade Commission Act*.[156] The *Sherman Act* proscribes collusion and monopolization.[157] Section 1 of the *Sherman Act* states that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."[158] Section 2 of the *Sherman Act* states that "[e]very 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."[159] Likewise, the *Clayton Act* defines

[154] Canadian *Foreign Extraterritorial Measures Act*, *supra* note 106, s 8.
[155] Competition law is also called antitrust law in the U.S.
[156] Federal Trade Commission, "The Antitrust Laws", online: <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/antitrust-laws>.
[157] American *Sherman Act*, *supra* note 113, ss 1–2.
[158] *Ibid*, s 1.
[159] *Ibid*, s 2.

"commerce" to mean "trade or commerce among the several States and with foreign nations."[160] Although this definition of "commerce" refers to trade or commerce "with foreign nations," it is not clear whether "commerce" includes violations conducted entirely abroad by foreigners or whether there should be at least one U.S. citizen involved in the alleged conduct. Similarly, it is also not clear to what extent the *Sherman Act* will apply to acts conducted abroad.

In his discussion about the extraterritorial jurisdiction of the *Sherman Act*, one commentator, Larry Kramer, asserted that "Congress seldom thinks about questions of extraterritoriality, which is why so few federal statutes address it."[161] William Dodge takes a different approach, arguing that "acts of Congress should presumptively apply only to conduct that causes *effects* within the United States regardless of where that conduct occurs."[162] Because the intention of Congress is unclear, the courts must fill the gap.[163]

The first case in which the U.S. Supreme Court addressed extraterritorial jurisdiction under the *Sherman Act* was *American Banana Co. v. United Fruit Co.*[164] in 1909. In this case, both the plaintiff and defendant were U.S. corporations, but the alleged monopolization occurred in Panama and Costa Rica.[165] In hearing the plaintiff's appeal, the Court observed that "the acts causing the damage were done, so far as appears, outside the jurisdiction of the United States and within that of other states. It is surprising to hear it argued that they were governed by the act of Congress."[166] This observation implies that in *American Banana* the Court presumed that the jurisdiction of the *Sherman Act* was confined to the territory of the U.S. The Court then concluded that

> it alleges no case under the act of Congress, and discloses nothing that we can suppose to have been a tort where it was done. A conspiracy in this country to do acts in another jurisdiction does not draw to itself those acts and make them unlawful, if they are permitted by the local law.[167]

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[160] American *Clayton Act*, 1914, 15 USC §§ 12-27, 29 USC §§ 52-53 [*Clayton Act*], s 12.
[161] Larry Kramer, "Extraterritorial Application of American Law After the Insurance Antitrust Case: A Reply to Professors Lowenfeld and Trimble" (1995) 89:4 The American Journal of International Law 750 at 757.
[162] Dodge William S, "Understanding the Presumption against Extraterritoriality" (1998) 16:1 Berkeley Journal of International Law 85 at 90.
[163] Kramer, *supra* note 161 at 757.
[164] *American Banana Co v United Fruit Co*, [1909] 213 US 347.
[165] *Ibid* at 354.
[166] *Ibid* at 355.
[167] *Ibid* at 359.

Four years after *American Banana*, the Court slightly changed its interpretation of the extraterritorial jurisdiction of the *Sherman Act* in *U.S. v. Pacific and Arctic Railway Navigation Co.*[168] In this case, the defendants, which included a U.S. corporation and a Canadian corporation, engaged in a combination and conspiracy in restraint of trade and commerce with one another.[169] The cartel effectively eliminated and destroyed competition in the business of transportation in freight and passengers between various ports in the U.S. and Canada.[170] The defendants contended that U.S. antitrust law did not apply because part of the transportation route was outside the U.S.,[171] but the Court rejected this argument.[172] It observed that "it was a control to be exercised over transportation in the United States, and, so far, is within the jurisdiction of the laws of the United States, criminal and civil."[173] The Court then claimed jurisdiction over the foreign defendant asserting that "[i]f we may not control foreign citizens or corporations operating in foreign territory, we certainly may control such citizens and corporations operating in our territory, as we undoubtedly may control our own citizens and our own corporations."[174]

Although the Supreme Court in *Pacific and Arctic* asserted that it may not control foreign corporations operating in foreign territory, it held, in contrast to *American Banana*, that jurisdiction under the *Sherman Act* is not confined to U.S. territory. [175] Although some parts of the alleged collusion were conducted outside the U.S. territory, the Court concluded that the conduct was entirely within the jurisdiction of the *Sherman Act*.[176] This finding suggests that jurisdiction under the *Sherman Act* extends to a violation of the act that is, at least in part, conducted abroad. However, in *Pacific and Arctic*, there was at least some connection to the U.S.—the foreign defendant colluded with a U.S. corporation and the business of the foreign defendant was conducted partly in the U.S. This connection might

[168] *United States v Pacific & Arctic Ry & Nav Co*, [1913] 228 US 87.
[169] *Ibid* at 88.
[170] *Ibid*.
[171] *Ibid* at 105.
[172] *Ibid* at 106.
[173] *Ibid* at 107.
[174] *Ibid*.
[175] *Ibid* at 105–106.
[176] *Ibid*.

explain why the Court did not provide extensive reasons justifying its divergence from the *American Banana* approach to jurisdiction under the *Sherman Act*.

4.2.2. The effects doctrine and the extraterritorial jurisdiction of the Sherman Act

Although the Supreme Court in *American Banana* asserted that acts conducted abroad are outside the jurisdiction of the U.S., this interpretation has not been strictly followed by lower courts. In 1945, the Court of Appeal for the Second Circuit outlined an "effects" test for determining the extraterritorial jurisdiction of the *Sherman Act* in *United States v. Aluminum Company of America* ("*Alcoa*").[177] In this case, the defendants entered into the agreements to form cartels in 1931[178] and 1936,[179] which were alleged to have adverse competitive effects on the U.S. market. Judge Learned Hand, in delivering the opinion of the court, wrote that "we are concerned only with whether Congress chose to attach liability to the conduct outside the United States of persons not in allegiance to it."[180] Judge Hand referred to *American Banana* to illustrate that the Congress did not intend to punish all whom its courts can catch for conduct that has no consequence within the United States. He then asserted that "[o]n the other hand, it is settled law . . . that any state may impose liabilities, even upon persons not within its allegiance, for conduct outside its borders that has consequences within its borders which the state reprehends; and these liabilities other states will ordinarily recognize."[181]

Judge Hand proposed two conditions to consider when determining whether an act conducted abroad is under the jurisdiction of the *Sherman Act*. First, there must be an intent to affect U.S. imports.[182] A cartel entered outside the territory of the U.S. might affect the country's trade even if the parties did not intend to do so; these effects might result indirectly through international trade. Analyzing this first condition, Judge Hand stated that the *Sherman Act* was enacted to cover agreements that intend to affect U.S. trade.[183] Second,

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[177] *United States v Aluminum Company of America*, [1945] 148 F2d 416 (2d Cir).
[178] *Ibid* at 443.
[179] *Ibid*.
[180] *Ibid*.
[181] *Ibid*.
[182] *Ibid*.
[183] *Ibid*.

there must be an actual effect upon imports into the United States.[184] Judge Hand refers to an example of cartels that were entered into with the intent to affect imports into the U.S. but which had no actual effect on the imports.[185] Following this example, Judge Hand asserted that "the [Sherman] Act does not cover agreements, even though intended to affect imports or exports, unless its performance is shown actually to have had some effect upon them."[186] Therefore, under this test, when both conditions are satisfied, a cartel conducted abroad is within the jurisdiction of the *Sherman Act*.

In 1982, the U.S. Congress expressed more clearly its intention to cover certain acts conducted abroad by passing the *Foreign Trade Antitrust Improvements Act* ("FTAIA"), which takes into account the effects test proposed by Judge Hand.[187] The act provides that conduct involving trade with foreign nations to which the *Sherman Act* applies must have a direct, substantial, and reasonably foreseeable effect on trade or commerce in the United States.[188] In *Kruman v. Christie's International*, the Second Circuit Court of Appeal, referring to the phrase "direct, substantial, and reasonably foreseeable effect" in the FTAIA, said that "this limit will likely prevent conduct that merely has an ancillary effect on our markets from being actionable under our antitrust laws."[189]

However, the extraterritorial jurisdiction of the *Sherman Act* provided for under the FTAIA is broader than the approach suggested by Judge Hand in *Alcoa* because the FTAIA does not consider the intent to affect trade, but rather focuses only on the effects. The FTAIA allows the *Sherman Act* to cover conduct that has a direct, substantial, and reasonably foreseeable effect effects on trade or commerce.[190] The Department of Justice ("DOJ") and the Federal Trade Commission ("FTC") explain subsection 6A of the FTAIA in the Antitrust Enforcement Guidelines for International Operations:[191]

> [The DOJ and FTC] apply the "direct, substantial, and reasonably foreseeable" standard of the FTAIA . . . in cases in which a cartel of foreign enterprises, or a foreign

[184] *Ibid* at 444.
[185] *Ibid*.
[186] *Ibid*.
[187] American *Foreign Trade Antitrust Improvements Act*, *supra* note 116.
[188] *Ibid*.
[189] *Kruman v Christie's International PlC*, [2002] 284 F3d 384 (2d Cir), para 70.
[190] American *Foreign Trade Antitrust Improvements Act*, *supra* note 116.
[191] The Department of Justice and the Federal Trade Commission of the United States, *Antitrust Enforcement Guidelines for International Operations* (1995), s 3.121.

> monopolist, reaches the U.S. market through any mechanism that goes beyond direct sales, such as the use of an unrelated intermediary, as well as in cases in which foreign vertical restrictions or intellectual property licensing arrangements have an anticompetitive effect on U.S. commerce.[192]

The most recent case that tests the extraterritorial jurisdiction of the *Sherman Act* is *Motorola Mobility v. AU Optronics*, in which the court considered the language from the FTAIA.[193] Motorola, a company that manufactured and sold cellular telephones, and its foreign subsidiaries bought liquid-crystal display panels and incorporated them into cell phones manufactured by either the parent or the subsidiaries.[194] Motorola alleged that several foreign manufacturers of the panels violated the *Sherman Act* by engaging in price-fixing.[195] Judge Posner analyzed the effects of the defendants' alleged cartel on the U.S. and observed that

> [o]nly about 1 percent of the panels were bought by, and delivered to, Motorola in the United States; the other 99 percent were bought by, paid for, and delivered to its foreign subsidiaries … Forty-two percent of all the panels were bought by the subsidiaries and incorporated by them into products that were then shipped to Motorola in the United States for resale by Motorola (which did none of the manufacturing). Another 57 percent of the panels were also bought by the subsidiaries, but were incorporated into products that were sold abroad as well …[196]

Judge Posner then asserted that the court should ignore 57% of the panels from Motorola's claim because any claim against those panels was clearly barred by the FTAIA because the panels were sold abroad.[197] Although the district court had ruled that Motorola's claim regarding 42% of the panels was barred by the FTAIA,[198] the Seventh Circuit required that Motorola "show that the defendants' price fixing of [these] panels that they sold abroad and that became components of cellphones imported by Motorola had 'a direct, substantial, and reasonably foreseeable effect' on commerce within the United States."[199] Judge Posner then contended,

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[192] *Ibid*.
[193] *Motorola Mobility LLC v AU Optronics Corp, et al*, [2014] 746 F3d 842 (7th Cir).
[194] *Ibid* at 843.
[195] *Ibid*.
[196] *Ibid*.
[197] *Ibid* at 844.
[198] *Motorola Mobility, Inc v AU Optronics Corporation, et al*, [2014] WL 258154 (United States District Court, ND Illinois, Eastern Division) at 10.
[199] *Motorola Mobility LLC v. AU Optronics Corp., et al., supra* note 193 at 844.

> the alleged price fixers are not selling the panels in the United States. They are selling them abroad to foreign companies (the Motorola subsidiaries) that incorporate them into products that are then exported to the United States for resale by the parent. The effect of component price fixing on the price of the product of which it is a component is indirect.[200]

The Seventh Circuit continued, stating that "[t]he effect of the alleged price fixing on that commerce in this case is mediated by Motorola's decision on what price to charge U.S. consumers for the cellphones manufactured abroad that are alleged to have contained a price-fixed component."[201] Judge Posner asserted that if the defendants were overcharging, they were overcharging other foreign manufacturers.[202] He also cited the U.S. Supreme Court's warning "that rampant extraterritorial application of U.S. law 'creates a serious risk of interference with a foreign nation's ability independently to regulate its own commercial affairs.'"[203] The Seventh Circuit then upheld the district court's ruling that

> the FTAIA applies to Motorola's foreign injury claims because they are based on nonimport conduct involving trade with foreign nations. These claims do not fall under the FTAIA's domestic injury exception because they do not arise from any domestic effect … . Motorola's claims based on overseas purchases by its foreign affiliates (the Category II and III claims) are dismissed.[204]

The interpretations of extraterritorial jurisdiction under the *Sherman Act* by U.S. courts are difficult to reconcile. The decision of the Second Circuit in *Alcoa* is contrary to the Supreme Court's decision in *American Banana*. Moreover, the two-condition effects test, introduced in *Alcoa*, is supported by other courts and even by the Supreme Court in *Hartford Fire Insurance*. Moreover, the effects test is also reflected in the FTAIA.[205] This indicates that Congress and U.S. courts do not intend to confine the application of the *Sherman Act* to the territory of the U.S. However, this support does not mean that the exercise of extraterritorial jurisdiction under the *Sherman Act* is unlimited. In addition to considering the direct, substantial, and reasonably foreseeable effects of the alleged conduct on U.S. trade, the exercise of extraterritorial jurisdiction under the *Sherman Act* also considers international comity and the sovereign immunity of foreign countries.

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[200] *Ibid*.
[201] *Ibid* at 845.
[202] *Ibid* at 846.
[203] *Ibid*.
[204] *Motorola Mobility, Inc. v. AU Optronics Corporation, et al., supra* note 198 at 10.
[205] American *Foreign Trade Antitrust Improvements Act, supra* note 116.

a. Consideration of Foreign Country Interests and International Comity

Although court decisions on the extraterritorial jurisdiction of the *Sherman Act* have differed over time, it has not undermined foreign country interests or the international law principle of international comity. In *Timberlane Lumber Co. v. Bank of America*, Judge Choy delivered the opinion for the Ninth Circuit, stating that "[t]he effects test by itself is incomplete because it fails to consider other nations' interests."[206] He then introduced a three-part analysis that takes into account: first, the actual or intended effect on U.S. foreign commerce;[207] second, whether the effect is sufficiently significant to present a cognizable injury to the plaintiffs and therefore a civil violation of the antitrust laws;[208] and third, whether the interests of the U.S., including the magnitude of the effect on U.S. foreign commerce, are sufficiently strong, vis-a-vis those of other nations, to justify an assertion of extraterritorial authority.[209] This analysis is called a "balancing of interests" approach.[210] Besides considering the effects of the alleged act on U.S. foreign trade, as Judge Hand proposed in *Alcoa*, this approach also considers the interests of other countries in comparison with those of the U.S. in determining the extraterritorial jurisdiction of the *Sherman Act*.

The American Law Institute's 1987 Restatement (Third) of Foreign Relations Law of the United States reflects the consideration of foreign interests in the extraterritorial effect of laws. Section 403 provides that a state may not enact laws that have an unreasonable extraterritorial effect on persons or activities.[211] The unreasonableness may relate to the extent to which another state might have an interest in regulating the activity, and the likelihood of conflict with regulation by another state.[212] The Restatement also provides that

> [w]hen it would not be unreasonable for each of two states to exercise jurisdiction over a person or activity, but the prescriptions by the two states are in conflict, each state has an obligation to evaluate its own as well as the other state's interest in exercising

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[206] *Timberlane Lumber Co et al, v Bank of America, NT & SA*, [1976] 549 F2d 597 (9th Cir), para 67.
[207] *Ibid*, para 72.
[208] *Ibid*.
[209] *Ibid*.
[210] M Sornarajah, "The Extraterritorial Enforcement of U.S. Antitrust Laws: Conflict and Compromise" (1982) 31:01 International & Comparative Law Quarterly 127 at 147.
[211] The American Law Institute, *Restatement (Third) of The Foreign Relations Law of the United States* (U.S: American Law Institute, 1987) at §403(1).
[212] *Ibid* at §403(2).

> jurisdiction, in light of all the relevant factors … . [A] state should defer to the other state if that state's interest is clearly greater.[213]

Although the 1987 Restatement provides helpful guidance, this restatement is a secondary source of law, and it reflects the opinions of the American Law Institute, a private organization not affiliated with the U.S. government or any of its agencies.[214] The 1987 Restatement reflects the opinions of the American Law Institute in international law as it applies to the U.S. and domestic law impacting foreign relations.[215] Nevertheless, although it is "in no sense an official document of the United States,"[216] the 1987 Restatement has been cited by U.S. courts in a number of cases.[217]

In *F. Hoffman-La Roche Ltd. v. Empagran S.A.* in 2004, the Supreme Court rejected the application of the *Sherman Act* under the FTAIA's exception because the Court ordinarily construes ambiguous statutes in a way that avoids unreasonable interference with the sovereign authority of other nations.[218] In this case, the defendants entered into a cartel in a foreign territory and caused damage to the plaintiff outside U.S. territory.[219] The Court said that "Congress would not have intended the FTAIA's exception to bring independently caused foreign injury within the *Sherman Act*'s reach."[220] Justice Scalia and Justice Thomas concurred in the judgment asserting that "statutes should be read in accord with the customary deference to the application of foreign countries' laws within their own territories."[221] Thus, the consideration of foreign country interests and international comity is a factor on which American courts rely to limit the extraterritorial application of competition law.

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[213] *Ibid* at §403(3).
[214] See the foreword of The American Law Institute, *supra* note 211.
[215] *Ibid*.
[216] *Ibid*.
[217] *See F Hoffman-La Roche v Empagran SA*, [2004] 542 US 155 at 164. See also *Hartford Fire Insurance Co. v. California*, *supra* note 110 at 815; and *Moritimer Off Shore Services, Ltd v Federal Republic of Germany*, [2010] 615 F3d 97 (2nd Cir) at 109.
[218] *F. Hoffman-La Roche v. Empagran S.A.*, *supra* note 217 at 164.
[219] *Ibid* at 159.
[220] *Ibid* at 156.
[221] *Ibid* at 176.

b. Consideration of the Sovereign Immunity Doctrine

When an act occurs in one country and has an effect on another country, there is a possibility that the party acted under the compulsion of the former country's law or under the direction of that country's authority. These acts should be distinguished from purely private conduct. Accordingly, U.S. courts have recognized sovereign immunity when determining jurisdiction over these acts, cognizant of the fact that claiming jurisdiction over such acts means taking the opportunity to judge the acts of other states. This awareness is consistent with the doctrine of state immunity in customary international law and the U.N. *Convention on Jurisdictional Immunities of States and Their Property* ("*Convention on Jurisdictional Immunities*").[222] In general, this doctrine prevents courts from exercising jurisdiction over another state.[223] Such disputes over jurisdiction can be disposed of only by the courts of the foreign state itself, by an international court or tribunal, or by diplomatic settlements.[224]

Sovereign immunity was first recognized in the U.S. in 1812 in the U.S. Supreme Court case *The Schooner Exchange v. McFaddon*.[225] Justice Marshall delivered the opinion of the Court, asserting that "[i]t seems then to the Court, to be a principle of public law, that national ships of war, entering the port of a friendly power open for their reception, are to be considered as exempted by the consent of that power from its jurisdiction."[226] Similarly in *Underhill* v. *Hernandez* in 1897, Justice Fuller of the U.S. Supreme Court explained that "the acts of the defendant were the acts of the government of Venezuela, and as such are not properly the subject of adjudication in the courts of another government."[227] The Court concluded that "[e]very sovereign State is bound to respect the independence of every other sovereign State, and the courts of one country will not sit in judgment on the acts of the government of another done within its own territory."[228]

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[222] Aust, *supra* note 65 at 159–178. The Convention's entry into force: https://treaties.un.org/Pages/ShowMTDSGDetails.aspx?src=UNTSONLINE&tabid=2&mtdsg_no=III-13&chapter=3&lang=en.
[223] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, 2 December 2012 [*United Nations Convention on Jurisdictional Immunities of States and Their Property*] at Article 5.
[224] Aust, *supra* note 65 at 159.
[225] *Intern Ass'n of Machinists v Org'n of Petroleum*, [1979] 477 F Supp 553 (CD Cal) at 565.
[226] *The Schooner Exchange v McFaddon*, [1812] 11 US 116 at 145.
[227] *Underhill v Hernandez*, [1897] 168 US 250 at 254.
[228] *Ibid* at 251.

In antitrust law, because the *Sherman Act*'s prohibitions apply only to a "person" or a "corporation," courts in the U.S. have asserted that the act's jurisdiction does not extend to the conduct of another state.[229] According to the District Court of Delaware in *InterAmerican Refining Corp. v. Texaco Maracaibo* in 1970, "[t]he *Sherman Act* does not confer jurisdiction on United States courts over acts of foreign sovereigns. By its terms, it forbids only anticompetitive practices of persons and corporations."[230] The District Court for the Central District of California agreed with this point in *International Association of Machinists v. OPEC*.[231]

However, a state might not enjoy sovereign immunity when the alleged act is commercial in nature. Article 10 of the *Convention on Jurisdictional Immunities* provides a limit on invoking immunity if a state "engages in a commercial transaction with a foreign natural or juridical person" and "differences relating to the commercial transaction fall within the jurisdiction . . . of another State."[232] The same limit to sovereign immunity is provided for in the U.S. in the *Foreign Sovereign Immunities Act* ("FSIA").[233] According to section 1605, a foreign state shall not be immune from the jurisdiction of U.S. or state courts when the "action is based [on] commercial activity carried on in the United States by [a] foreign state"; an action performed in the United States is connected to "a commercial activity of [a] foreign state elsewhere"; or an action outside the territory of the United States is connected to "a commercial activity of the foreign state elsewhere and that act causes a direct effect in the United States."[234]

According to the FSIA the "foreign state" includes corporations that are agents or instrumentalities of a foreign state. [235] Therefore, the action of a company under the direction or compulsion of a foreign state is regarded as that of the foreign state. Section 1603(d) defines "commercial activity" as "either a regular course of commercial conduct or a

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[229] *Interamerican Refining Corporation v Texaco Maracaibo, Inc*, [1970] 307 F Supp 1291 (D Del) at 1298.
[230] *Ibid*.
[231] *Intern. Ass'n of Machinists v. Org'n of Petroleum*, *supra* note 225 at 571.
[232] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 223 at Article 10.
[233] American *Foreign Sovereign Immunities Act*, 1976, 28 USC (90 Stat 2891) [*Foreign Sovereign Immunities Act*].
[234] *Ibid*, s 1605.
[235] *Ibid*, s 1603.

particular commercial transaction or act," and adds that "[t]he commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."[236] Commercial contracts or transactions will, therefore, generally be regarded as commercial activities and will not be protected by sovereign immunity. In *Machinists*[237] the court found that, using legislative intent, "commercial activity" includes activity within "'a regular course of commercial conduct' . . . the carrying on of a commercial enterprise such as a mineral extraction company, an airline, or a state trading corporation."[238] There is, however, a difference between the *Convention on Jurisdictional Immunity* and the FSIA. Article 2 of the Convention indicates that the law considers the purpose of a commercial transaction, while section 1603(d) of FSIA does not.[239]

Despite the fact that section 1603(d) of the FSIA suggests that "commercial activity" is much broader than the "commercial transaction" of the *Convention of Jurisdictional Immunity*, U.S. courts have found that "commercial activity" should be defined narrowly.[240] In *Machinists*, the plaintiff commenced an action in the District Court for the Central District of California against the Organization of Petroleum Exporting Countries ("OPEC") and its 13 member nations.[241] The plaintiff alleged that the defendants' price-fixing activities violated the *Sherman Act*.[242] Additionally, the plaintiff claimed that the court's jurisdiction was based on the FSIA.[243] The 13 OPEC member nations chose not to make an appearance in the action.[244]

Judge Hauk observed that under the theory of absolute sovereign immunity, a foreign state could not be sued without its consent.[245] But under the restrictive theory, foreign states and sovereignties are not immune insofar as their commercial activities are concerned.[246] In

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[236] *Ibid*, s 1603(d).
[237] *Intern. Ass'n of Machinists v. Org'n of Petroleum*, *supra* note 225 at 571.
[238] *Ibid* at footnote 14.
[239] *United Nations Convention on Jurisdictional Immunities of States and Their Property*, *supra* note 223 at Article 5.
[240] *Intern. Ass'n of Machinists v. Org'n of Petroleum*, *supra* note 225 at 571.
[241] *Ibid* at 558.
[242] *Ibid*.
[243] *Ibid* at 559.
[244] *Ibid* at 560.
[245] *Ibid* at 565.
[246] *Ibid*.

determining whether the activities of the OPEC members were governmental or commercial in nature, Judge Hauk examined both the FSIA and the standards recognized under international law and concluded that "the defendants' control over their oil resources is an especially sovereign function because oil, as their primary, if not sole, revenue-producing resource, is crucial to the welfare of their nations' peoples."[247] Judge Hauk also considered the views of the state of California and the federal government concerning domestic crude oil activities and concluded that "there can be little question that establishing the terms and conditions for removal of natural resources from its territory, when done by a sovereign state, individually and separately, is a governmental activity."[248] The Central District Court of California then held that the defendants' activity was immune by the FSIA because it was not "commercial activity."[249] The court, therefore, lacked jurisdiction.[250]

4.2.3. The exercise of foreign extraterritorial jurisdiction in the United States

Unlike Canada, U.S. laws do not provide strict opposition to the exercise of foreign extraterritorial jurisdiction in the U.S. There is no statute that prevents the enforcement of foreign judgments or directions in the U.S., and there is no law, such as the Canadian *Foreign Extraterritorial Measures Act*, allowing a defendant to claim back the damages or penalties paid under a foreign court's judgment.[251] On the other hand, an Act on providing assistance to foreign and international tribunals and to litigants before such tribunals (28 U.S.C. § 1782) allows U.S. district courts to assist foreign and international tribunals, and litigants before such tribunals. Section 1782 provides that a district court may order its resident "to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal."[252] Section 1782 also states that a person in the U.S. is not prohibited from cooperating with foreign authority if such an authority exercises foreign jurisdiction in the U.S.[253] Thus American law does not preclude a person within the U.S. from voluntarily giving his testimony or producing a document for a foreign or international

[247] *Ibid* at 568.
[248] *Ibid*.
[249] *Ibid* at 569.
[250] *Ibid*.
[251] Canadian *Foreign Extraterritorial Measures Act*, *supra* note 106, s 8.
[252] 28 USC (1948), s 1782 (a).
[253] *Ibid*, s 1782(b).

tribunal.[254] However, the foreign authority in this section is limited to foreign countries with which the U.S. is at peace.[255]

In sum, the U.S. exercises extraterritorial jurisdiction in antitrust law. The exercise of that jurisdiction includes both prescriptive and adjudicative jurisdiction. American courts apply the effects doctrine to assert extraterritorial jurisdiction. The extraterritorial application of antitrust law is, however, neither unlimited nor at the discretion of the courts. Federal statutes and court decisions have set out restrictions on the application of antitrust law to conduct in foreign territories. The alleged act must have a direct, substantial, and reasonably foreseeable effect on American trade or commerce; the alleged person must have intended to affect U.S. trade or commerce; and the magnitude of the effect on U.S. foreign commerce must be sufficient relative to the effect on other nations. This limit also considers whether the alleged act is governed or remedied by foreign law.

4.3. A Japanese Approach

Japan is a civil law jurisdiction in which laws arise primarily from statutes rather than judicial decisions.[256] Japan's main competition law legislation, the *Antimonopoly Act of Japan* ("AMA"),[257] does not state the scope of its extraterritorial jurisdiction. However, the extraterritorial application of the AMA has been discussed by the Japan Fair Trade Commission ("JFTC"). These decisions were previously treated as equivalent to judgments of the district court.[258]

The AMA was enacted in 1947 and the latest amendment was passed in 2013.[259] The AMA has no provision that expressly states that the act covers conduct that took place in a foreign territory, but jurisdiction over such conduct may be inferred from certain provisions.

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[254] *Ibid*.
[255] *Ibid* at Historical and Revision Notes.
[256] Hiroshi Itoh & Lawrence W Beer, *The Constitutional Case Law of Japan - Selected Supreme Court Decisions, 1961-1970* (Washington, U.S.: University of Washington Press, 1978) at 8.
[257] *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*, *supra* note 34.
[258] According to Article 85 of the 2005 amendment of the AMA, decisions of the JFTC were subject to the judicial review of the Tokyo High Court. Since the 2013 amendment of the AMA went into effect decisions of the JFTC are reviewed by the Tokyo District Court. *Ibid* at articles 85, 85-2.
[259] Press Release Japan Fair Trade Commission, *Enactment of the Bill to Amend the Antimonopoly Act: Japan Fair Trade Commission* (2013).

Article 2 defines private monopolization, unreasonable restraint of trade, and monopolistic situations as activities of an "enterprise."[260] Similarly, Article 9 states that "[n]o company may be established that would cause an excessive concentration of economic power due to shareholding . . . in other companies in Japan."[261] The words "enterprise" and "company" may be understood to limit the jurisdiction of the AMA to Japanese territory. However, these terms may be interpreted more broadly, which is to say that regardless of an enterprise's or company's nationality, the AMA governs its conduct if its activities have effects on Japan.

4.3.1. The effects doctrine of Japan

In practice, the JFTC tends to interpret the words "enterprise" and "company" more broadly. In *MDS Nordion Inc.* in 1998, the JFTC applied the AMA to a foreign company's act that occurred mostly outside Japan. MDS Nordion, a Canadian firm, was the largest manufacturer of Molybdenum-99 in the world and possessed 100% market share in the Molybdenum-99 market in Japan.[262] MDS Nordion allegedly prevented its competitors from entering the Japanese market by entering into exclusive contracts, effective for ten years, with two companies that were the sole purchasers of Molybdenum-99 in Japan.[263]

The JFTC observed that the word "'firm' is defined in the AMA as 'a person who carries on a commercial, industrial, financial or any other business.'"[264] It held that this definition does not exclude foreign firms.[265] Therefore, although MDS Nordion was a Canadian firm that did not have an office in Japan, it was included in the definition of "firm" because it had entered into long-term contracts with two Japanese companies and continuously shipped products to Japan.[266] The JFTC ultimately held that MDS Nordion's conduct was illegal under the AMA.[267]

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[260] *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*, *supra* note 34 at Article 2.
[261] *Ibid* at Article 9.
[262] Hiroo Iwanari, *Remedies, Sanctions and Judicial Review in Japan - A brief overview of the Antimonopoly Act procedures* (Jakarta, Indonesia, 2004) at 1.
[263] *Ibid*.
[264] *Ibid*.
[265] *Ibid* at 5.
[266] Shogo Itoda, "Competition Policy of Japan and its Global Implementation" in Mitsuo Matsushita & Clifford Jones, eds, *Competition Policy in the Global Trading System* (The Netherlands: Kluwer Law International, 2002) at 63.
[267] *Ibid*.

In 2008 in *Marine Hose*, the JFTC applied the AMA to an international cartel, conducted abroad by foreign companies, that had anticompetitive effects on Japan.[268] In this case, the JFTC launched an investigation in collaboration with the U.S. Department of Justice and the European Commission.[269] These entities investigated one Japanese company, one British company, one French company, and two Italian companies.[270] These companies agreed to allocate consumers in the international market of specified Marine Hose.[271] The JFTC issued a cease and desist order against the companies participating in the cartel, including those foreign companies located abroad.[272] The entrepreneurs subject to the cease and desist order were required to confirm that the illegal trade practices had terminated, and each entrepreneur was required to conduct independent business operations that were free of illegal practices.[273] This case indicates that the JFTC exercised jurisdiction over companies located abroad when the companies entered into a cartel and harmed the Japanese market. Although the foreign companies were not subject to any administrative fine, their activities were found to be illegal and the companies were subject to a cease and desist order.[274]

Cathode Ray Tubes for Television is the latest case in which the JFTC applied the AMA extraterritorially.[275] In 2009, the JFTC issued a cease and desist order and a surcharge payment order against an international cartel that fixed the price of Cathode Ray Tubes ("CRTs") imported into Japan.[276] Japanese CRT television manufacturers required their overseas manufacturing subsidiaries to enter into an agreement that set minimum target prices for specified CRTs.[277] Although the manufacturers and their subsidiaries did not sell CRTs directly to customers in Japan, CRT television sets, which included a CRT, were sold to customers in Japan.[278] The JFTC concluded that although the agreement was entered into

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[268] Japan Fair Trade Commission, *Cease and Desist Order and Surcharge Payment Order against Marine Hose Manufacturers*, News release (2008).
[269] *Ibid*.
[270] *Ibid*.
[271] *Ibid*.
[272] *Ibid*.
[273] *Ibid*.
[274] *Ibid*.
[275] Japan Fair Trade Commission, *Cease and Desist Order and Surcharge Payment Orders against Manufacturers of Cathode Ray Tubes for Televisions*, News release (2009).
[276] *Ibid*.
[277] *Ibid*.
[278] Ryunosuke Ushijima, "Price-fixing conspiracy on cathode ray tubes ('CRT') for television sets", (6 November 2009), online: *AntitrustAsia*.

outside of Japan, the AMA could be applied because competition inside Japan was substantially restrained.[279]

Although the JFTA seemingly adopted an effects doctrine in applying the AMA to anticompetitive conduct engaged in outside Japan, there is no clear limit on the exercise of this jurisdiction. In *MDS Nordion Inc.* and *Marine Hose* the violation had a direct and substantial restraint on competition in Japan. In *CRT* the effect on competition in Japan was indirect.

The *MDS Nordion Inc.*, *Marine Hose*, and *Cathode Ray Tubes* cases illustrate that the JFTC is willing to apply the AMA to anticompetitive conduct that occurs in foreign territory but has effects on Japan. The absence of any Japanese statutes or higher court judgments opposing such an extraterritorial application of the AMA by the JFTC suggests that the National Diet of Japan intended the AMA to be applied extraterritorially.

4.3.2. The exercise of foreign extraterritorial jurisdiction in Japan

In contrast to its willingness to apply the AMA to anticompetitive conduct abroad, the Japanese government does not recognize the exercise of foreign competition law in Japan. On 18 November 1996 in *United States of America v. Nippon Paper Industries Co.*, the government of Japan filed a brief in the U.S. Court of Appeal for the First Circuit in which it asserted that, following principles of international law, "anticompetitive activities occurring within Japanese territory by Japanese corporations fall primarily under the scope of Japanese jurisdiction and are regulated by Japanese legislation."[280] The Japanese government continued that the application American antitrust laws to such activities would be invalid "in the absence of a substantial link between the activities and the source of jurisdiction."[281] The Japanese government also argued that "[o]ne nation's unilateral adjudication or extraterritorial application of its national laws is not, however, an appropriate means of resolving international differences."[282] The government of Japan urged the court to

[279] Takanori Abe & Kaoru Ochiai, "Japan: The JFTC Applies Antimonopoly Act Beyond Borders for The First Time", *Managing Intellectual Property* (28 October 2015).
[280] Brief of amicus curiae the Government of Japan in *United States of America v Nippon Paper Industries Co*, [1997] F 109 F3d 1 (1st Cir) at 2.
[281] *Ibid*.
[282] *Ibid*.

hold that U.S. courts should not exercise American jurisdiction over business activities conducted in Japan by Japanese companies.[283]

The government of Japan made the same argument in 2004 in *F. Hoffman-La Roche v. Empagran S.A.*[284] In that case, the Japanese government submitted an amicus curiae brief in support of petitioners to the Court of Appeal for the District of Columbia Circuit.[285] The Japanese government argued that the FTAIA sought to clarify the limits of U.S. antitrust jurisdiction in U.S. foreign commerce, not expand that jurisdiction.[286] The brief cited the statement of the U.S. Congress that "[t]he clarified reach of our own laws could encourage our trading partners to take more effective steps to protect competition in their markets under their competition laws."[287] The government of Japan asserted that nothing in the FTAIA's legislative history suggests that it was intended to expand American antitrust jurisdiction to foreign firms in foreign markets and if the legislature had intended such an expansion, "there would have been a storm of criticism by foreign governments."[288]

In sum, Japan's approach to the extraterritorial application of competition law is inconsistent. On the one hand, the JFTC has applied the AMA extraterritorially, apparently based on an effects doctrine, but it fails to provide a clear limit on the AMA's extraterritorial jurisdiction. On the other hand, the Japanese government strongly opposes the extraterritorial application of foreign competition law to transactions conducted by Japanese corporations in Japan. These conflicting views suggest that Japan has a double standard when it comes to the extraterritorial application of competition law.

4.4. A Vietnamese Approach

In Vietnam law is made by the National Assembly and only the Standing Committee of the National Assembly has the power to interpret the law when it is unclear.[289] The Judge

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[283] *Ibid* at 8.
[284] *F. Hoffman-La Roche v. Empagran S.A., supra* note 217 at 164.
[285] Brief of amicus curiae the Government of Japan in *F Hoffman-La Roche v Empagran SA*, [2004] 542 US 155 at 4.
[286] *Ibid*.
[287] *Ibid*.
[288] *Ibid*.
[289] Vietnamese *Law on Promulgation of Legislative Documents*, 22 June 2015, 80/2015/QH13 [*Law on Promulgation of Legislative Documents*] at Article 3.3.

Council of the People's Supreme Court has the power to provide guidelines unifying the application of law to adjudication.[290] Therefore, the extraterritorial jurisdiction of competition law should be found in the *Competition Law* of Vietnam enacted by the National Assembly or in the interpretation of that law by the Standing Committee, and not in decisions of the People's Supreme Court.

Article 2 of the *Competition Law* of Vietnam expressly states that this law shall apply to "[b]usiness organizations and individuals (hereinafter referred collectively to as enterprises), including also enterprises producing, supplying products, providing public-utility services, enterprises operating in the State-monopolized sectors and domains, and foreign enterprises operating in Vietnam."[291] However, the law does not define the word "operating" and the Standing Committee has not yet interpreted this term.

There are two different ideas among the legal community on the meaning of "foreign enterprises operating in Vietnam" that are subject to the Competition Law.[292] The first is that the Competition Law can govern acts conducted by foreign enterprises only when two conditions are satisfied: first, the alleged act has taken place, or is taking place, in Vietnam; and second, the foreign enterprise must register its business in Vietnam as a foreign direct invested company, branch, or representative office.[293] This opinion suggests that it is impossible for the Vietnamese authority to conduct an investigation or enforce a final judgement in a foreign territory. Moreover, the exercise of the Vietnamese jurisdiction over acts conducted by a foreign enterprise abroad will violate international comity.

Those who support the first opinion argue that the *Competition Law* of Vietnam should state the extraterritorial jurisdiction of the *Competition Law* more clearly if lawmakers intended the law to have extraterritorial effects.[294] This request for express language is supported by the express language in the *Penal Code* of Vietnam, enacted five years before the *Competition Law.* Article 6.2 of the *Penal Code* provides clearly that "[f]oreigners who commit offenses [sic] outside the territory of the Socialist Republic of Vietnam may be examined for penal liability according to the *Penal Code* of Vietnam in circumstances

[290] *Ibid* at Article 21.
[291] Vietnamese *Competition Law*, *supra* note 6 at Article 2.
[292] Thanh Phan, *Competition Law Enforcement of Viet Nam and the Necessity of a Transparent Regional Competition Policy* (ERIA Discussion Paper 2015-86) at 23–25.
[293] *Ibid*.
[294] *Ibid*.

provided for in the international treaties, which the Socialist Republic of Vietnam has signed or acceded to."[295]

The second idea on the extraterritorial jurisdiction of the *Competition Law* of Vietnam is that the law can cover conduct by foreign enterprises abroad if such acts have effects on Vietnam.[296] Those who support this opinion argue that the term "operating" is broad.[297] It covers a wide range of activities, including commercial purposes. According to Article 3.1 of the *Commercial Law* of Vietnam "commercial activity" means "[an] activity for profit-making purposes, comprising purchase and sale of goods, provision of services, investment, commercial enhancement, and other activities for profit-making purposes."[298] Therefore, any foreign firm doing any profit-making activity is covered by the *Competition Law*, regardless of its registration in the territory where it is located. Article 3.3 of the *Competition Law* also defines "practices in restraint of competition" as "acts performed by enterprises to reduce, distort and prevent competition on the market, including agreements to restrict competition, abuse of a dominant position in the market, abuse of the monopoly position and economic concentration."[299] This definition does not limit acts restraining competition to acts engaged in Vietnam.

These two opinions on extraterritorial jurisdiction are in conflict. Business registration in Vietnam is not necessary to determine the jurisdiction of the *Competition Law*. On the one hand, according to Article 4.9 of *Law on Enterprise* of Vietnam, "Vietnamese company means any enterprise that is established or registered under Vietnam's law and has its headquarter located in Vietnam."[300] A foreign-direct-invested company in Vietnam, consequently, is a Vietnamese enterprise, not a foreign company. On the other hand, Article 16 of the *Commercial Law* of Vietnam provides that "[f]oreign business entities shall be liable before the law of Vietnam for all operations of their representative offices and branches in Vietnam."[301] The conduct of a branch or a representative office of a foreign company is

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[295] Vietnamese *Penal Code of Vietnam*, 21 December 1999, 15/1999/QH10 [*Penal Code of Vietnam*] at Article 6.2.
[296] Phan, *supra* note 292 at 24.
[297] *Ibid*.
[298] Vietnamese *Commercial Law*, 14 June 2005, 36/2005/QH11 [*Commercial Law*] at Article 3.1.
[299] Vietnamese *Competition Law*, *supra* note 6 at Article 2.
[300] Vietnamese *Law on Enterprise*, 26 November 2014, 68/2014/QH13 [*Law on Enterprise*] at Article 4.9.
[301] Vietnamese *Commercial Law*, *supra* note 298 at Article 16.3.

that of the foreign company and is, therefore, still regarded as conduct that has taken place in a foreign territory. The second opinion, therefore, contends that the phrase "operating in Vietnam" refers to the link between the alleged conduct of a foreign enterprise that takes place abroad and its effects on Vietnam. This opinion is consistent with the effects doctrine in international law and the approach taken in other jurisdictions.

In the early days of the Vietnam Competition Authority ("VCA"), there was a widely-shared view that the *Competition Law* did not apply to conduct abroad.[302] After nine years of growth, the VCA has become capable of dealing with complicated cases, including offshore mergers.[303] Thus, the second opinion has come to prevail. The first case involving the extraterritorial application of the *Competition Law* of Vietnam was the Prudential Plc ("Prudential") and AIA Group Limited ("AIA") acquisition case.[304] In April 2010, the VCA received an application for consultation made by Prudential, based in England, and the American International Group Inc. ("AIG"), based in the U.S., concerning the plan of Prudential to acquire AIA, a subsidiary of AIG.[305] At the time of application, Prudential and AIA had subsidiaries in Vietnam.[306] The combined market share of the subsidiaries in the life insurance market in Vietnam was 47%.[307] The merger was not conducted in Vietnam and the participants were not Vietnamese companies.[308] The merger would, however, substantially affect the Vietnamese life insurance market because the affiliates of the merging parties had a large market share in Vietnam.[309] Despite the fact that the merger and merger participants were located abroad, Prudential and AIG worked with the VCA on the submission of their merger notification.[310] The case was closed in June 2010 because the participants chose not to proceed with the merger.[311]

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[302] Phan, *supra* note 292 at 25.
[303] Vietnam Competition Authority, *Annual Report 2010*, Annual Report (2011) at 29. See also Vietnam Competition Authority, *Report on Economic Concentration in Vietnam 2014*, Annual Report (2015) at 53.
[304] Vietnam Competition Authority, *supra* note 303 at 29.
[305] *Ibid*.
[306] *Ibid*.
[307] *Ibid*.
[308] *Ibid*.
[309] *Ibid*.
[310] *Ibid*.
[311] Prudential Plc Press Release, *Termination of Agreement to Combine with AIA Group Ltd* (2010).

The second case involving the extraterritorial application of the *Competition Law* of Vietnam is the P3 case in 2014.[312] P3 was an alliance of three big shipping companies: Maersk Line, Mediterranean Shipping Company, and CMA CGM. The head offices of these companies were located outside of Vietnam.[313] The participating companies sought to create a joint venture titled Network Centre, which would operate the P3 Network.[314] The participating firms submitted a merger notification to the VCA pursuant to Article 20 of the *Competition Law* of Vietnam, as the operation of the proposed network would affect the Vietnamese container shipping market.[315] This case was closed and the proposed network was abandoned when China's Ministry of Commerce, a competition authority, refused to approve the merger.[316]

Besides these two primary cases, there have been some offshore merger cases where the participating parties consulted the VCA before concluding the mergers.[317] These cases then came to an end because the combined market share of the participating parties exceeded 50% of the relevant market, making them prohibited mergers under the *Competition Law* of Vietnam.[318] This practice of merger control by the VCA suggests that the second viewpoint on the extraterritorial jurisdiction of the *Competition Law* of Vietnam has become the primary approach in Vietnam. The law, therefore, regulates not only conduct in Vietnam but also acts in a foreign territory that influences the Vietnamese market. This viewpoint is consistent with the effects doctrine in other jurisdictions.

The effects doctrine in Vietnam is, however, not clear because there is neither an official guideline nor a judgment stating the limit of the extraterritorial jurisdiction. The practical exercise of extraterritorial jurisdiction is not as aggressive as that of other countries.

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[312] *See* Vietnam Competition Authority, *supra* note 303 at 53.
[313] For information about Maersk *see generally*, AP Moller - Maersk, "About Us", online: <http://www.maersk.com/en/the-maersk-group/about-us>. For information about CMA CGM, see generally, CMA CGM, "About us", online: <https://www.cma-cgm.com/the-group/about-us/presentation>. For information about MSC, see generally, Mediterranean Shipping Company, "About Us", online: <https://www.msc.com/che/contact-us?showHQ=true>.
[314] Vietnam Competition Authority, *supra* note 303 at 53.
[315] *Ibid*.
[316] AP Moller - Maersk, "The P3 Network will not be Implemented Following Decision by the Ministry of Commerce (MOFCOM) in China", (17 June 2014), online: <http://www.maerskline.com/en-us/countries/int/news/news-articles/2014/06/p3-network>.
[317] Abbott acquired CFR. *See* Vietnam Competition Authority, *supra* note 303 at 53.
[318] Vietnamese *Competition Law*, *supra* note 6 at Article 18.

The exercise of jurisdiction relies heavily on the compliance of MNCs. Moreover, there has been no case where foreign law was enforced with respect to conduct in Vietnam. Thus, the degree of Vietnamese government opposition to such an exercise of extraterritorial jurisdiction is not clear.

5. CONCLUSION

In analyzing the key attributes of the extraterritorial application of competition law and the practical approaches of different countries, this chapter finds that extraterritorial measures are consistent with international law. In addition, the extraterritorial application of competition law relies on the effects doctrine.

Countries, however, take different approaches to the extraterritorial application of competition law. Canada consistently relies on the territorial principle in applying its competition law. Although sections 109 and 110 of the *Competition Act* provide for extraterritorial jurisdiction for merger notification, Canada practically confines the enforcement of the act to its territory. Additionally, Canada has enacted statutes that resist the enforcement of foreign competition law in Canada.

In contrast, the U.S. vigorously exercises extraterritorial jurisdiction in the area of competition law. American antitrust laws are applied to any conduct that takes place abroad and that has a direct, substantial, and reasonably foreseeable effect on U.S. trade or commerce. Courts in the U.S. must, however, consider the interests of foreign countries, international comity, and the sovereign immunity doctrine when deciding whether to apply American antitrust laws extraterritorially. The U.S. also does not oppose the extraterritorial application of foreign competition law in its territory. The approach to the extraterritorial application of competition law in the U.S. is internally consistent.

Japan, unlike the U.S., Canada, and Vietnam, adopts a double standard toward the extraterritorial application of competition law. On the one hand, Japan applies its competition law, the AMA, to business transactions conducted in foreign territory that substantially restrain competition inside Japanese territory. Japan arguably adopts the effects doctrine more aggressively than the United States does. While the U.S. considers only direct, substantial, and reasonably foreseeable effects, Japan considers acts conducted abroad that have indirect effects on the Japanese market. On the other hand, Japan strongly opposes the

application of foreign competition law to conduct in Japanese territory. Unlike the U.S. and Canada, Japan employs an internally inconsistent approach to the extraterritorial application of competition law, which might cause conflict between countries in cross-border competition cases.

Finally, Vietnam is a developing country that has been enforcing competition law for only ten years. Although there are two contrasting opinions on the extraterritorial jurisdiction of the *Competition Law* of Vietnam, the practice of merger control indicates that Vietnam is changing its approach to favour the extraterritorial principle when applying its competition law. The practical application of the Vietnamese competition law to mergers conducted completely abroad by foreign companies suggests that the effects doctrine is not simply the privilege of a powerful country, but a doctrine that a small, developing country can also effectively employ. Like the U.S., Vietnam does not oppose the application of foreign competition law to conduct that takes place in Vietnam.

The inconsistency in the extraterritorial application of competition law at the global level deepens the conflicts among national competition laws in dealing with cross-border competition cases. While some countries are enforcing their competition law extraterritorially to protect their national interests, others strongly oppose this measure. International institutions offer one possibility for overcoming these conflicts. The following chapter considers the prospect of international cooperation in the competition law area.

Chapter 4

International Cooperation in Competition Law[1]

1. INTRODUCTION

Exemptions for export cartels and different approaches to the extraterritorial application of competition law discussed in Chapter 3 suggest that it is important for countries to co-operate in dealing with cross-border competition cases. This chapter analyses international cooperation as a way for countries to deal with transnational competition problems.

By examining different means of cooperation among countries in dealing with transnational anticompetitive conduct, this chapter demonstrates that countries have not been able to develop a reliable and binding international mechanism to deal with transnational competition cases. In negotiating international agreements on competition, developed countries often seek to achieve international competition regimes that facilitate trade liberalization, while developing countries emphasize the need to respect their diversity in terms of stages of development, socio-economic circumstances, legal frameworks and cultural norms.[2] Developing countries also raise concerns about the financial and administrative burdens they would have to incur in implementing an agreement that set developed country standards.[3]

International cooperation in competition law, therefore, relies on voluntary participation by countries as well as soft cooperation mechanisms such as those provided by the Organisation for Economic Co-operation and Development ("OECD"), the United Nations Conference on Trade and Development ("UNCTAD"), or the International Competition Network ("ICN"). These voluntary participation and soft cooperation

[1] This chapter was published as a journal article entitled "Realism and International Cooperation in Competition Law" in Houston Journal of International Law, Volume 41, Issue I, 2018.
[2] Aditya Bhattacharjea, "The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective" (2006) 9:2 Journal of International Economic Law 293 at 296–297.
[3] *Ibid* at 297.

mechanisms may be constrained by the conflicting interests of countries in a cross-border case. The lack of an effective international cooperation mechanism in competition law, therefore, makes it difficult for countries to deal with transnational competition problems.

This chapter consists of four sections and a conclusion. Section two provides an overview of international cooperation in competition law. It analyses the benefits as well as the drawbacks of formal international agreements on competition law. Section three discusses multilateral cooperation regimes in competition law concluding that attempts by countries to integrate competition rules into multilateral agreements focus on promoting market access instead of consumer welfare, competition or efficiency. A possible solution for multilateral cooperation in this area of law is having soft or non-binding laws, which may help countries cooperate but are insufficient to deal with transnational competition challenges. The fourth section analyses some bilateral agreements on competition law. Bilateral agreements that provide significant cooperation on matters of procedure and enforcement between the parties only work for some developed countries with robust competition law regimes.

2. OVERVIEW OF INTERNATIONAL COOPERATION IN COMPETITION LAW

Global competition purports to benefit society from several perspectives. First, global competition promotes global economic welfare by allowing markets to allocate resources to their optimal uses.[4] Second, global competition creates larger, more efficient markets that "reduce waste, increase output from available resources and lower costs to consumers.".[5] Third, global competition stimulates economic growth and thereby "increases aggregate wealth, produces jobs, funds other social and political activities."[6]

On the other hand, global competition allows for transnational anticompetitive conduct. According to the Organisation for Economic Co-operation and Development (OECD), the annual average number of cross-border mergers has increased from 3,513 in the period from

[4] David J Gerber, *Global Competition: Law, Markets, and Globalization* (New York: Oxford University Press, 2010) at 278.
[5] *Ibid*.
[6] *Ibid*.

1995 to 1999 to 7,523 in the period from 2007 to 2011.[7] Likewise, the number of cross-border cartels revealed in an average year has increased substantially. From 1990 to 1994 there was an average of about three cross-border cartels per year. From 2007 to 2011 the average number of revealed cartel cases per year was about 16.[8]

Global competition governance, however, has not kept up with the rise of transnational anticompetitive business practices. Some countries are seeking international cooperation in competition law while some others are unwilling to cooperate.[9] In addition, the effectiveness and strength of competition authorities differs from country to country.[10] The OECD found that "some competition authorities where the law has been violated, have either not investigated in their own jurisdictions or did not have access to sufficient evidence to impose fines."[11]

As business transactions become more transnational, competition authorities face greater difficulties in dealing with cross-border anticompetitive business practices. The lack of cooperation in this field of law may result in several problems, including high costs of enforcing laws and negative effects externalized by national competition laws.[12] Countries, however, may incur costs to achieve international cooperation in this field of law. This section discusses the problems with not having international cooperation in competition law and costs that countries may incur if they cooperate in this area.

2.1. Problems with not Having International Cooperation in Competition Law

The divergence of national competition regimes and the lack of international cooperation gives rise to four main problems. First, the absence of effective international cooperation results in unilateral conduct which may deepen conflicts among countries. Section 2 of Chapter 3 points out that the competition laws of some countries, such as

[7] The Organisation for Economic Co-operation and Development, *Challenges of International Co-operation in Competition Law Enforcement* (OECD, 2014) at 24.
[8] *Ibid* at 29.
[9] See section 3.
[10] Anu Bradford, "International Antitrust Negotiations and the False Hope of the WTO" (2007) 48 Harvard International Law Journal 383 at 401.
[11] The Organisation for Economic Co-operation and Development, *supra* note 7 at 49.
[12] Paul Stephan, "Global Governance, Antitrust, and the Limits of International Cooperation" (2005) 38:1 Cornell International Law Journal 173 at 183.

Canada,[13] the U.S.,[14] and Vietnam,[15] explicitly provide exemptions for business transactions that enhance global competitiveness of domestic firms regardless of their adverse anti-competitive effects on foreign markets. These exemptions are controversial from a global perspective.[16] Under the competition laws of countries affected by such mergers or cartels, those business transactions are illegal. Affected countries, therefore, would protect their markets by enforcing their competition law extraterritorially. Consequently, the extraterritorial application of affected countries' competition laws creates conflicts in law enforcement.[17] Countries where the exempted cartels or mergers operate may take measures to resist the extraterritorial application of foreign competition laws. For example, as discussed in Chapter 3, Canada has several provincial and federal blocking and claw back laws.[18] These laws allow Canadian companies and individuals to refuse orders relating to access to business records in Québec and Ontario made by a foreign competition authority or court.[19] In addition, the Canadian *Foreign Extraterritorial Measures Act*[20] empowers the Canadian Attorney General to declare that a foreign judgment is not recognized and enforced in Canada.[21] The Act also provides measures for a Canadian resident to recover the damages and expenses incurred due to such a foreign judgment.[22] These conflicts among countries, however, may be solved by cooperation. The OECD suggests that cooperation aims at minimizing risks of divergent outcomes by facilitating dialogue among the enforcers involved reviewing of the same cases.[23]

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[13] Canadian *Competition Act*, RSC, 1985, c C-34 [*Competition Act*], s 45.5, as amended.
[14] American *Webb-Pomerene Act*, 1918, 15 USC §§ 61-66 [*Webb-Pomerene Act*]. See also American *Export Trading Company Act*, 1982, 15 USC §§4001-4016 [*Export Trading Company Act*].
[15] Vietnamese *Competition Law*, 3 December 2004, 27/2004/QH11 [*Competition Law*] at Article 10.
[16] Stephan, *supra* note 12 at 198.
[17] See Chapter 3 section 4.
[18] See more in Chapter 3 section 4.1.1. Québec *Business Concerns Record Act*, RSQ 1977, c D-12 [*Business Concerns Record Act*]. Ontario *Business Records Protection Act*, RSO 1990, c B-19 [*Business Records Protection Act*]. Canadian *Foreign Extraterritorial Measures Act*, RSC 1985, c F-29 [*Foreign Extraterritorial Measures Act*].
[19] Ontario *Business Records Protection Act*, *supra* note 18, s 1(d). Québec *Business Concerns Record Act*, *supra* note 18, s 3(d).
[20] Canadian *Foreign Extraterritorial Measures Act*, *supra* note 18.
[21] *Ibid*, s 8.
[22] *Ibid*, s 9(1).
[23] The Organisation for Economic Co-operation and Development, *supra* note 7 at 19.

Second, global society may incur negative effects externalized by national competition laws due to the lack of cooperation among countries.[24] A competition regime that strengthens the monopoly position of a local producer will inflict costs on producers and consumers of other countries.[25] International rules on competition, therefore, would prevent individual countries from producing global welfare losses.[26] Given that national protectionism is often demanded by certain industries or interest groups, international negotiations may help to reduce the power of the lobbying actors.[27] When governments participate in a negotiation, powerful interest groups in one state may be offset by counterparts in another.[28]

Third, the lack of cross-border cooperation may result in overlapping investigations launched by different countries against the same violations. These overlapping procedures make the costs for remedying cross-border competition cases unnecessarily high.[29] Moreover, private actors also incur high costs due to overlapping enforcement efforts.[30] Multiple jurisdictions may punish a corporation or an executive for the same violations without considering sanctions imposed on the violators in other jurisdictions.[31] Overlapping merger reviews also increase transaction costs and result in unnecessary delays as well as legal uncertainty.[32]

Fourth, by conducting overlapping investigations in a certain cross-border case without cooperation, each competition authority may have a portion of evidence but none of them may have sufficiently thorough facts about the violation. An international cartel may operate in different countries. Each of these countries' competition authorities can obtain evidence only within their territory, while missing any piece of evidence may make it difficult for them

[24] In this situation, the negative externality is a loss of consumer welfare in more than one country. See Stephan, *supra* note 12 at 183. See also Andrew T Guzman, "Is International Antitrust Possible" (1998) 73 New York University Law Review 1501 at 1517 (hereinafter "Guzman, Is International Antitrust Possible").
[25] Stephan, *supra* note 12 at 183.
[26] *Ibid* at 182.
[27] Andrew Guzman, "The Case for International Antitrust" (2004) 22:3 Berkeley Journal of International Law 355 at 366 (hereinafter "Guzman, The Case for International Antitrust").
[28] *Ibid*.
[29] Hugh M Hollman, William E Kovacic & Andrew S Robertson, "Building Global Antitrust Standards: the ICN's Practicable Approach" in Ariel Ezrachi, ed, *Research Handbook on International Competition Law* (Northampton, Massachusetts, U.S.: Edward Elgar Publishing, 2012) at 91.
[30] Gerber, *supra* note 4 at 94.
[31] The Organisation for Economic Co-operation and Development, *supra* note 7 at 47.
[32] Bradford, *supra* note 10 at 398.

to prove and remedy such a transnational violation. According to the OECD, cooperation allows a competition authority to use material of the counterparts and therefore offers authorities the opportunity to have more effective investigations and to generate efficiencies.[33]

2.2. Costs of International Cooperation in Competition Law

Countries may incur high costs to achieve cooperation in the competition law area even though international cooperation may help them solve the above-mentioned problems.[34] The OECD observed that "providing co-operation in a specific matter can be time and resource intensive, particularly for smaller agencies."[35] Countries that pursue international cooperation in competition law may incur the following four types of costs.

The first type of costs refers to costs countries may incur for dealing with distributional problems.[36] States have difficulties "ex-ante identifying which country would fare better under an international agreement and, therefore, who should compensate whom and by how much."[37] Agreements on competition law do not necessarily promote the welfare of all participating countries and some of them may be worse off.[38] Potential losers would not participate in an international competition law agreement unless they are compensated in some other form.[39]

Second, an individual country that participates in making an international competition agreement also incurs costs in addressing domestic conflicts of interest that arise in the context of negotiating an international competition law agreement.[40] Some voters who will not derive any benefit from such an agreement or who may be worse off under such an

[33] The Organisation for Economic Co-operation and Development, *supra* note 7 at 19.
[34] Guzman, The Case for International Antitrust *supra* note 27 at 364.
[35] The Organisation for Economic Co-operation and Development, *supra* note 7 at 19.
[36] Distributional problem arises as states assume that the costs and the benefits of an international antitrust agreement would be unevenly distributed among them. See Bradford, *supra* note 10 at 385.
[37] *Ibid*.
[38] Guzman, Is International Antitrust Possible, *supra* note 24 at 1542.
[39] *Ibid*.
[40] *Ibid* at 1544.

agreement may oppose it.[41] For example, exporting companies may oppose the formation of an international agreement that aims to eliminate exemptions for export cartels or mergers. Negotiators might favour the interests of certain groups over those of others. Thus, each country must solve domestic conflicts of interest before reaching an agreement with other negotiating partners.

Third, developing countries may incur higher costs than developed countries in adjusting their competition regimes to meet standards specified in an international agreement. For example, amending domestic laws and building capacity for antitrust agencies to enforce an agreement are costly for negotiating countries.[42] Complying with an international agreement would probably not be much of a burden on developed countries that have competition law regimes generally consistent with international competition law standards.[43] Developing countries that do not have competition law regimes generally consistent with international standards are likely to find adjusting to an international cooperative competition law regime more expensive. Fourth and finally, countries participating in an international agreement may also incur "sovereignty costs", which deprive a country of some independence in decision making or requires a country to change domestic laws as part of concessions to other countries.[44] The next section examines how these costs partly constrain countries from achieving multilateral cooperation in competition law.

3. MULTILATERAL COOPERATION IN COMPETITION LAW

The differences between national competition laws and the conflicting interests among countries in certain competition cases may result in negative effects externalized by national competition laws.[45] Unilateral efforts are no longer an appropriate measure to deal with problems within global competition law.[46] Some countries, therefore, seek to cooperate in

[41] Bradford, *supra* note 10 at 401. See also Guzman, Is International Antitrust Possible *supra* note 24 at 1544; and David L Levy & Aseem Prakash, "Bargains Old and New: Multinational Corporations in Global Governance" (2003) 5:2 Business and Politics 131 at 136.
[42] Bradford, *supra* note 10 at 401.
[43] *Ibid* at 412.
[44] *Ibid* at 401.
[45] See *supra* note 24. See Stephan, *supra* note 12 at 183; and Guzman, Is International Antitrust Possible *supra* note 24 at 1517.
[46] Gerber, *supra* note 4 at 280. See Chapter 3 section 4.

competition law to deal with transnational competition issues although a global policy is generally not optimal for every country.[47]

Despite the importance of international cooperation in competition law, countries have never attempted to make a standalone global agreement on competition. They are instead seeking to integrate competition rules into multilateral trade agreements. There are two different opinions that explain this integration. According to the first opinion, the main objective of competition rules in a trade agreement is trade liberalization but not the traditional economic objectives of competition law.[48] Competition rules integrated into an international trade agreement are made to ensure market access, not consumer welfare.[49] Under such an antitrust market access approach, international trade law would adopt a principle of prohibiting anticompetitive business practices that block market access.[50] Countries might agree on the general principle that "there should be no substantial unjustified market blockage by public or private action (as well as no transnational cartels),"[51] and countries should take a liberal antitrust approach to support the worldview of liberal trade.[52]

The second explanation for the integration of international competition rules in trade agreements argues that the success of international competition rules depends on the concessions among countries in other areas of the agreement. Some countries may be better off while some others may be worse off due to the formation and enforcement of competition rules in such a trade agreement.[53] An agreement in antitrust law could be reached if worse-off countries are able to obtain concessions in other areas of negotiation. Countries would, therefore, consider other unrelated issues concurrently with international cooperation on competition law.[54] For example, developing countries may incur costs in reforming their competition law regimes, but they could exchange the required antitrust reforms for a

[47] Guzman, Is International Antitrust Possible *supra* note 24 at 1544.
[48] Stephan, *supra* note 12 at 185. See economic objectives of competition law in Chapter 2.
[49] Rene Uruena, "The World Trade Organization and its Powers to Adopt a Competition Policy" (2006) 3 International Organizations Law Review 55 at 62–63. See also Eleanor M Fox, "Toward World Antitrust and Market Access" (1997) 91:1 The American Journal of International Law 1 at 19–22.
[50] Fox, *supra* note 49 at 23.
[51] *Ibid*.
[52] *Ibid* at 2.
[53] Bradford, *supra* note 10 at 385. See also Guzman, Is International Antitrust Possible *supra* note 24 at 1544.
[54] Guzman, Is International Antitrust Possible *supra* note 24 at 1545.

commitment from developed countries to reduce agricultural subsidies or tariff barriers.[55] Although integrating competition rules into multilateral trade agreements provides countries with more incentives to negotiate, countries have not been successful in doing so.[56]

This section explores three possible ways to achieve global cooperation in competition law. The first way is to create a harmonized global competition regime that directly regulates undertakings within the territories of member countries. Such a regime would establish an international authority dealing with cross-border competition cases. The second way is to forge an international agreement that relies on national competition laws and enforcement mechanisms of member countries to deal with cross-border cases. The third way refers to soft laws and soft cooperation, which do not affect the sovereignty of participating countries. Soft laws and soft cooperation offer states low-cost means of addressing transnational competition problems.

3.1. A Harmonized Global Competition Regime

A harmonized global competition regime—consisting of a global competition code and an enforcement mechanism—is an ideal tool for dealing with cross-border competition issues.[57] Unlike international agreements that regulate the behaviours of states, a global competition code would regulate and remedy illegal business practices directly. Such a regime would also provide an institution to which member countries would transfer their sovereignty to deal with cross-border competition cases. This level of cooperation would address concerns about conflicts of interest and the divergence of competition laws among member countries in competition cases.

Having a global competition code and a corresponding institution, however, may result in four problems for participating countries. First, the global code and institution would bring about inflexibility because fixed obligations would be applicable to countries that have competition regimes at different levels of development.[58] While some countries may demand exceptions, some may oppose taking into account differences among countries' level of

[55] Bradford, *supra* note 10 at 413.
[56] See subsection 3.2.
[57] See Levy & Prakash, *supra* note 41 at 138.
[58] Gerber, *supra* note 4 at 319.

development and pursue objectives on non-discrimination.[59] Second, the code and institution would impose high costs on participating countries especially developing countries.[60] Third, an international institution may incur institutional failures as national institutions can, but the problems are likely to be more complex for an international regime.[61] For example, an international institution may apply a controversial economic theory that serves the interests of certain countries or pursues objectives other than those of competition law, such as trade liberalization.[62] Fourth, a global competition regime that considers export cartels to be anti-competitive would have to overcome the resistance of exporting countries and would have a costly cross-border enforcement mechanism.[63] Therefore, a global competition code and a corresponding institution are likely hard to create.[64]

Although a harmonized global competition regime would be the most effective way to deal with global anti-competitive conduct, such a regime has never materialized. The *Treaty of Rome*,[65] which established the European Economic Community, is the only regional agreement that provides a cross-border enforcement institution and transnational competition rules applying directly to undertakings.[66] The transnational competition regulations of the E.U. result from the efforts of member countries to build a community in which competition law is not the only rule of trade.[67] The prerequisite of the transnational competition code of the E.U. is a high degree of economic integration of member countries.[68] European integration provides a transnational power for competition law in the E.U.[69] In addition, free trade is the foundation of the competition policy of the E.U.[70] The *Treaty of Rome* also

[59] See for example discussion in subsection 3.2.1 about the tension between developed and developing countries in negotiating competition rules in the Havana Charter. See more Richard Toye, "Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948" (2003) 25 The International History Review 282 at 291.
[60] Gerber, *supra* note 4 at 324.
[61] Stephan, *supra* note 12 at 175.
[62] *Ibid* at 199.
[63] *Ibid* at 198.
[64] *Ibid* at 203.
[65] *Treaty of Rome*, 25 March 1957 [*Treaty of Rome*].
[66] Article 85 of the Treaty prohibits anti-competitive agreements. Article 86 prohibits abuse of a dominant position.
[67] Fox, *supra* note 49 at 225.
[68] Gerber, *supra* note 4 at 321.
[69] *Ibid*.
[70] Fox, *supra* note 49 at 224.

prohibits member countries from providing subsidies that "distort or threaten to distort competition".[71]

3.2. International Agreements Relying on National Competition Regimes

The second form of global cooperation in competition law relies on national competition regimes and international comity. This form of cooperation provides neither substantive rules governing business practices directly nor a mechanism to deal with transnational competition cases. This form of cooperation may establish a mechanism allowing a member country, or an international institution, to request that the competition laws of another member country be enforced by that other member country to deal with an anti-competitive practice taking place in the territory of the country receiving the request where the anti-competitive practices have adverse effects in the territory of the country making the request.

Cooperation among independent competition regimes relies on countries reciprocally agreeing to consider important interests of the other country when conducting their law enforcement activities.[72] This is referred to as "positive comity". The OECD classifies two types of comity: negative and positive comity. Negative or traditional comity refers to "a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests."[73] Positive comity involves "a request by one country that another country undertakes enforcement activities in order to remedy an allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country."[74] The following subsections (3.2.1 to 3.2.4) discuss failed efforts made by countries to achieve global cooperation among independent competition regimes.

[71] *Treaty of Rome*, *supra* note 65 at Article 92.
[72] The Organisation for Economic Co-operation and Development, *supra* note 7 at 11.
[73] *Ibid* at 13.
[74] *Ibid*.

3.2.1. The collapse of the Havana Charter

After World War II countries attempted to create the International Trade Organization (ITO) encompassing a wide range of rich and poor countries.[75] In 1948, the United Nations Conference on Trade and Employment concluded a final act in Havana.[76] The *Havana Charter* sought to provide a broader scope and more detail than any previous agreement on economic relations.[77]

Chapter V of the Charter was designed to regulate restrictive business practices. It required each member to take appropriate measures and cooperate with the ITO to prevent business practices affecting international trade that restrained competition, for example, price fixing, market allocation, production restriction, or excluding competitors.[78] Article 47 of the Charter provided consultation procedures to reach a mutually satisfactory conclusion regarding an antitrust case between a member country in which the anti-competitive business practice is conducted and a party which is affected by the practice.[79]

In addition, the Charter also provided a mechanism that would have allowed the affected country to complain to the ITO. According to Article 48.4,

> if the Organization decides that an investigation is justified, it shall inform all Members of the complaint, request any Member to furnish such additional information relevant to the complaint as the Organization may deem necessary, and shall conduct or arrange for hearings on the complaint. Any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of, shall be afforded reasonable opportunity to be heard.[80]

Article 48.5 allowed the ITO to review all information available and decide "whether the practice in question has had, has or is about to have harmful effects" on the expansion of production or trade or if it would interfere with the achievement of any of the other objectives

[75] Toye, *supra* note 59 at 282.
[76] *Final Act of The United Nations Conference on Trade and Employment* (Lake Success, New York, 1948).
[77] Toye, *supra* note 59 at 303.
[78] *Supra* note 76 at Article 46.3.
[79] *Ibid* at Article 47.
[80] *Ibid* at Article 48.4.

of the Charter.[81] Moreover, the ITO had the power to request that any member concerned report fully on the remedial action it had taken in any particular case.[82]

However, the efforts to prevent cross-border restrictive business practices under the Charter relied on member states' competition mechanism. According to Article 50.1:

> each Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of Article 46 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organization in preventing these practices.[83]

Article 52 also provided that "[n]o act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade."[84]

Chapter V of the Havana Charter, however, collapsed with the whole Charter and the ITO for two main reasons. First, the demands of developed and underdeveloped countries were different.[85] The demands of some of the underdeveloped countries for "unequal treatment" were extreme and were not always clearly reasoned while European countries, especially, Britain did not consider the difference among countries' level of development and pursued objectives on non-discrimination.[86] Second, there was domestic political resistance in the U.S.—a country that played an important role in the international system at the time.[87] The U.S. Congress did not ratify the Charter due to organized opposition to it and because the Republican Party—a party that pursued protectionism and isolationism—took over control of the U.S. Congress in 1947.[88] The Havana Charter was opposed on the basis that it was strongly constructed on liberal trade principles.[89]

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[81] *Ibid* at Article 48.5.
[82] *Ibid* at Article 48.8.
[83] *Ibid* at Article 50.1.
[84] *Ibid* at Article 52.
[85] Ivan D Trofimov, "The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective" (2012) 5 Journal of Politics and Law 56 at 57. See also Toye, *supra* note 59 at 291.
[86] Toye, *supra* note 59 at 291.
[87] Trofimov, *supra* note 85 at 57.
[88] *Ibid.*
[89] Toye, *supra* note 59 at 283.

3.2.2. The unborn Draft International Antitrust Code

In 1992 and 1993, a group of competition scholars proposed a Draft International Antitrust Code ("DIAC") that was designed to be the "international law of competition, consisting of unfair trade and restraint of competition inhibitions."[90]According to Wolfgang Fikentscher, a co-author of the DIAC, "having the [WTO] in place, it would be strange if this trade organization would not look into the question of competition."[91] The drafters expected that the DIAC could be a candidate for Annex 4 of the WTO.[92]

The drafters set five principles in drafting the DIAC. The first principle was to not have a world law but, instead, to "let national antitrust laws do the job, and let national antitrust laws stay in their place and take care of the problems which are posed in the international arena".[93] The DIAC, therefore, did not aim to create substantive rules directly governing private actors or establish an international competition institution to take over the role of national competition authorities at the international level. The second principle was the national treatment principle that requires the competition regime of each country to treat home enterprises and foreign firms equally.[94] The third principle was the principle of minimum standards that would regulate the "consensus wrong."[95] The drafters expected to propose antitrust offences that every country is likely to prohibit. The fourth principle was the principle of self-execution that would authorize an international agency to safeguard the application of national competition laws[96] by allowing an international agency anti-trust official to enforce the competition laws of a country that did not enforce its own competition laws properly. The fifth principle was that the DIAC would apply only to cross-border cases.[97]

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[90] Wolfgang Fikentscher, "The Draft International Antitrust Code (DIAC) in the Context of International Technological Integration - The Institutional and Jurisdictional Architecture" (1996) 72:2 Chicago-Kent Law Review 533 at 533.
[91] *Ibid.*
[92] *Ibid* at 535.
[93] *Ibid* at 536.
[94] *Ibid* at 537.
[95] *Ibid.*
[96] *Ibid* at 538.
[97] *Ibid* at 539.

The DIAC was opposed for several reasons by some countries.[98] Fikentscher observes that one objection was that the DIAC was too general while another objection was that it should have been more general but with wider scope.[99] Some authors, however, assert that many countries, including the U.S., did not accept the DIAC because, among other concerns, the prohibitions were overly broad, the wording was ambiguous, and the DIAC contained several procedural flaws.[100] Despite its flaws and failure, the DIAC was an effort to achieve a widely perceived goal: "international recognition of an obligation upon all governments to prevent private business firms from closing or restricting access to markets."[101]

3.2.3. The failure of a WTO's agreement on competition

The WTO is the only global international organization dealing with the rules of trade among countries.[102] From an international trade perspective, a multinational competition agreement should perfectly supplement trade liberalization policy because a global competition agreement would aim to reduce trade restrictions.[103] The WTO, therefore, acknowledges the role of a multilateral competition framework in its trade topics. The WTO's first Ministerial Conference in 1996 in Singapore established the Working Group on the Interaction between Trade and Competition Policy (the Working Group). According to the Singapore Ministerial Declaration, this working group studies "issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, to identify any areas that may merit further consideration in the WTO framework."[104] In 1997 and 1998, the Working Group focused on three main issues:

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[98] *Ibid* at 542.
[99] *Ibid* at 542–543.
[100] Daniel J Gifford, "The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry" (1996) 6:1 University of Minnesota Law School 1 at 4–5. See also Fox, *supra* note 49 at 15–16.
[101] Gifford, *supra* note 100 at 28.
[102] "What is the WTO?", online: *The World Trade Organization* <https://www.wto.org/english/thewto_e/whatis_e/whatis_e.htm>.
[103] Uruena, *supra* note 49 at 55. See also Fox, *supra* note 49 at 19–22.
[104] World Trade Organization, *Singapore WTO Ministerial Declaration WT/MIN(96)/DEC* (Singapore, 1996), para 20.

> (i) The relationship between the objectives, principles, concepts, scope and instruments of trade and competition policy; and their relationship to development and economic growth, (ii) Stocktaking and analysis of existing instruments, standards, and activities regarding trade and competition policy, … (iii) The interaction between trade and competition policy.[105]

According to the Working Group's report in 1999, many members affirmed the need to enhance cooperation among members in addressing anti-competitive practices. However, their views differed on the need for action "at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system."[106] While several members supported a multilateral agreement on competition policy in the WTO, others favoured bilateral and/or regional cooperation in competition.[107]

The fourth Ministerial meeting in Doha in 2001 recognized the demand of developing and less-developed countries for technical assistance and capacity building in the competition law area.[108] The Ministerial meeting agreed that negotiations would "take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations."[109] The Working Group planned to work on core principles, including "transparency, non-discrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building."[110] However, the fifth Ministerial Conference in Cancún in 2003 ended without consensus.[111] There was no discussion of competition law in subsequent

[105] World Trade Organization, *Trade and Competition Policy: Working Group Set Up by Singapore Ministerial* (Seattle, U.S, 1999).
[106] *Ibid*.
[107] *Ibid*.
[108] World Trade Organization, *Doha WTO Ministerial Declaration WT/MIN(01)/DEC/1* (Doha, Qatar, 2001), para 24.
[109] *Ibid*, para 23.
[110] *Ibid* at 25.
[111] World Trade Organization, *Summary of The Cancún Ministerial Conference* (Cancún, Mexico, 2003).

conferences in Hong Kong in 2005,[112] Geneva in 2009,[113] Geneva in 2011,[114] Bali in 2013,[115] or Nairobi in 2015.[116]

The U.S., which is an influential member of the WTO, rejected the WTO proposals on competition law. Some American experts expressed fear that an international institution governing competition law might undermine national sovereignty, and that a global rule would be inconsistent with the objectives of some countries' competition laws.[117] In addition, they feared that a WTO body would enforce international competition policy against American corporations.[118] The U.S. experts, therefore, argued that "an international competition law framework is simply not necessary."[119]

The WTO's proposals on competition law were also opposed by developing countries. These countries resisted a "one size fits all" agreement and feared the transplantation of competition law—a legal idea that has evolved in industrial countries—into developing economies.[120] These countries emphasized the need to respect their "diversity in terms of stages of development, socio-economic circumstances, legal frameworks and cultural norms."[121] A number of developing countries were also concerned by the potential administrative burdens arising from enforcement of a competition law agreement.

In sum, WTO member countries have not been able to reach an agreement on competition law for five reasons. First, since the WTO deals with rules of trade between nations, its proposed competition agreement tends to focus more on trade liberalization than the core objectives of competition law such as protecting consumer welfare, protecting competition, or promoting efficiency.[122] Second, concern by countries for their self-interest over the unfair distribution of interests and over the cost of such an agreement were too strong

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[112] World Trade Organization, *Hongkong WTO Ministerial Declaration WT/MIN(05)/DEC* (Hongkong, China, 2005).
[113] World Trade Organization, *The Seventh WTO Ministerial Conference* (Geneva, Switzerland, 2009).
[114] World Trade Organization, *The Eighth WTO Ministerial Conference* (Geneva, Switzerland, 2011).
[115] World Trade Organization, *The Ninth WTO Minister Conference* (Bali, Indonesia, 2013).
[116] World Trade Organization, *Nairobi WTO Ministerial Declaration WT/MIN(15)/DEC* (Nairobi, Kenya, 2015).
[117] See this discussion in Gerber, *supra* note 4 at 105–106.
[118] *Ibid* at 106.
[119] *Ibid*.
[120] Bhattacharjea, *supra* note 2 at 297.
[121] *Ibid* at 296–297.
[122] Uruena, *supra* note 49 at 55. See also Fox, *supra* note 49 at 19–22.

to overcome. Third, the WTO's national treatment and the most-favoured-nation principles could constrain enforcement by a member country's competition authority, especially in transnational merger cases.[123] For example, country A might block a merger between a foreign firm and a domestic firm due to its anti-competitiveness, but country A might nevertheless allow a similar merger between two domestic firms on the basis that its efficiency gains outweigh its anti-competitiveness. Countries that have interest in the merger may argue that country A is discriminating between domestic firms and foreign firms. Country A and other countries in question may not agree on the similarity between the two cases. The national treatment principle, therefore, may constrain the enforcement of country A's competition law. Fourth, some countries provide exemptions for export cartels and countries are taking different approaches to the extraterritorial application of competition law.[124] A WTO agreement on competition law, therefore, could not be achieved until these differences between countries are mitigated. Fifth and finally, setting up a dispute settlement mechanism for an agreement on competition law would be a difficult task for WTO member countries. The Government of Canada asserts that competition law enforcement is fact and data intensive and requires detailed investigation.[125]

3.3. Soft Laws and Soft Cooperation Governing Transnational Competition Problems

As mentioned above, some countries are not willing to reach a binding multilateral agreement on competition because of the gap between countries in their capacity to implement the agreement[126] as well as the differing demands of countries.[127] In addition, a binding multilateral agreement may require member countries to give up some degree of their

[123] World Trade Organization, "Principles of The Trading System", online: <https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm>.
[124] See Chapter 3.
[125] Government of Canada, *Options for the Internationalization of Competition Policy*, Reports (1999), pt V.
[126] Bhattacharjea, *supra* note 2 at 296–297.
[127] Trofimov, *supra* note 85 at 57. See also Toye, *supra* note 59 at 291.

sovereignty.[128] Countries, therefore, seek soft laws and soft cooperation to fulfil their demand for low-cost means of addressing transnational competition problems.

Soft laws here refer to non-binding rules providing countries with flexible solutions to deal with transnational competition problems.[129] These laws allow adhering countries to adapt gradually to a new regime and to select only the provisions they prefer for implementation.[130] Soft laws rely on mutual understanding among countries and help competition laws across countries converge without weakening the enforcement of their national competition regime. [131] They also promote cooperation among competition agencies in dealing with transnational competition cases. Soft or informal cooperation is defined as unofficial, casual, daily, friendly and unconstrained collaboration between competition agencies.[132] An advantage of soft cooperation is "states' willingness to enter into deeper substantive commitments if those commitments are kept non-binding."[133] The following subsections analyse multilateral soft laws on competition provided by the International Competition Network, the Organisation for Economic Co-operation and Development, and the United Nations Conference on Trade and Development.

3.3.1. The International Competition Network

The ICN, which was launched on 25 October 2001, consists of 104 competition agencies from 92 jurisdictions.[134] The ICN provides a dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.[135] The ICN serves to "advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and

[128] Bradford, *supra* note 10 at 401.
[129] Guzman, The Case for International Antitrust *supra* note 27 at 370.
[130] Ariel Ezrachi, *Research Handbook on International Competition Law* (Massachusetts, U.S.: Edward Elgar Publishing, 2012) at 96.
[131] Guzman, Is International Antitrust Possible *supra* note 24 at 1543.
[132] The United Nations Conference on Trade and Development, *Informal Cooperation among Competition Agencies in Specific Cases*, TD/B/C.I/CLP/29 (Geneva, Switzerland: UNCTAD, 2014) at 3.
[133] Bradford, *supra* note 10 at 439.
[134] The International Competition Network, *ICN Factsheet and Key Messages* (ICN, 2009) at 1.
[135] The International Competition Network, "About the International Competition Network", online: <http://www.internationalcompetitionnetwork.org/about.aspx>.

substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide."[136]

The ICN is not a rule-making body.[137] The ICN says that "[w]here the ICN reaches consensus on recommendations, or 'best practices', arising from the projects, individual competition authorities decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate."[138] A notable work of the ICN on international cooperation is the Practical Guide to International Enforcement Cooperation on Mergers.[139] This guide is intended to serve as: "(i) a voluntary and flexible framework for inter-agency cooperation on merger investigations; (ii) practical guidance for agencies seeking to engage in such cooperation; and (iii) practical guidance for merging parties and third parties seeking to facilitate cooperation."[140] It provides agencies with cooperation guidance in specific cases but allows competition authorities to decide the form of their cooperation.[141] Thus, the ICN's soft cooperation framework allows competition agencies to deal with transnational competition cases when necessary without giving up their sovereignty.[142]

3.3.2. The Organisation for Economic Co-operation and Development

The OECD, which consists of 34 member countries, has adopted a number of non-binding recommendations on competition law and policy and best practices such as the OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings,[143] the Revised Recommendation Concerning Co-operation

[136] *Ibid*.
[137] *Ibid*.
[138] *Ibid*.
[139] The International Competition Network, *Practical Guide to International Enforcement Cooperation in Mergers* (ICN, 2012).
[140] *Ibid*, para 3.
[141] *Ibid*, s II.3.
[142] Guzman, The Case for International Antitrust *supra* note 27 at 370.
[143] The Organisation for Economic Co-operation and Development, *OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings* (2014).

Between Members Countries on Anticompetitive Practices Affecting International Trade,[144] and the Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations.[145]

The Recommendation concerning International Co-operation on Competition Investigations and Proceedings is a remarkable soft law of the OECD that calls for significant cooperation between adherents.[146] Adherents, by adopting this recommendation on 16 September 2014, recognize that "anticompetitive practices and mergers with anticompetitive effects may constitute an obstacle to the achievement of economic growth, trade expansion and other economic goals."[147] The recommendation, therefore, suggests that the adherents promote international co-operation and "minimise direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities."[148] Adhering countries pursue three basic commitments to effective international cooperation. First, they should aim to minimize the impact of laws that might impair cooperation among competition authorities or that prohibit domestic entities from cooperating with foreign competition authorities.[149] Second, adherents should aim to "make publicly available sufficient information on their substantive and procedural rules, including those relating to confidentiality, by appropriate means with a view to facilitating mutual understanding of how national enforcement systems operate."[150] Third, adhering countries should aim to "minimise inconsistencies between their leniency or amnesty programmes that adversely affect cooperation."[151]

In addition, the Recommendation concerning International Co-operation on Competition Investigations and Proceedings calls for significant enforcement cooperation

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[144] The Organisation for Economic Co-operation and Development, *Revised Recommendation Concerning Co-operation Between Members Countries on Anticompetitive Practices Affecting International Trade*, C(95)130/Final (OECD, 1995).
[145] The Organisation for Economic Co-operation and Development, *Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations* (OECD, 2005).
[146] "Adherents" refers to OECD members and non-members adhering to a recommendation. See The Organisation for Economic Co-operation and Development, *supra* note 144, s I.
[147] *Ibid* at 1. Chapter 2 shows that some business transactions are widely-accepted as illegal across countries.
[148] *Ibid*, s II.
[149] *Ibid*, s II.1.
[150] *Ibid*, s II.2.
[151] *Ibid*, s II.3.

between competition agencies in dealing with cross-border competition cases. First, it suggests the adoption of national 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."[152] This would facilitate the sharing of information related to cross-border cases by competition authorities in a more timely and efficient manner. Second, it recommends each adherent provide investigative assistance to another competition authority including the possibility of executing searches to obtain evidence and compelling "the production of information in the form of testimony or documents."[153]

While the recommendations and best practices of the OECD are not binding, they suggest that some business transactions are generally wrong and encourage countries to cooperate significantly, especially on cross-border investigative assistance.[154] Moreover, while the soft cooperation framework applies to OECD member countries, non-OECD member countries are encouraged to adhere to these recommendations and best practices.[155]

3.3.3. The United Nations Conference on Trade and Development

The UNCTAD also provides soft laws on transnational competition that help countries to achieve significant cooperation in competition law. The objective of UNCTAD's work on competition and consumer policies is to ensure that "partner countries enjoy the benefits of increased competition, open and contestable markets, private sector investment in key sectors and ultimately that consumers achieve improved welfare."[156] On 5 December 1980, the U.N. General Assembly adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("the Set") approved by the United Nations Conference on Restrictive Business Practices.[157] These rules are not binding but the U.N. suggests all member states implement the Set.[158]

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[152] *Ibid*, s VII. 10.
[153] *Ibid*, s VIII.1.
[154] *Ibid* at VIII.
[155] *Ibid*, s IX.
[156] The United Nations Conference on Trade and Development, "Competition Law and Consumer Protection Policy", online: <http://unctad.org/en/Pages/DITC/CompetitionLaw/Competition-Law-and-Policy.aspx>.
[157] The United Nations Conference on Trade and Development, *The United Nations Set of Principles and Rules on Competition*, TD/RBP/CONF/10/Rev.2 (1980) at 1.
[158] *Ibid*.

The Set has five objectives that emphasize the interest of developing countries and aim to limit restrictive business conduct by multinational corporations. The first objective focuses on the trade-liberalization perspective of transnational competition rules. It seeks to ensure that "restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries."[159]

The second and third objectives of the Set are in accordance with the economic objectives of competition law such as promoting efficiency, protecting competition, and promoting consumer welfare.[160] The second objective of the Set is to "attain greater efficiency in international trade and development, particularly that of developing countries."[161] It seeks to (a) "create, encourage, and protect competition," (b) control the concentration of capital and economic power, and (c) encourage innovation.[162] The third objective is "to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries."[163]

The fourth objective is aimed at multinational corporations. It seeks "to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries."[164] The fifth and final objective of the Set is to "facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels."[165]

In sum, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices is a work of the UNCTAD that calls on countries to act in a mutually reinforcing manner at the national, regional and international levels to eliminate or effectively deal with restrictive business practices. While the first objective of the Set seeks to promote trade liberalization, the second and third objectives are in accordance with the economic objectives of competition law as discussed in Chapter 2.

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[159] *Ibid*, s IV. A.1.
[160] See economic objectives of competition law in Chapter 2.
[161] The United Nations Conference on Trade and Development, *supra* note 158, s IV. A.2.
[162] *Ibid*.
[163] *Ibid*, s IV. A.3.
[164] *Ibid*, s IV. A.4.
[165] *Ibid*, s IV. A.5.

4. BILATERAL COOPERATION IN COMPETITION LAW

A multilateral agreement on competition law is costly and likely infeasible and soft law principles are not binding. In the absence of a multilateral agreement several countries seek bilateral cooperation to deal with cross-border competition cases. Bilateral negotiations generally have a higher likelihood of success than multilateral negotiations because a smaller group of countries has a higher probability of finding common ground.[166] With only a few participating countries, there is a greater chance to achieve a policy that will benefit all parties.[167]

Some countries sign a bilateral agreement that exclusively governs competition law while some others integrate transnational competition rules into a bilateral trade agreement. Most bilateral agreements that exclusively govern competition law are between developed countries that have strong competition regimes.[168] Developed countries may achieve agreements that provide significant cooperation on matters of procedure and enforcement of competition law because they similarly benefit from such agreements.[169] Gaps in interests between developing countries and between a developing country and a developed country make it much more difficult for them to achieve bilateral agreements with significant cooperation in the competition law area.[170]

This section analyses bilateral agreements between the group of countries on which this dissertation focuses. It proceeds with two subsections: bilateral agreements between developed countries and bilateral agreements between a developed country and a developing country.

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[166] Guzman, Is International Antitrust Possible *supra* note 24 at 1547.
[167] *Ibid*.
[168] Gerber, *supra* note 4 at 108.
[169] Guzman, Is International Antitrust Possible *supra* note 24 at 1546. Charles Lipson argues that co-operation can be sustained among advanced capitalist states. See Charles Lipson, "International Cooperation in Economic and Security Affairs" in David A Baldwin, ed, *Neorealism and Neoliberalism: the Contemporary Debate* (New York: Columbia University Press, 1993) at 76.
[170] Guzman, Is International Antitrust Possible *supra* note 24 at 1546.

4.1. Bilateral Agreement between Developed Countries

Three out of the four countries that this dissertation focuses on (Canada, the U.S., and Japan) are considered developed countries. These countries have robust competition regimes and they have signed bilateral agreements on competition enforcement.[171] These agreements enhance bilateral cooperation between these competition agencies in enforcing competition law against cross-border anticompetitive business practices.

4.1.1. Canada and the United States

On 01 August 1995, the Government of Canada and the Government of the United States of America signed an agreement on the application of their competition and deceptive marketing practices laws ("Agreement 1995"). The purposes of this agreement are to "promote cooperation and coordination between the competition authorities of the Parties, to avoid conflicts arising from the application of the Parties' competition laws and to minimize the impact of differences on their respective important interests."[172] The agreement addresses the following four areas of cooperation and coordination among others.

The first area it addresses is notification of enforcement activities. Each country is required to notify the other when the former's competition law enforcement may affect important interests of the other party.[173] A country shall also notify the other when the competition authority of the former requests "that a person provide information, documents or other records located in the territory of the other Party."[174] Agreement 1995 also allows officials of either country to visit the territory of the other country in the course of conducting

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[171] "Rating Enforcement 2015", (19 June 2015), online: *Global Competition Review* <http://globalcompetitionreview.com/surveys/article/38900/star-ratings>.

[172] *Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*, 1 August 1995 [*Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*] at Article I.1.

[173] *Ibid* at Article II.1.

[174] *Ibid* at Article II.5.

investigations pursuant to their respective competition laws. Such visits are subject to notification pursuant to the agreement and the consent of the notified party.[175]

The second area is enforcement assistance. The two countries acknowledge the importance of enforcement cooperation within their reasonably available resources.[176] The cooperation includes information sharing, assistance in "locating and securing evidence and witnesses", and significant information provided by a country about "anticompetitive activities that may be relevant to, or may warrant, enforcement activity" by the other's competition authorities.[177]

The third area is enforcement coordination. The two countries agree to consider coordination of their enforcement activities in addition to enforcement cooperation.[178] Agreement 1995 provides that "[i]n any coordination arrangement, each Party's competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other Party's competition authorities."[179] This coordination may help the two countries to deal with possible conflicts of interests or differences of competition laws between the two countries in certain cases.

The fourth area addressed by the Agreement 1995 is cooperation between the two countries regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party.[180] When a party believes that anticompetitive activity has taken place in the territory of the other party that harms its important interests, that party may request that the competition authorities of the other party initiate appropriate enforcement activities.[181] The competition authorities receiving the request are required to "consider whether to initiate enforcement activities, or to expand ongoing enforcement activities, with respect to the anticompetitive activities identified in the request."[182] This agreement, however, does not limit "the discretion of the requested party's competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement

[175] *Ibid* at Article II.6.
[176] *Ibid* at Article III.1(a).
[177] *Ibid* at Article III.
[178] *Ibid* at Article IV.1.
[179] *Ibid* at Article IV.3.
[180] *Ibid* at Article V.
[181] *Ibid* at Article V.2.
[182] *Ibid* at Article V.3.

activities with respect to the anticompetitive activities identified in a request."[183] On the other hand, the agreement also does not preclude "the requesting Party's competition authorities from undertaking enforcement activities with respect to such anticompetitive activities."[184]

In sum, the agreement between Canada and United States on competition law provides significant enforcement cooperation between the two competition regimes in dealing with transnational competition cases. This agreement allows the countries to deal with cross-border anticompetitive activities by procedural methods such as information sharing and enforcement assistance.[185] Moreover, one Party may allow officials of the other Party to conduct an investigation in the first Party's territory in enforcing the other Party's competition law.[186] For example, the U.S. could allow Canadian competition authority officials to conduct some activities in the American territory in enforcing Canadian competition laws. The two countries, therefore, recognize the extraterritorial enforcement of competition law of the other country on an *ad hoc* basis. The agreement on competition law between Canada and the U.S., however, strongly relies on the two countries' respective national competition regimes. The enforcement of the competition law of a country, including the extraterritorial enforcement of competition law, considers international comity and the other country's interests but the enforcement is at such a country's discretion.[187]

4.1.2. Japan and the United States

Japan and the U.S. concluded an agreement concerning cooperation on anticompetitive activities in 1999 (Agreement 1999). The purpose of Agreement 1999 is to "contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party."[188] Similar to Agreement 1995 between Canada and the U.S., this agreement includes, among other

[183] *Ibid* at Article V.4.
[184] *Ibid*.
[185] *Ibid* at articles 2 and 3.
[186] *Ibid* at Article II.6.
[187] *Ibid* at Article V.
[188] *Agreement between the Government of Japan and the Government of the United States of America concerning Cooperation on Anticompetitive Activities*, 7 October 1999 [*Agreement between the Government of Japan and the Government of the United States of America concerning Cooperation on Anticompetitive Activities*] at Article I.1.

matters, four elements: (i) notification of enforcement activities, (ii) enforcement assistance, (iii) enforcement coordination, and (iv) cooperation when an activity carried out in the territory of a party adversely affects the important interests of the other party.

First, where enforcement activities of a party may affect important interests of the other party, the party engaging in such enforcement activities is required to notify the other party.[189] Second, a party is to provide the other with assistance in enforcing the latter's competition law. Such assistance is, however, to be consistent with the laws, regulations and important interests of the assisting country.[190] Unlike Agreement 1995 between Canada and the U.S., Agreement 1999 between Japan and the U.S. does not require that a country provide the other with assistance in locating and securing evidence and witnesses in the former's territory. Enforcement assistance provided by Agreement 1999 between Japan and the U.S. is limited to information sharing.[191]

Third, Agreement 1999 provides that both parties "shall consider coordination of their enforcement activities" where they deal with cross-border issues.[192] Parties should consider, among other factors, "the effect of such coordination on their ability to achieve the objectives of their enforcement activities."[193]

Fourth, when the competition authority of a party "believes that anticompetitive activities carried out in the territory of the other country adversely affect the important interests of the former Party," the competition authority of the country believing it is adversely affected may request that the competition authority of the other party initiate appropriate enforcement activities.[194] The requested competition authority shall consider whether to initiate enforcement activities with respect to the anticompetitive activities identified in the request and inform the requesting counterpart of its decision.[195]

In general, Agreement 1999 between Japan and the U.S. relies heavily on national competition law regimes[196] and international comity.[197] Implementation of Agreement 1999

[189] *Ibid* at Article II.1.
[190] *Ibid* at Article III.1.
[191] *Ibid* at Article III.2.
[192] *Ibid* at Article IV.1.
[193] *Ibid* at Article IV.2.
[194] *Ibid* at Article V.1.
[195] *Ibid* at Article V.2.
[196] *Ibid*.
[197] *Ibid* at Article V.1.

is to be in accordance with the laws and regulations in each country and subject to the availability of resources of the respective competition authorities.[198] Moreover, the two countries agree that this agreement is to be construed to not "prejudice the policy or legal position of either party regarding any issue related to jurisdiction."[199] The degree of cross-border cooperation provided by this agreement is lower than that of Agreement 1995 between the U.S. and Canada because it neither provides assistance in locating and securing evidence and witnesses[200] in the assisting country nor allows officials of a country to conduct investigations in the other's territory pursuant to the former's competition law.[201]

4.1.3. Canada and Japan

The government of Canada and the government of Japan signed an agreement concerning cooperation on anticompetitive activities in 2005. The purposes of this agreement are (i) "to contribute to the effective enforcement of the competition law of each country through the development of cooperative relationships between the competition authorities of the Parties" and (ii) "avoid or minimize the possibility of conflicts between the Parties arising from the application of the competition law of each country."[202] Similar to Agreement 1995 and Agreement 1999, this agreement is "implemented by the Parties in accordance with the laws and regulations in force in each country and within the available resources of their respective competition authorities."[203] This agreement also includes, among other matters, the same four main elements: (i) notification of enforcement activities, (ii) mutual assistance in enforcing competition laws, (iii) coordination in enforcement activities, and (iv) positive comity.

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[198] *Ibid* at Article XI.1.
[199] *Ibid* at Article XI.4.
[200] *Ibid* at Article III.2.
[201] *Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*, *supra* note 173 at Article II.6.
[202] *Agreement between the Government of Canada and the Government of Japan concerning Cooperation on Anticompetitive Activities*, 6 September 2005 [*Agreement between the Government of Canada and the Government of Japan concerning Cooperation on Anticompetitive Activities*] at Article I.1.
[203] *Ibid* at Article X.1.

First, the competition authority of a party is required to notify the competition authority of the other party of the first party's competition enforcement activities that may affect important interests of the latter.[204] Second, the competition authority of a party shall assist the competition authority of the other party in enforcement of the other party's competition law.[205] Such assistance is consistent with the assisting country's laws and regulations, its important interests, and its reasonably available resources.[206] As with the 1999 Agreement between Japan and the U.S., this agreement does not state whether or not a country would provide the other with assistance in locating and securing evidence or witnesses in its territory like that provided in Agreement 1995 between Canada and the U.S. The assistance focuses only on information sharing.[207]

Third, where the competition authorities of the two states deal with cross-border competition matters, they will seek coordination of their enforcement activities.[208] In considering coordination the authorities consider, among other matters, "the effect of such coordination on their ability to achieve the objectives of their enforcement activities."[209]

Fourth, the agreement relies on positive comity to deal with cross-border competition cases. By this mechanism, a Party may request that the competition authority of the other country initiate appropriate enforcement activities with respect to anticompetitive business practices carried out in the territory of the country receiving the request that have adverse effects on the requesting country.[210] The competition authority receiving the request shall have the discretion to decide whether to initiate enforcement activities.[211]

4.2. Bilateral Agreement between a Developed Country and a Developing Country

Vietnam is the only developing country among the four countries analysed by this dissertation. Vietnam does not have a bilateral agreement with any country that exclusively

[204] *Ibid* at Article II.1.
[205] *Ibid* at Article III.1.
[206] *Ibid*.
[207] *Ibid* at Article III.2.
[208] *Ibid* at Article IV.1.
[209] *Ibid* at Article IV.2 (a).
[210] *Ibid* at Article V.1.
[211] *Ibid* at Article V.2.

governs competition law. Vietnam has signed bilateral trade agreements with both Japan and the U.S. that provide some rules on competition laws.

4.2.1. Vietnam and the United States

The U.S. and Vietnam entered an agreement on trade relations in 2000. The agreement seeks to "establish and develop mutually beneficial and equitable economic and trade relations on the basis of mutual respect for their respective independence and sovereignty."[212] The signing of the agreement was before the enactment of the *Competition Law* of Vietnam[213] in 2004 so it does not have a chapter on cross-border competition. Some articles, however, regulate competition to prevent the abuse of a monopoly position that restrains trade and investment. Chapter III, that regulates trade in services, includes Article 5 on monopolies and exclusive service suppliers[214] and Article 6 on market access.[215]

Article 5 provides that each party shall prevent any monopoly supplier of a service in the relevant market in its territory from acting in a manner inconsistent with most-favoured-nation treatment.[216] Article 5 also sets out specific commitments on abuse of monopoly position and substantial prevention of competition among suppliers in its territory.[217] Article 6 provides that a party shall not maintain or adopt limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, or exclusive service suppliers.[218]

In general, these articles do not serve to facilitate economic objectives of competition law such as promoting unfettered competition, protecting consumer welfare, or enhancing economic efficiency[219] but to ensure market access.[220] These articles do not constitute a

[212] See the preamble to the *Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations*, 13 July 2000 [*Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations*].
[213] Vietnamese *Competition Law*, *supra* note 15.
[214] *Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations*, *supra* note 213 at Chapter III Article 5.
[215] *Ibid* at Chapter III Article 6.
[216] *Ibid* at Chapter III Article 5.1.
[217] *Ibid* at Chapter III Article 5.2 and 5.3.
[218] *Ibid* at Chapter III Article 6.2.
[219] See Chapter 2 section 2.
[220] See more about this objective in Uruena, *supra* note 49 at 62–63. See also Fox, *supra* note 49 at 19–22.

chapter on competition but are integrated in the chapter on trade in services.[221] Moreover, given that Vietnam did not have a competition law at the time this agreement came into effect, the agreement does not provide any cooperation mechanism for countries to deal with transnational competition cases.

4.2.2. Vietnam and Japan

Vietnam and Japan concluded an Agreement for an Economic Partnership in 2008. Unlike the agreement on trade relations between Vietnam and the U.S., one of the objectives of the agreement between Vietnam and Japan is to "promote cooperation and coordination for the effective enforcement of competition laws in each Party."[222] It includes a chapter on competition.[223] The Parties agreed that each country would, "in accordance with its laws and regulations, promote competition by addressing anti-competitive activities in order to facilitate the efficient functioning of its market."[224]

Cooperation between the parties on promoting competition has two objectives. First, cooperation is with a view to "contributing to the effective enforcement of the competition law of each Party."[225] Second, it seeks to avoid possible conflicts between the two countries in the enforcement of the competition laws of each party.[226] The agreement also says that cooperation may take the form of exchange of information, notification and coordination of enforcement activities, and consultation.[227] The agreement allows the parties to seek assistance from or provide "assistance to one another pursuant to other bilateral or multilateral agreements or arrangements."[228]

In sum, the Agreement for an Economic Partnership between Japan and Vietnam provides for soft cooperation between the countries' competition authorities. Such

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[221] *Agreement between the United States of America and the Socialist Republic of Vietnam on Trade Relations*, *supra* note 213 at Chapter III.
[222] *Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership*, 25 December 2008 [*Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership*] at Article 1(c).
[223] *Ibid*, ch 10.
[224] *Ibid* at Article 99.
[225] *Ibid* at Article 101.
[226] *Ibid*.
[227] *Ibid*.
[228] *Ibid* at Article 104.2.

cooperation is enforced in accordance with the parties' respective laws and regulations and subject to their respective available resources.[229] Moreover, Chapter 10 on competition is not subject to the agreement's dispute settlement mechanism.[230]

4.3. A Comparative Analysis

The significance of cooperation on the enforcement of competition law between countries depends on the level of development of these countries' competition regimes. Bilateral agreements on competition law providing significant and concrete cooperation are more likely to be made between developed countries with reasonably well-developed competition law regimes. There are three significant attributes to bilateral competition law agreements between developed countries that this dissertation examines. First, since these agreements deal exclusively with competition law, they seek to deal with cross-border competition cases. Second, cooperation between these countries strongly relies on national competition law regimes and international comity. Third, cooperation generally focuses on four elements: (i) notification of enforcement activities, (ii) enforcement assistance, (iii) enforcement coordination, and (iv) cooperation when an activity carried out in the territory of a party adversely affects the important interests of the other party. Among the bilateral agreements analysed above, the level of cooperation is highest in the agreement between the U.S. and Canada. In addition to four general elements, the U.S. and Canada agree to provide assistance in locating and securing evidence and witnesses[231] in the assisting country and allows officials of a country to conduct investigations in the other's territory pursuant to the former's competition law.[232]

In contrast to a bilateral agreement on competition law between some developed countries, the agreement between the U.S. and Vietnam does not serve to achieve economic objectives of competition but to ensure market access. The agreement between Vietnam and Japan that contains a chapter promoting cooperation and coordination in the enforcement of

[229] *Ibid* at Article 101.
[230] *Ibid* at Article 103.
[231] *Agreement between the Government of Canada and the Government of the United States of America Regarding the Application of Their Competition and Deceptive Marketing Practices Laws*, *supra* note 173 at Article 3.3(a).
[232] *Ibid* at Article II.6.

competition law[233] provides for soft cooperation between the two countries.[234] Such cooperation relies on the countries' national competition regimes.

5. CONCLUSION

Countries have not been able to achieve a reliable and binding international mechanism for dealing with transnational competition cases for three reasons. First, there is the issue of the distribution of costs and benefits arising from an international agreement on competition law. Concern by countries for their self-interest over the unfair distribution of interests and over the cost of such an agreement were too strong to overcome. The second reason constraining international cooperation in competition law is that pursuing such cooperation is costly. An individual country that participates in making an international competition agreement incurs costs in addressing domestic conflicts of interest arising from the negotiations. Also, developing countries may incur higher costs than developed countries in adjusting their competition law regimes to meet standards specified in an international agreement. In addition, countries participating in an international agreement may also incur sovereignty costs if they vest their power to deal with competition cases in international institutions.

The third reason constraining an international agreement on competition law refers to two technical issues that WTO members are encountering. The WTO's national treatment and the most-favoured-nation principles could constrain enforcement by a member country's competition authority, especially in transnational merger cases. In addition, setting up a dispute settlement mechanism for an agreement on competition law would be a difficult task for WTO member countries.

Because of the drawbacks of international cooperation in competition law, international institutions such as OECD, ICN, and UNCTAD strive to provide soft law and soft cooperation in the area of competition law that help states work together on dealing with some international problems. Soft laws rely on international comity and do not require

[233] *Agreement between Japan and the Socialist Republic of Viet Nam for an Economic Partnership*, *supra* note 223 at Article 1(c).
[234] *Ibid* at Article 101.

countries to sacrifice their sovereignty. Soft laws do not impose obligations on states but seek voluntary cooperation. Although soft laws are easier to achieve, they cannot deal with situations in which countries have conflicting interests since they are not binding.

In addition to soft law and soft cooperation, some developed countries achieved bilateral agreements that provide significant cooperation on matters of competition law procedure and enforcement. Although these agreements may help the signing parties deal with some cross-border competition cases, they are unable to deal with transnational competition problems that go beyond bilateral cooperation.

Chapters 3 and 4 show that state centric methods have some drawbacks that make them unable to deal with some transnational competition problems. These drawbacks suggest the need for a new approach to dealing with cross-border competition challenges as discussed in the following chapter.

Chapter 5

Corporations and the Possibility of Private Transnational Governance

1. INTRODUCTION

The previous three chapters discuss the economic objectives of competition law and how states deal with transnational competition problems. Chapter 2 suggests that at a national level competition laws across countries have similar objectives that promote consumer welfare, protect effective competition, and promote social welfare.[1] These objectives serve to protect the interests of society and vulnerable stakeholders such as consumers and small business from the aggregation of excessive market power.

At the global level, however, there can be conflicts of interests between different countries in some aspects of competition law. Chapter 3 discusses two aspects that may cause competition law between countries to conflict. First, some countries provide exemptions for export cartels, which help them promote their social welfare at the expense of consumers and producers in other countries.[2] These exemptions create conflicts between countries and impair international cooperation in dealing with transnational competition cases. Second, several countries apply their competition law extraterritorially in cross-border competition cases.[3] This is not contrary to international law. Countries, however, take different approaches to the extraterritorial application of competition law. Some countries strongly oppose the extraterritorial application of competition laws, some consider international comity and only apply competition law extraterritorially within limits, while some apply competition law extraterritorially without any clear limits. In addition, some countries apply a double standard in the extraterritorial application of competition law.[4] These different

[1] See Chapter 2 section 2.
[2] See Chapter 3 section 2.
[3] See Chapter 3 section 4.
[4] For example, the Japanese government applies its competition law extraterritorially but also resists the extraterritorial application of foreign competition law in Japan. See Chapter 3, section 4.3.

approaches to the extraterritorial application of competition law impair the efforts of nations in dealing with cross-border competition cases.

Differences of emphasis in competition law objectives at the global level and differences in approaches to the extraterritorial application of competition law make it important for countries to co-operate in dealing with cross-border competition cases. Chapter 4 examines different means of cooperation among countries and indicates that countries have not been able to achieve a globally binding mechanism to deal with cross-border anticompetitive conduct. Chapter 4 suggests that countries are not attempting to integrate fundamental objectives of competition law into free trade agreements but instead pursue an objective of promoting market access. International cooperation in competition law, therefore, relies on national competition regimes and soft international cooperation. Such cooperation, however, is insufficient to deal with transnational competition challenges.

The previous three chapters suggest that state-centric mechanisms are not likely to be able to deal with cross-border competition law problems. This chapter, therefore, examines a private mechanism in which multinational corporations ("MNCs") can play a role in the regulation and enforcement of competition law at a transnational level. This chapter analyzes how some MNCs can help states deal with cross-border competition violations by internalizing state laws in their global codes of conduct.

The chapter discusses three different approaches to the role of corporations and suggests that while some corporations seek to maximize their profits within the constraints of law, others find it is profitable to benefit society in the course of doing business. A third approach to conducting business suggests that some corporations might make business decisions that benefit society beyond the requirements of law and the constraints of corporate profits. These corporations are likely to internalize national competition laws in their contractor codes of conduct. By doing so, the corporations comply with obligations that are widely shared by competition laws across countries and voluntarily enforce these obligations at the transnational level.

An MNC that internalizes national competition law employs processes of persuasion and deliberation perhaps assisted by potential contractual enforcement to make contractors doing business in a country comply with the competition law of another country. Transnational law based on internalized national law, therefore, helps countries deal with

cross-border competition issues avoiding formal conflicts of interest. Such transnational law, however, does not replace state law or diminish state regulatory authority or result in private hegemony. Unlike some other forms of transnational law, contractor codes of conduct internalize state law. These codes neither dictate nor control the content of national law but incorporate obligations that are widely shared by competition laws across countries. This helps to strengthen the regulatory power of states at the transnational level. In addition, transnational competition law helps to enhance justice and fairness in international society by allowing MNCs to act alongside states and society to protect consumers and small businesses in global society from cartels or firms with a dominant position in relevant markets.

This chapter has seven sections and a conclusion. The second section provides an overview of different approaches to the objectives of corporations. This section suggests that some corporations are willing to make decisions that benefit society even when those decisions are not conducive to profit. Such a socially responsible sense of doing business can help corporations internalize law as natural persons do. The third section discusses a constructivist approach to the role of MNCs in global governance. It suggests that non-state actors also participate in governing global society and that norm-compliant behaviour refers to a process in which actors socialize norms. The fourth section analyzes what H.L.A. Hart calls the internal aspect of law. The internal aspect of law helps to explain the transformation of law into standards of behaviour and the extension of the normativity of law to geographic areas in which sanctions are not available. The fifth section examines the internalization of law by MNCs through contractor codes of conduct and suggests that MNCs are capable of enforcing their norms. The sixth section discusses the transnational legality of internalized national competition laws. It shows that by requiring contractors in the global supply chain to comply with all applicable laws, lead firms can help to extend the jurisdiction of national laws to the territory of other countries. The seventh section analyzes private authority in global governance and argues that lead firms have a plausible claim to legitimacy in the regulation of their supply chains.

2. DIFFERENT APPROACHES TO THE ROLE OF CORPORATIONS

The role of corporations in society is a controversial topic in corporate governance. Several theories have discussed duties that the directors of a corporation owe their shareholders and stakeholders, for example, shareholder primacy theory, stakeholder theory, dualism, monism, modest idealism, high idealism, and pragmatism.[5] These theories take different views on whether the role of corporations is to maximize shareholder wealth or to become socially responsible citizens in society or to become socially responsible to maximize shareholder wealth.

This section discusses three approaches to the role of corporations: strict profit maximization within the constraints of law, society-oriented profit maximization, and social responsibility beyond profit maximization. The section suggests that a corporation could take any of these roles. While many corporations strive to maximize profit within the constraints of law and some make society-oriented business decisions as a strategy to maximize profits,

[5] Proponents of the "shareholder primacy theory" believe "that directors of a company must act in the best interests of the company's shareholders, present and future, and run the company in such a way as to maximize the interests of the shareholders ahead of any other parties who might have interests in the company." See Andrew Keay, "Getting to Grips with the Shareholder Value Theory in Corporate Law" (2010) 39:4 Common Law World Review 358 at 359 (hereinafter "Keay, Getting to Grips"). "Dualism" or "traditionalism" takes the view that "a corporation's directors and officers have a fiduciary duty to maximize shareholder wealth, subject to numerous duties to meet specific obligations to other groups affected by the corporation." See Robert Charles Clark, *Corporate Law* (Boston: Little, Brown and Company, 1986) at 678. "Stakeholder value theory" asserts that a company's success should not be justified solely on the basis of its profit but also on other values such as the contribution to the improvement of society, the provision of a healthy working environment for employees, and the creation of wealth and its fair distribution. See Edward Freeman & Jeanne Liedtka, "Stakeholder Capitalism and the Value Chain" (1997) 15:3 European Management Journal 286 at 286. See also Gérard Charreaux & Philippe Desbrières, "Corporate Governance: Stakeholder Value Versus Shareholder Value" (2001) 5:2 Journal of Management & Governance 107. A "monist" view is one that says "many types of corporate activities that appear to be profit-reducing voluntary expenditures for the public good are really conducive to profit maximization in the long run." See Clark, *supra* note at 681. "Modest idealism" refers to the view that "corporate managers should cause their corporations to comply with applicable laws and regulations even when noncompliance would increase the corporation's net present value." See Clark, *ibid* at 684–685. A "high idealism" approach takes the position that "the business corporation's residual goal, and not just its specific, externally imposed legal obligations, should be defined to include a much wider set of interests than those of the shareholders." See Clark, *ibid* at 688. "Pragmatism holds that governmental units should make greater use of business corporations to implement public policies, and that business corporations should design, develop, and seize opportunities to perform public service on a profit-making basis." See Clark, *ibid* at 694.

some corporations make business decisions that reflect what they think they should do in the public interest even if the decisions are not profitable.[6] The selection of any of these objectives depends on each corporation's social philosophy.[7]

2.1. Strict Profit Maximization within the Constraints of Law

A traditional approach to the role of corporations asserts that the corporate objective is strict profit maximization. This approach, often referred to as "shareholder primacy theory" and "dualism", suggests that directors of corporations have a fiduciary duty to maximize shareholder wealth and comply with law.[8] Corporations do not have to take into account the interests of other stakeholders such as employees, contractors, consumers, and the general public because these stakeholders are protected by law.[9]

This traditional approach to the role of corporations has five rationales. First, this approach provides directors with a single, clear goal which they can use to operate firms in complicated business environments.[10] Apart from complying with laws to fulfil legal obligations to stakeholders, the duty of directors to shareholders is making profits as large as possible.[11] Consequently, this approach is said to help directors work more effectively.[12]

Second, shareholders are supposed to be risk bearers as the residual claimants of the company. Non-shareholders such as employees and creditors get contractual payments from the firm while shareholders can claim only the residual assets of the firm when it goes bankrupt.[13] Shareholders, it is therefore argued, bear a higher risk than employees or creditors.

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[6] Examples for society-oriented business decisions are hiring local employees who may be less skillful than outsiders, buying local inputs which may be more expensive than imported products, or spending more money on protecting the environment than the requirements of law.
[7] Clark, *supra* note 5 at 677.
[8] Milton Friedman, "The Social Responsibility of Business Is to Increase Its Profits" in Walther C Zimmerli, Markus Holzinger & Klaus Richter, eds, *Corporate Ethics and Corporate Governance* (Online: Springer Berlin Heidelberg, 2007) 173 at 173–174. See also Clark, *supra* note 5 at 678.
[9] Clark, *supra* note 5 at 678.
[10] *Ibid* at 679. See also Wesley Cragg, "Business Ethics and Stakeholder Theory" (2002) 12:2 Business Ethics Quarterly 113 at 124; and Keay, Getting to Grips, *supra* note 5 at 365.
[11] Clark, *supra* note 5 at 678.
[12] Keay, Getting to Grips, *supra* note 5 at 366.
[13] Frank H Easterbrook & Daniel R Fischel, *The Economic Structure of Corporate Law* (Massachusetts, U.S.: Harvard University Press, 1991) at 36. See also Aloy Soppe, "Corporate

Third, the proponents of shareholder primacy theory assert that shareholders are not protected by laws or by clearly defined contracts as non-shareholders are.[14] Non-shareholders are protected by a wide variety of laws. For example, employees are protected by labour law, pension law, and health and safety law. Consumers are protected by consumer protection law and tort law. Environmental law protects the public. However, no law protects shareholders from loss if the directors do not commit any fraud.[15] Others have also asserted that shareholders are not protected by contract like other stakeholders.[16] Corporations, therefore, should serve the benefit of shareholders.[17]

Fourth, the strict profit maximizing approach is said to help firms attract investment. Because most investors seek a profit, a corporate governance model that maximizes shareholder wealth meets with the investors' expectations.[18] A corporate governance regime that adopts a shareholder-oriented model provides shareholders with credible protection, which in turn helps the firm mobilize capital from equity markets.[19]

Finally, some proponents of this approach contend that a profit-maximizing corporation ultimately benefits society.[20] A company that works for profit is said to be more efficient and more wealthy than others; therefore it can provide benefits to stakeholders in the form of, for example, higher wages, higher interest rates, and better and cheaper products

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Governance, Ethics and sustainable development" in Ingo Pies & Peter Koslowski, eds, *Corporate Citizenship and New Governance* (The Netherlands: Springer, 2011) at 248; and Keay, Getting to Grips, *supra* note 5 at 365; and Ciaran O'Kelly, "History Begins: Shareholder Value, Accountability and the Virtuous State" (2009) 60 N Ir Legal Q 35 at 410.

[14] Margit Osterloh, Bruno S Frey & Hossam Zeitoun, "Corporate Governance as an Institution to Overcome Social Dilemmas" in Alexander Brink, ed, *Corporate Governance and Business Ethics* (New York: Springer, 2011) at 51. See also Henry Hansmann & Reinier Kraakman, "The End of History for Corporate Law" (2000) 89 Geo LJ 439 at 441; and Clark, *supra* note 5 at 680.

[15] Hansmann & Kraakman, *supra* note 14 at 442.

[16] Frederick Tung, "The New Death of Contract: Creeping Corporate Fiduciary Duties for Creditors" (2008) 57:4 Emory Law Journal 809 at 813. See also Andrew Keay, "Shareholder Primacy in Corporate Law: Can it Survive? Should it Survive?" (2010) 7:3 European Company & Financial Law Review 369 at 398 (hereinafter "Keay, Shareholder Primary").

[17] Tung, *supra* note 16 at 813. See also Keay, Shareholder Primary, *supra* note 16 at 398.

[18] Cragg, *supra* note 10 at 124.

[19] Hansmann & Kraakman, *supra* note 14 at 442.

[20] Keay, Getting to Grips, *supra* note 5 at 365. See also Hansmann & Kraakman, *supra* note 14 at 441.

and service.[21] In addition, these companies help to allocate resources more efficiently.[22] Milton Friedman, an economist who won a Nobel Prize in economic science in 1976, made a famous statement that "there is one and only one social responsibility of business—to use it[s] resources and engage in activities designed to increase its profits so long as it stays within the rules of the game."[23]

The view that corporations should, within legal constraints, only maximize profit, however, has been questioned. One objection is that a vague definition of "profit maximization" could direct managers to different goals.[24] It could refer to maximizing share value.[25] It could alternatively refer to maximizing the value of the corporate equity.[26] In addition, shareholder interests may not be uniform. For example, some shareholders are short-term investors who only care about the stock price while some others care about the corporation's long-term value; others are institutional investors while some others are minority shareholders.[27]

Another objection is that focusing only on shareholder interests might discriminate against stakeholders because shareholders are not the only risk bearers in a firm.[28] In addition to shareholders, other stakeholders such as employees, unsecured creditors and suppliers, are also risk bearers and might not get full payment if the firm goes bankrupt.[29] Therefore, focusing only on the maximization of shareholder wealth does not protect the interests of other stakeholders.[30]

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[21] Easterbrook & Fischel, *supra* note 13 at 38. See also Ian B Lee, "Efficiency and Ethics in the Debate about Shareholder Primacy" (2006) 31 Delaware Journal of Corporate Law 533 at 538; and Keay, Getting to Grips Keay, *supra* note 5 at 363.

[22] Keay, Getting to Grips, *supra* note 5 at 365.

[23] Friedman, *supra* note 8 at 178. See more about Milton Friedman at "Milton Friedman - Facts", online: *Nobelprize.org, The Official Web Site of the Nobel Prize* <http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/1976/friedman-facts.html>.

[24] Keay, Getting to Grips, *supra* note 5 at 377. See also Claudio Loderer et al, "Shareholder Value: Principles, Declarations, and Actions" (2010) 39:1 Financial Management 5 at 10; and O'Kelly, *supra* note 13 at 45.

[25] Keay, Getting to Grips, *supra* note 5 at 369.

[26] *Ibid* at 371.

[27] Keay, Shareholder Primary, *supra* note 16 at 407. See also Loderer et al, *supra* note 24 at 11.

[28] Osterloh, Frey & Zeitoun, *supra* note 14 at 51. See also Hansmann & Kraakman, *supra* note 14 at 441.

[29] Keay, Shareholder Primary, *supra* note 16 at 378 and 402. See also Margaret M Blair, *Ownership and Control: Rethinking Corporate Governance for the Twenty-First Century* (Washington, D.C: Brookings Institution, 1995) at 238.

[30] Keay, Shareholder Primary, *supra* note 16 at 402.

A third objection is that corporations should take into account the interests of stakeholders beyond the requirements of law because of governmental and regulatory failures.[31] Due to such failures the profit maximization approach to the role of corporations leads to negative externalities that harm other stakeholders, such as environmental degradation, poor working conditions, and over-priced, low-quality products.[32] In addition, maximizing shareholder wealth is not likely to automatically increase social benefits because wealth distribution is not proportional and nothing ensures that society as a whole would benefit from increasing share prices.[33] For example, a study conducted in the U.S. indicates that "while median household income for the poorest 20 percent of households in the United States rose by 14 percent between 1980 and 2007, the incomes of the wealthiest five percent of households rose by 72 percent."[34] The profit maximization approach has also been said to have led to many notorious harms to society.[35]

2.2. Society-Oriented Profit Maximization

It has been asserted that corporations should be more socially responsible.[36] Arguments along these lines often refer to corporate social responsibility ("CSR"). There is, however, no common definition of this term. At the most general understanding, CSR refers to

[31] See this discussion by Clark, *supra* note 5 at 680.
[32] Keay, Shareholder Primary, *supra* note 16 at 383. See also Loderer et al, *supra* note 24 at 8. "Economic externality" refers to "an imposition on society as a whole of costs arising from specific market activities." See Alfred A Marcus & Marijke Rijsberman, *Externality*, 4th ed (Detroit: Gale, 2011) at 641.
[33] O'Kelly, *supra* note 13 at 42. See also Allan C Hutchinson, *The Companies We Keep: Corporate Governance for a Democratic Society* (Toronto: Irwin Law, 2005) at 125.
[34] Loderer et al, *supra* note 24 at 8.
[35] For example: Enron, WorldCom, Parmalat, Adelphia. See more at Stelios Andreadakis, "Enlightened Shareholder Value: Is it the New Modus Operandi for Modern Companies?" in Sabri Boubaker, Bang Dang Nguyen & Duc Khuong Nguyen, eds, *Corporate Governance* (Online: Springer Berlin Heidelberg, 2012) 415 at 420.
[36] Joan Fontrodona & Alejo José G Sison, "The Nature of the Firm, Agency Theory and Shareholder Theory: A Critique from Philosophical Anthropology" (2006) 66:1 Journal of Business Ethics 33 at 39. See also Bob Tricker, *Corporate Governance: Principles, Policies, and Practices*, 3rd ed (Oxford, U.K.: Oxford University Press, 2015) at 72; and Andreadakis, *supra* note 35 at 420; and Josef Wieland, "Corporate governance, values management, and standards: A European perspective" (2005) 44:1 Business and Society 74 at 77.

corporate decisions made beyond the requirements of law.[37] For example, the United Nations Industrial Development Organization defines CSR as

> a management concept whereby companies integrate social and environmental concerns in their business operations and interactions with their stakeholders. CSR is generally understood as being the way through which a company achieves a balance of economic, environmental and social imperatives…, while at the same time addressing the expectations of shareholders and stakeholders.[38]

The definitions of CSR, however, do not help to distinguish between a business decision that takes into account the interests of society for the sake of maximizing profit and a socially responsible business decision that goes beyond profit maximization. This subsection discusses the society-oriented profit maximization approach, which refers to business decisions that benefit society so as to maximize corporate profits.

According to the society-oriented profit maximization approach, which is shared by monism and some discussions of the stakeholder value theory, "many types of corporate activities that appear to be profit-reducing voluntary expenditures for the public good [(hereinafter referred to as "society-oriented business decisions")] are really conducive to profit maximization in the long run."[39] Proponents of this approach believe that a successful company should have loyal employees, a mutually beneficial relationship with suppliers, reliable relationships with creditors and investors, and a sustainable connection with society.[40] If a director has good reasons as to why a society-oriented business decision would

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[37] Keith Davis, "The Case for and against Business Assumption of Social Responsibilities" (1973) 16:2 The Academy of Management Journal 312 at 313. See also Manuel Castelo Branco & Lúcia Lima Rodrigues, "Positioning Stakeholder Theory within the Debate on Corporate Social Responsibility" (2007) 12:1 Electronic Journal of Business Ethics and Organization Studies at 11; and Edward Hallett Carr, "Morality in International Politics" in *The Twenty Years' Crisis, 1919-1939: An Introduction to the Study of International Relations*, 1122 (New York: Harper & Row, 1964) at 149.

[38] United Nations Industrial Development Organization, "What is CSR?", online: <https://www.unido.org/csr/o72054.html?L=1%3Ftx_indexedsearch_pi2%5Baction%5D>. See more definitions of CSR at Michael Kerr, Richard Janda & Chip Pitts, *Corporate Social Responsibility: a Legal Analysis* (Markham, Ont, Canada: LexisNexis, 2009) at 6. See also Clark, *supra* note 5 at 676; and Industry Canada, "Corporate Social Responsibility", (1 December 2011), online: <https://www.ic.gc.ca/eic/site/csr-rse.nsf/eng/home>.

[39] Clark, *supra* note 5 at 681.

[40] Fontrodona & Sison, *supra* note 36 at 39. See also Tricker, *supra* note 36 at 72; and Wieland, *supra* note 36 at 77.

benefit the corporation, it is unlikely that shareholders could successfully challenge that decision.[41] Four rationales for society-oriented profit maximization are set out below.[42]

First, the interest of corporations is deeply rooted in society because society provides firms with profits and other demands.[43] A company that positively nurtures society with what the society needs is likely to achieve a sustainable development and gain long-run benefits.[44] For example, employees may be more willing to work for society-oriented corporations and the quality and loyalty of labour will be greater than for corporations that only seek to maximize profits.[45]

Second, the society-oriented profit maximization approach helps corporations improve their public image.[46] Large companies spend billions of dollars on advertising every year.[47] Promoting public image can help firms attract more customers and employees of higher quality.[48] Some corporations, therefore, in addition to advertising and marketing, make society-oriented business decisions as a means of capturing a favourable public image and to benefit from the process of value creation.[49]

Third, a society-oriented profit maximization approach helps companies keep up with changes in society's standards while seeking profits.[50] Society sets certain cultural and social constraints on its members in terms of what they should do and what they should not do.[51]

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[41] Clark, *supra* note 5 at 682–682.
[42] Bidhan L Parmar et al, "Stakeholder Theory: The State of the Art" (2010) 4:1 The Academy of Management Annals 403 at 415. See also R Edward Freeman, Andrew C Wicks & Bidhan Parmar, "Stakeholder Theory and 'The Corporate Objective Revisited'" (2004) 15:3 Organization Science 364 at 364; and E Merrick Dodd, "For Whom Are Corporate Managers Trustees?" (1932) 45:7 Harvard Law Review 1145 at 254. See chart 1: A convergence of interests.
[43] Davis, *supra* note 37 at 314.
[44] Yawen Jiao, "Stakeholder Welfare and Firm Value" (2010) 34:10 Journal of Banking & Finance 2549 at 2550. See also Davis, *supra* note 37 at 313; and Rajendra Sisodia, David B Wolfe & Jagdish N Sheth, *Firms of Endearment: How World-Class Companies Profit from Passion and Purpose* (Upper Saddle River, N.J: Wharton School Publishing, 2007) at 175.
[45] Davis, *supra* note 37 at 313.
[46] *Ibid*.
[47] Lara O'Reilly, "These are the 10 companies that spend the most on advertising", *Business Insider* (6 July 2015), online: <http://www.businessinsider.com/10-biggest-advertising-spenders-in-the-us-2015-7>.
[48] Michael E Porter & Mark R Kramer, "The Competitive Advantage of Corporate Philanthropy" (2002) 80:12 Harvard Business Review 56 at 59. See also Davis, *supra* note 37 at 313.
[49] Porter & Kramer, *supra* note 48 at 57. See also Davis, *supra* note 37 at 313.
[50] Davis, *supra* note 37 at 314.
[51] *Ibid* at 315.

These norms, which exceed legal standards, change over time as society changes. Corporations that keep up with such sociocultural standards would promote their public image and benefit in the long run. For example, firms that refuse input made by sweatshop factories and child labour will be more competitive in markets where consumers and human rights activists demand a high moral standard for products.[52]

Fourth, a society-oriented profit maximization approach is consistent with international business leadership in the twenty-first century which requires firms to be responsible "towards people and the societies in which the company operates."[53] Mr. Kofi Annan, the former secretary-general of the United Nations ("UN"), said in his speech at the World Economic Forum in Davos that

> [w]e have to choose between a global market driven only by calculations of short-term profit, and one which has a human face. Between a world which condemns a quarter of the human race to starvation and squalor, and one which offers everyone at least a chance of prosperity, in a healthy environment. Between a selfish free-for-all in which we ignore the fate of the losers, and a future in which the strong and successful accept their responsibilities, showing global vision and leadership.[54]

He suggested the UN and business leaders "initiate a global compact of shared values and principles, which will give a human face to the global market."[55] The UN Global Compact, which calls on "companies to align strategies and operations with universal principles on human rights, labour, environment and anti-corruption, and take actions that advance societal goals," has attracted the participation of 9,146 companies and 168 countries.[56]

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[52] See, for example, Max Nisen, "How Nike Solved Its Sweatshop Problem", *Business Insider* (9 May 2013), online: <http://www.businessinsider.com/how-nike-solved-its-sweatshop-problem-2013-5>. See also Andrew Herman, "Reassessing the Role of Supplier Codes of Conduct: Closing the Gap Between Aspirations and Reality" (2012) 52:2 Virginia Journal of International Law 445 at 466; and Kate Macdonald, "Public Accountability within Transnational Supply Chains: A Global Agenda for Empowering Southern Workers?" in Alnoor Ebrahim & Edward Weisband, eds, *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge, UK: Cambridge University Press, 2007) at 262–263.

[53] Niall Fitzgerald & Mandy Cormark, *The Role of Business in Society: An Agenda for Action*, CSR-06-Citizen (The Conference Board, Harvard University CSR Initiative, and the International Business Learders Forum, 2006) at 5.

[54] Kofi Annan, *Secretary-General Proposes Global Compact on Human Rights, Labour, Environment in Address to World Economic Forum in Davos* (Davos, Switzerland, 1999) at 4.

[55] *Ibid* at 1.

[56] The United Nations, "UN Global Compact Home Page", online: <https://www.unglobalcompact.org/>.

For those reasons, making society-oriented business decisions is not a zero-sum game between corporations and society. Instead, the decisions promote reciprocal benefits between firms and society. A society-oriented firm may achieve a convergence of social and economic benefit as indicated by Michael E Porter and Mark R Kramer in the chart below.

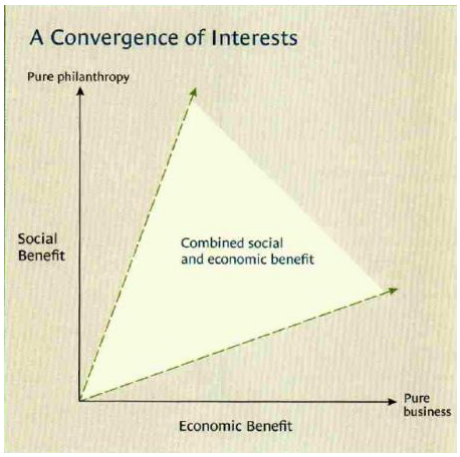

Chart 1: A convergence of interests[57]

In this chart, society-oriented business decisions do not merely refer to philanthropic activities such as charitable donations but the combination of social and economic benefit. For example, a corporation that strictly maximizes profits and a society-oriented one will take different strategies when they expand their production by building a new factory. The strict profit-maximizing firm will seek profits regardless of negative impact on the environment, employees and local society. This corporation may still donate some amount of money to the local community, but the donation does not make the corporation society-oriented because its business harms society in the first place. In contrast, a society-oriented corporation, which may or may not make a charitable donation, will improve the working conditions for workers and take all necessary measures to protect the environment and consumers beyond legal standards. Some firms would go beyond this and, as discussed in the next subsection, make some business decisions that benefit society even when the decisions are not profitable.[58]

[57] Porter & Kramer, *supra* note 48 at 59.
[58] For example, pressure was brought by the Coca-Cola Company on a supplier in Brazil to protect the environment of the local community. See more at The Coca Cola Company, *The Coca-Cola Company's Human Rights Report 2016-2017* (2017) at 13.

2.3. Social Responsibility beyond Profit Maximization

The previous two subsections contrast a traditional business approach that strictly maximizes profit with an approach that recognizes corporations can benefit from acting in socially responsible ways. Suppose, for example, the cost to a car manufacturer in moving the gas tank of all cars of a model to a safer position for consumers is CAD 10 million while the total expected payment for damages to injured consumers due to the unsafe position of the gas tanks is less than CAD 10 million. In this situation, a profit-maximizing business decision would not relocate the gas tanks while a socially responsible decision that goes beyond profit maximization would move the gas tanks to a safer position for consumers.

The justification for a corporation to make socially responsible decisions even where they are not conducive to the corporation's long-run profit is that these decisions derive from moral standards socially constructed in the perception of shareholders and directors.[59] It has been suggested that shareholders and directors normally act in the best interests of shareholders but some might also act for others in many cases as they are not mere profit maximizers.[60] Some shareholders and directors, who are referred to as being "prosocial", might be "willing to sacrifice at least some corporate profits in order to benefit, or at least avoid harming, employees, consumers, society, or the environment."[61] For example, Unilever, as a powerful buyer of white fish, collaborated with the World Wild Fund for Nature in 1996 to improve fishing practices although the improved practices would increase the cost of harvesting the fish.[62] Similarly, in the gas tank case mentioned above, a director who complies with moral standards would move the gas tank to a safer position to protect consumers or withdraw the defective car model from the market even when the cost to do so

[59] Moral norms generally refer to "the conviction that some forms of behavior are inherently right or wrong, regardless of their personal or social consequences." Antony Stephen Reid Manstead, "The Role of Moral Norm in the Attitude-Behavior Relationship" in Deborah J Terry & Michael A Hogg, eds, *Attitudes, Behavior and Social Context: The Role of Norms and Group Membership* (Mahwah, N.J.: Lawrence Erlbaum, 2000) 11 at 12. See also Sander van der Linden, "Charitable Intent: A Moral or Social Construct? A Revised Theory of Planned Behavior Model" (2011) 30:4 Curr Psychol 355 at 358.

[60] Lynn A Stout, "New Thinking on 'Shareholder Primacy'" (2012) 2:2 Accounting, Economics, and Law 1 at 16. See also Freeman & Liedtka, *supra* note 5 at 287–288.

[61] Stout, *supra* note 60 at 16. See also Osterloh, Frey & Zeitoun, *supra* note 14 at 55.

[62] Fitzgerald & Cormark, *supra* note 53 at 5.

is would significantly lower the corporation's profits. Likewise, prosocial shareholders would consider the decision of the director as necessary and would not challenge it as a breach of fiduciary duty on the basis that it reduced corporate profit or shareholder wealth.

The possibility that socially responsible corporations make business decisions to benefit society even where it is not conducive to corporate profit to do so suggests that these corporations can play a positive role in governing society. Some corporations act in accord with societal interests where doing so aligns with its long-run profits. Some may, however, still pursue societal interests even where it is not profitable but is what they should do. The following sections consider the role of corporations in global governance, how they help to enforce national law at a transnational level, and their legitimacy in making and enforcing transnational law.

3. A CONSTRUCTIVIST APPROACH TO LAW AT THE INTERNATIONAL LEVEL

Constructivism emerged as a norm-based theory in international law and international relations in the early 1990s.[63] Constructivism refers to a theory that "highlights the role of non-instrumental action, of social structure comprised of identities and norms, and of a broad range of normative actors in world politics."[64] Constructivists analyze the function of institutions and norms in shaping behaviour of actors in society.[65] Constructivists have the following two major concerns that support the analysis of the role of MNCs in making transnational law.

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[63] David Armstrong, Theo Farrell & Hélène Lambert, "Three Lenses: Realism, Liberalism, and Constructivism" in *International Law and International Relations*, 2d ed (New York: Cambridge University Press, 2012) at 75. See also Jutta Brunnee & Stephen J Toope, "International Law and Constructivism: Elements of an Interactional Theory of International Law" (2000) 39 Colum J Transnat'l L 19 at 26; and Stephano Guzzini, Anna Leander & Barry Buzan, eds, *Constructivism and International Relations* (New York: Routledge, 2006) at 10.

[64] Armstrong, Farrell & Lambert, *supra* note 63 at 95. A social structure is a set of relatively unchangeable constraints on the behavior of actors. See Ted Hopf, "The Promise of Constructivism in International Relations Theory" (1998) 23:1 International Security 171 at 172. Instrumental action refers to "actions which are planned and taken after evaluating the goal in relation to other goals, and after thorough consideration of various means (and consequences) to achieve it." See https://en.wikipedia.org/wiki/Social_actions

[65] Brunnee & Toope, *supra* note 63 at 20–21. See also Jeffrey T Checkel, "Why Comply? Social Learning and European Identity Change" (2001) 55:3 International Organization 553 at 553.

First, constructivists reject the view that the social world as given and assert that actors construct and continuously redefine the social world.[66] Constructivists view international relations as a social system encompassing multiple participants including states and non-state actors such as non-governmental organizations ("NGOs"), MNCs, and individuals.[67] Theorists contend that the interaction of states and other actors shapes their behaviour.[68] Actors make decisions based on knowledge including "rhetorical knowledge" which is offered or created in dialogue among them.[69] States are the main actors in world politics but non-state actors also influence normative change.[70] While the literature on constructivism focuses on the role of states as the main actors in international relations, this dissertation takes a constructivist approach to discussing the function of MNCs in global competition governance.

The second concern of constructivists is about norms. Constructivists assert that norms substantively influence the behaviour of people.[71] According to constructivists, norms shape human decisions and provide people with means for communication.[72] Norms refer to beliefs shared by people about the world including those about "what is right and proper … and what is doable and effective."[73] Norms under a constructivist perspective, therefore, not only prescribe what actors should do but also suggest that they take "meaningful action."[74] Constructivists consider norm-compliant behaviour as a process in which actors socialize norms.[75]

The process of norm socialization includes the "institutionalisation of norms in official policy" by states and the "internalisation of norms in community discourse and culture" by

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[66] Guzzini, Leander, & Buzan, *supra* note 63 at 4.
[67] Phillip A Karber, "'Constructivism' as a Method in International Law" (2000) 94 Proceedings of the Annual Meeting (American Society of International Law) 189 at 189.
[68] Brunnee & Toope, *supra* note 63 at 28.
[69] *Ibid* at 71. "Rhetorical knowledge" refers to "the accomplishment of two or more persons working together creatively to refashion the linguistically structured symbols of social cohesion that serve as the resources for intersubjective experience". See Clarke Rountree, "Rhetorical Knowledge in Legal Practice and Critical Legal Theory, Francis J. Mootz, III" (2007) 26:3 Rhetoric Review 332 at 333.
[70] Armstrong, Farrell & Lambert, *supra* note 63 at 104.
[71] Guzzini, Leander, & Buzan, *supra* note 63 at 17.
[72] *Ibid*.
[73] Armstrong, Farrell & Lambert, *supra* note 63 at 101.
[74] The voluntary enforcement of national competition laws transnationally is an example for meaningful action. *Ibid* at 102.
[75] *Ibid*.

private actors.[76] Internalization refers to an interactive process by which the regulated actors endorse the legitimacy and appropriateness of norms.[77] From a constructivist approach, laws are authoritative but only considered legitimate when they are mutually constructed by state and non-state actors.[78] Constructivists, therefore, assert that when actors internalize a law, they automatically comply with it.[79] Such automatic compliance avoids the cost of state enforcement of law.[80]

A constructivist approach to law is important for the discussion in this chapter about the internalization of national law by MNCs. The discussion indicates that once MNCs internalize a law of a country, the automatic compliance with the law not only reduces enforcement costs for authorities of such a country but also provides a potential private mechanism for extra-territorial enforcement. The following section analyzes the internal aspect of law and the process of the internalization.

4. THE INTERNAL ASPECT OF LAW

John Austin—an English legal philosopher—refers law to as orders backed by threats.[81] By using an example of a gunman, Hart criticizes this view on the basis that it equates law with a gunman's orders. He argues that a person threatened by a gunman is obliged to hand over money not because the person has an obligation to do so but because the person is afraid of the threat.[82] Thus, Hart suggests that when we observe compliance with law by a person, we should not assume that the person does so merely to avoid punishments imposed by states.[83]

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[76] *Ibid.*
[77] *Ibid.*
[78] Brunnee & Toope, *supra* note 63 at 51–52. See also Gerald J Postema, "Implicit Law" (1994) 13:3 Law and Philosophy 361 at 373–374.
[79] Armstrong, Farrell & Lambert, *supra* note 63 at 102.
[80] *Ibid.*
[81] John Austin, *The Province of Jurisprudence Determined* (London, U.K.: John Murray, 1832) at 18.
[82] Hart does not reject the function of sanctions and threats. He states that rules that lack a "centrally organized system of punishments" are wholly customary in origin. In addition, serious social pressure is a primary factor that makes rules obligatory. H L A Hart, *The Concept of Law*, 1st ed (Oxford, U.K.: Clarendon Press, 1961) at 84.
[83] *Ibid* at 81.

Hart proposes that law has external and internal aspects.[84] When persons interpret compliance with law as a way to avoid possible sanctions, they experience only the external aspect of a rule. Persons taking the external point of view include observers that are not regulated by the rule and persons who are regulated by a rule but do not accept it (the "bad man").[85] Hart asserts that the external point of view fails to explain how rules function in the lives of persons who do not take into account the presence or absence of sanctions.[86]

In contrast, those who experience the internal aspect of a rule take an "internal point of view" towards the rule.[87] The internal point of view recognizes that some members of a group accept and use law as guides to conduct and "general standard[s] to be followed by the group as a whole."[88] Perry Stephen, who shares this view, asserts that a rule exists only if the majority of the regulated people take the internal point of view towards the rule.[89] Persons who take the internal point of view seek conformity based on "the normative terminologies of 'ought', 'must', and 'should', 'right' and 'wrong'."[90] In sum, the internal point of view recognizes the view of those who consider law as common standards for their behaviour.[91] The internal aspect of law helps to explain the transformation of law into standards of behaviour.

Drawing on Hart's "internal aspect of law", this dissertation examines the normative function of competition law in the absence of sanctions. From an external aspect of law, it has been assumed that some corporations are willing to disobey law if it is costly to detect a violation.[92] This dissertation, by analyzing the internal aspect of law, suggests that it is reasonable to believe that corporations would comply with law even where sanctions are not available. The internal aspect of law also can extend the normativity of law to geographic

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[84] *Ibid* at 55.
[85] *Ibid* at 88. The term "bad man" was used by Oliver Wendell Holmes. See Oliver Wendell Holmes, "The Path of the Law" (1997) 110:5 Harvard Law Review 991 at 992.
[86] Hart, *supra* note 82 at 88.
[87] *Ibid*.
[88] *Ibid* at 55 and 86. See also Scott J Shapiro, "What is the Internal Point of View?" (2006) 75:3 Fordham Law Review 1157 at 1159.
[89] Perry Stephen, "Hart on Social Rules and the Foundations of Law: Liberating the Internal Point of View" (2006) 75 Fordham Law Review 1171 at 1171.
[90] Hart, *supra* note 82 at 56.
[91] Shapiro, *supra* note 88 at 1159.
[92] Douglass C North, "Transaction Costs, Institutions, and Economic History" (1984) 140:1 Journal of Institutional and Theoretical Economics 7 at 8.

areas in which sanctions are not available, for example, in a foreign territory. In the absence of sanctions, a "bad man" tends to violate the law but a good person still complies with it. Studying the internal aspect of law helps to distinguish between good corporate citizens that internalize national laws and "bad men"—irresponsible corporations.

In addition, this dissertation analyzes the internal aspect of law from a global perspective. Hart proposes the internal aspect of law in the context of a local society. Studies of law and society, however, no longer confine society to local regions but consider society to be global in some respects.[93] This dissertation examines society from a global perspective. The global society does not mean a sum of isolated local societies but refers to interconnected local societies. In the global society some actors, such as local corporations and consumers, may participate entirely in one local society while others such as MNCs and transnational consumers[94] participate in several local societies. Actors that operate only in one local society can harm other societies.[95] The internalization of law by MNCs, therefore, is a process that helps to connect local societies into the global one. This explains why this dissertation focuses on MNCs and their internalization of law to examine the possibility of private transnational governance.

5. THE INTERNALIZATION OF LAW BY MNCs

Section 2 suggests that some corporations may make socially responsible business decisions even when the decisions are unprofitable because those are what they should do. This sense of doing business allows for corporations to internalize national law as standards for their behaviour. A socially responsible corporation would not only comply with law but also make its best efforts to prevent private actors that are directly linked to their business such as contractors from violating law. This section examines the potential for a corporation to enforce its contractor codes of conduct as a signal showing that the corporation internalizes law.

[93] See more about this argument at Peer Zumbansen, "Defining the Space of Transnational Law: Legal Theory, Global Governance and Legal Pluralism" (2012) 21:2 Transnational Law & Contemporary Problems 305 at 309.
[94] For example, consumers that buy goods and services directly from foreign suppliers.
[95] For example, a cartel among manufacturers that export products only through exporters.

5.1. Contractor Codes of Conduct

Complying with national laws is an essential factor indicating the responsibility of a corporation to society.[96] For some corporations, compliance with law is what they ought to do. These corporations, therefore, require not only employees but also businesses they deal with to comply with various national laws.[97] MNCs, for instance, often issue contractor codes of conduct.[98]

Contractor codes of conduct refer to rules made by a "lead firm"[99] to align the conduct of contractors with the MNC's socially responsible standards.[100] "Contractor" refers to a wide range of businesses the lead firm deals with including input suppliers, downstream distributors, retailers or tertiary processers. These codes indicate the efforts of some MNCs to harmonize economic and social goals.[101] The OECD conducted a survey collecting 233 codes of conduct of companies from OECD countries and found that 35% of the codes provide guidelines for contractors.[102]

Contractor codes of conduct require that contractors comply "with all applicable laws and regulations."[103] As mentioned in Chapter 2, competition laws of different countries have economic objectives that serve to protect vulnerable stakeholders such as consumers and small business from the aggregation of excessive market power. In addition, Chapter 3

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[96] A survey conducted by the OECD found that all surveyed corporate codes of conduct "include a commitment to observe the local laws in every jurisdiction in which the subscribing entity operates." OECD, *Codes of Corporate Conduct: An Inventory*, TD/TC/WP(98)74/FINAL (1999) at 44.
[97] *Ibid*.
[98] Also called "codes of conduct for the third party" or "third-party codes of conduct" or "codes of conduct for suppliers."
[99] "Lead firm" refers to the corporation issuing contractor codes of conduct to govern its supply chain.
[100] OECD, *supra* note 96, para 36. See also Bin Jiang, "Implementing Supplier Codes of Conduct in Global Supply Chains: Process Explanations from Theoretic and Empirical Perspectives" (2009) 85:1 Journal of Business Ethics 77 at 77; and Herman, *supra* note 52 at 446. See, for example, *The A.P Moller - Maersk Group's Third Party Code of Conduct* (A.P. Moller - Maersk Group, 2013) at 1.
[101] Martin C Schleper, Christian Busse & Michael Henke, "Towards a Standardized Supplier Code of Conduct – Requirements from a Literature-Based Analysis" in Uwe Clausen, Michael ten Hompel & Matthias Klumpp, eds, *Efficiency and Logistics*, Lecture Notes in Logistics (Springer Berlin Heidelberg, 2013) 197 at 197.
[102] The Organisation for Economic Co-operation and Development, *Codes of Corporate Conduct: Expanded Review of their Contents* (OECD, 2001) at 5.
[103] See, for example, *Apple Supplier Code of Conduct* (Apple Inc., 2016) at 1. See also The A.P Moller - Maersk Group note 100 at 2; and *Sony Supplier Code of Conduct* (Sony Group) at 1.

section 2 shows that competition laws of some countries provide exemptions for export cartels, which provoke conflicts between countries because consumer surplus transferred to producers makes the exporting country better off while making importing countries worse off.[104] "National competition law" and "applicable law" internalized by corporations in this dissertation, therefore, do not include exemptions for export cartels but refer to only the aspects of competition law that protect society from the aggregation of excessive market power as discussed in Chapter 2.

The concept of "applicable law" in terms of jurisdiction differs across corporations.[105] Some corporations adopt a narrow definition of applicable laws by referring to laws of countries where the contractors do business.[106] This definition means applicable competition laws are laws of countries in which contractors are threatened by legal sanctions.

Confining the applicable competition laws to those of countries in which the lead firm and contractors do business does not reflect a high level of social responsibly of the lead firm in protecting the interest of society. Chapter 3 suggests that competition law in some countries such as the U.S., Canada, and Vietnam may not consider an export cartel as illegal.[107] One, therefore, may question the commitment to corporate social responsibility of the lead firm if two contractors in country A enter into a price-fixing cartel aiming at consumers in country B[108] in which neither the contractors nor the lead firm has business and the cartel does not harm the lead firm's business.[109] In this situation, a good corporate citizen[110] that seeks to do the right thing and avoid impropriety[111] would prevent the cartel. The lead firm, therefore, should incorporate competition laws of countries affected by the anticompetitive business practice such as country B into their contractor codes of conduct.

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[104] Paul Stephan, "Global Governance, Antitrust, and the Limits of International Cooperation" (2005) 38:1 Cornell International Law Journal 173 at 198.
[105] This dissertation focuses on applicable antitrust law or competition law.
[106] See, for example, Sony Group, *Sony Group Code of Conduct* (2015) at 1.
[107] See Chapter 3 section 4.
[108] This assumes that competition authorities in country A do not remedy the cartel and the cartel is illegal in country B but competition authorities in country B are unable to remedy the cartel due to the limits of capacity and territorial jurisdiction.
[109] The lead firm is neither a cartel member nor a cartel victim.
[110] Some MNCs claim to be good corporate citizens. See, for example, The A.P Moller - Maersk Group note 100 at 1. See also Walmart, Walmart Corporation, *Walmart Global Statement of Ethics* (2012) at 25.
[111] See, for example, Lockheed Martin, *Lockheed Martin Supplier Code of Conduct* at 1.

The OECD also recommends in its Guidelines for Multinational Enterprises that firms should "take into account both the [antitrust] law of the country in which they are operating and the laws of all countries in which the effects of their conduct are likely to be felt."[112]

In practice, some corporations incorporate competition laws of countries affected by the anticompetitive business practice into their contractor codes of conduct although their statements about that coverage are not particularly clear. For example, the Lockheed Martin Supplier Code of Conduct expects contractors to avoid "business practices such as entry into arrangements that unlawfully restrain competition; improper exchange of competitive information; price fixing, bid rigging, or improper market allocation."[113] Similarly, Toyota Motor Corporation requires that contractors "[d]o not engage in illegal acts against the competition laws and regulations of each country and region including private monopolies, unreasonable restraint of trade (cartel, collusive bidding, etc.) or unfair trade practices."[114] These codes do not limit applicable antitrust laws to any specific countries. This suggests the applicable laws may include competition laws of countries affected by the contractors' anticompetitive business practices. Walmart's Global Statements of Ethics provides a clearer concept of applicable competition laws of this kind. Walmart and its contractors commit to complying "with all competition … laws applicable to [their] *global businesses* ... In doing so, [they] will thrive as a company and continue to *help [their] customers around the world* save money and live better."[115]

In addition, some corporations prioritize the strictest standard if there is any difference between laws across nations.[116] Competition laws across countries may have the same prohibitions and strictness, but in a cross-border competition case competition law of a country may be stricter than another. Suppose, for example, the competition laws of country A and country B consider cartels as illegal *per se*. An export cartel made in country A targeting country B may, however, be legal in country A while it is illegal in country B. In this case, competition law of country B is stricter than that of country A and lead firms should enforce the stricter law against the cartel.

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[112] OECD, *Guidelines for Multinational Enterprises* (2011) at 59.
[113] Lockheed Martin, *supra* note 111 at 2.
[114] Toyota Motor Corporation, *TOYOTA Supplier CSR Guidelines* (2012) at 7.
[115] Walmart Corporation, *supra* note 110 at 20. (Emphasis added)
[116] See, for example, BP, *Code of Conduct* at 4. See also Citigroup Inc, *Our Code of Conduct* (2015) at 11.

The contractor codes of conduct of an MNC signal the internalization of national laws by the lead firm. The MNC is not liable for any violations of law by its contractors.[117] A failure to prevent the contractor from violating a national law does not bring the MNC any negative legal consequence. The MNC, however, considers compliance as what firms ought to do because it helps to make the global business environment sustainable for everyone.[118] The internalization of law through contractor codes of conduct also endorses the constructivists' assertion that norms not only prescribe what actors should do but also enable meaningful action.[119]

Having contractor codes of conduct, however, is a signal but does not ensure that the MNC internalizes national laws. A corporation may have such codes to pre-empt social criticism of abuses along its supply chain.[120] An MNC that internalizes national laws should substantively enforce the codes even when a violation by a contractor increases the profits of the lead firm.

5.2. The Enforcement of Contractor Codes of Conduct

Constructivists claim that the internalization of law reduces public enforcement costs because voluntary private compliance helps to enforce national laws at private party expense.[121] One might argue that if a lead firm internalizes national laws, that firm may lack the power to enforce its contractor codes of conduct. This subsection focuses on the private enforcement of national laws incorporated in contractor codes of conduct. Lead firms employ self-compliance and economic incentives as measures to secure contractor compliance with their codes of conduct.[122]

Lead firms promote contractor compliance with codes of conduct. For example, the Coca-Cola Company provides contractors with guidance and a training program on

[117] Except for violations conducted by the contractor in collaboration with or under instructions or supports of the MNC.
[118] See, for example, Apple Inc. note 103 at 6. See also The A.P Moller - Maersk Group note 100 at Introduction.
[119] Armstrong, Farrell & Lambert, *supra* note 63 at 102.
[120] Herman, *supra* note 52 at 462.
[121] Armstrong, Farrell & Lambert, *supra* note 63 at 102.
[122] See more about these mechanisms in Checkel, *supra* note 65 at 557.

implementing the codes of conduct.[123] This mechanism encourages contractors to internalize national law incorporated in lead firm codes of conduct as standards for their behaviour in the same way lead firm codes of conduct operate as standards for lead firm behaviour. Voluntary compliance makes the enforcement of contractor codes more effective because it reduces costs states would otherwise incur to enforce their laws and because internalization of lead firm codes of conduct by contractors reduces the need for, and cost of, lead firm monitoring and enforcement of their contractor codes of conduct.[124]

For contractors that do not internalize contractor codes of conduct, lead firms employ three measures relying on economic incentives and sanctions to make contractors comply with the lead firm's rules. The first measure provides contractors with economic incentives to comply. While lead firms normally consider product price and quality when selecting a supplier, some lead firms consider the willingness to comply with the codes as an important benchmark apart from price and quality to give preference to a supplier.[125] This lead firm preference gives contractors an incentive to self-comply with lead firm codes of conduct.

The second measure is making the codes a source of rules governing the contractual relationships between a lead firm and its contractors.[126] The OECD found that 52 out of 233 surveyed codes of conduct incorporate a mechanism in contracts with contractors allowing for the lead firm to discipline its business partners.[127] The survey also indicated that 39 codes provide that non-compliance could lead to the discontinuance of the business between the lead firm and its contractors.[128] Some contractor codes of conduct provide that "any violations of this Code may jeopardize the supplier's business relationship with [the lead

[123] The Coca Cola Company, *supra* note 58 at 14.
[124] Cynthia Estlund, "Enforcement of Private Transnational Labor Regulation: A New Frontier in the Anti-Sweatshop Movement?" in Cafaggi Fabrizio, ed, *Enforcement of Transnational Regulation Ensuring Compliance in a Global World* (Cheltenham, UK: Edward Elgar, 2012) at 245.
[125] For example, A.P. Moller - Maersk Group gives "preference to Suppliers based on quality and price and who share our commitment to conduct business in an ethical, environmental and socially responsible manner," note 100 at 4.
[126] For example, the Starbucks Company states that "[o]ur suppliers are required to sign an agreement pledging compliance with Starbucks Supplier Code of Conduct and specific standards." See: The Starbucks Company, *Starbucks Supplier Code of Conduct* (2003). In this situation, contractor codes of conduct are part of contracts between the lead firm and its contractors.
[127] OECD, *supra* note 96, para 53.
[128] *Ibid*.

firm], up to and including termination."[129] Some MNCs regularly inspect and audit factories of their suppliers although inspections are costly. For example, Nike, a footwear company, and independent organizations, including the Fair Labor Association and the Better Work Programme of the ILO, conducted 1,300 factory audits of contract factories in 2014 and 2015 to monitor compliance, mostly in terms of complying with labour standards.[130] The factory inspections help the lead firm decide whether a contractor can stay in the supply chain.[131]

One might argue that in the absence of an authoritative decision, the lead firm may lack a legal basis for terminating a business relationship with a contractor if the contractor violates competition law even when the two firms made an explicit contractual term that non-compliance with the code of conduct is a ground for the termination of the contract. Such an argument by the contractor would be that the enforcement of competition law is under the exclusive jurisdiction of a competition authority and/or national courts.[132] For example, the contractor enters into a cartel that is not remedied by either the country in which the violation takes place (home country)[133] or the countries affected by the violation (affected country).[134] In the absence of an authoritative decision or judgment concluding that the contractor violated the competition law of an affected country, if the lead firm terminated the contract with the contractor on the ground that the contractor had entered into such a cartel, one might suggest that the contractor could challenge the validity of the contractual provision that allowed the lead firm to terminate the contract due to a contractor's breach of competition law through, for example, arbitration. One might also suggest that since an arbitration tribunal does not have subject-matter jurisdiction to hear a competition law issue, the lead

[129] Apple, Inc. note 103 at 1. See also other examples: The Coca-Cola Company, *Prohibition on Cartel Activity*, s 7; and The A.P Moller - Maersk Group, note 100 at 4.
[130] Nike, Inc, *Sustainable Business Report*, FY14/15 Nike, Inc. (Nike, Inc., 2016) at 62. The number of Nike's contract factories in 2015 was 692. See *ibid* at 13. See another example of factory inspection conducted by Walmart in *Walmart 2016 Global Responsibility Report* (Walmart, 2016) at 113.
[131] Walmart Corporation, *Sourcing Standards & Resources* (2016).
[132] See, for example, Canadian *Competition Act*, RSC, 1985, c C-34 [*Competition Act*], s 7(1), as amended. See also *Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*, 14 April 1947, No 54 [*Act on Prohibition of Private Monopolization and Maintenance of Fair Trade of Japan*] at Article 27-2.
[133] Because of the home country's exemptions for export cartels. See Chapter 3 section 2.
[134] Because some affected countries are unable or not willing to enforce competition law extraterritorially, see Chapter 3 section 4.

firm would lose the case unless a state authority concludes that the contractor violated the competition law of the affected country.

The public nature of competition law, however, does not deprive the lead firm of the right to terminate the business relationship in question because competition concerns are subject to international arbitration. Arbitrators enjoy jurisdiction to determine whether the contractor violates competition law of a country in question and thus can justify the lead firm's termination of the contract.[135] Many jurisdictions recognize the arbitrability of competition law.[136] For example, in 1985, the U.S. Supreme Court examined the question of whether claims arising under the *Sherman Act* are arbitrable in *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*[137] Justice Blackmun delivering the opinion of the Court wrote that "[t]he mere appearance of an antitrust dispute does not alone warrant invalidation of the selected forum on the undemonstrated assumption that the arbitration clause is tainted."[138] He rejected the *American Safety* doctrine established in 1968 by the United States Court of Appeals for the Second Circuit in *American Safety Equipment Corp. v. J. P. Maguire & Co.*[139] that antitrust claims are non-arbitrable.[140] Justice Blackmun observed that "[w]here the parties have agreed that the arbitral body is to decide a defined set of claims which includes … those arising from the application of American antitrust law, the tribunal therefore should be bound to decide that dispute in accord with the national law giving rise to the claim."[141] The U.S. Supreme Court then ruled that the "[r]espondent's antitrust claims are arbitrable pursuant to the Arbitration Act."[142]

Arbitrators still enjoy jurisdiction to make an award against the contractor even if the cartel is exempt by the home country because of the cartel's adverse competitive effects in

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[135] See more about the arbitrability of competition law at Phillip Landolt, *EU and US Antitrust Arbitration: A Handbook for Practitioners* (Kluwer Law International, 2011) at 12–13 and 15–16.
[136] See more about other jurisdictions recognizing the arbitrability of competition law in John Beechey, "Arbitrability of Anti-trust/Competition Law Issues – Common Law" (1996) 12:2 Arbitr Int 179 at 183–189. For example, French law "allows the arbitrability of matters, such as fraud and antitrust cases, involving public policy, leaving to the courts to review the compatibility of the award with the French notion of public policy in the context of an action to set aside or to enforce the award." Landolt, *supra* note 135 at 8.
[137] *Mitsubishi Motors Corp v Soler Chrysler-Plymouth, Inc*, [1985] 473 US 614 at 616.
[138] *Ibid* at 615.
[139] *American Safety Equipment Corp v J P Maguire & Co*, [1968] 391 F2d 821 at 827.
[140] *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, *supra* note 137 at 632–634.
[141] *Ibid* at 636–637.
[142] *Ibid* at 615.

the affected countries. The exemption in question merely means that the authorities in the home country would not punish the contractor. The exemption is not binding upon the lead firm and any contractors located outside the home country's territory.[143] The arbitrator, therefore, could rely on the competition law of the affected country, which is incorporated in the contractor codes of conduct, to decide that the contractor's violation justifies the lead firm's termination of the contract.

The third measure relying on economic sanctions to discipline contractors is the threat of loss in prospective procurements. Lead firms procuring goods or services often require that a supplier eligible to submit a tender should have never violated law especially in the areas the contractor does business.[144] Contractors, therefore, should strictly comply with laws and contractor codes of conduct because any violation might make them ineligible to participate in procurements offered by lead firms.

A strict enforcement of contractor codes of conduct, however, might provoke conflicts of interest within the lead firm. Contractors that violate laws normally incur lower costs and thus can benefit the lead firm with lower prices.[145] For example, firms exploiting employees with unpaid overtime work are likely to deliver products in a timely manner and at a lower price.[146] Similarly, a supplier that fails to internalize environmental costs would offer lead firms cheaper products than those that internalize a lead firm's code of conduct.

Given such conflicts of interest within lead firms, one might argue that MNCs would be reluctant to discipline contractors. It has been asserted that the enforcement of contractor codes of conduct derives from social pressure, especially the threat of hostile movements against the lead firm's supply chain.[147] From such an external point of view, powerful public voices force MNCs to improve the quality of monitoring contractor compliance with their codes of conduct.[148] However, as subsection 2.3 suggests, some corporations may still

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[143] Beechey, *supra* note 136 at 181.

[144] Government procurements make the same requirements. See David A Gantz et al, "Labor Rights and Environmental Protection under NAFTA and Other U.S. Free Trade Agreements [with Comments]" (2011) 42:2 The University of Miami Inter-American Law Review 297 at 342.

[145] Estlund, *supra* note 124 at 250.

[146] *Ibid* at 251.

[147] Helen Keller, "Corporate Codes of Conduct and Their Implementation: The Question of Legitimacy" in Rudiger Wolfrum & Volker Röben, eds, *Legitimacy in International Law* (New York: Springer, 2008) at 13; and Herman, *supra* note 52 at 462.

[148] Estlund, *supra* note 124 at 244. See also David Antony Detomasi, "The Multinational Corporation and Global Governance: Modelling Global Public Policy Networks" (2007) 71:3 J Bus Ethics 321 at

voluntarily enforce these codes even where it is unprofitable to do so. From an internal point of view, as Hart suggests, when we observe compliance with law by a person, we should not assume that the person does so merely to avoid punishments imposed by states.[149] It is, therefore, reasonable to believe that some corporations may enforce these codes not in response to external pressure, but because they have internalized the objectives of competition law.

6. TRANSNATIONAL LEGALITY OF INTERNALIZED NATIONAL LAWS

By requiring contractors in the global supply chain to comply with all applicable laws, lead firms can help to extend the jurisdiction of national laws to the territory of other countries. This section examines how lead firms transform contractor codes of conduct that internalize national laws into transnational law.

The concept of transnational law refers to "a methodological lens through which we can study the particular transformation of legal institutions in the context of an evolving complex society."[150] In the context of globalization, national law and international law are not able to deal with some cross-border problems.[151] From this perspective, transnational law refers to rules overlaying state law and international law.[152] Transnational law does not replace but coexists with national and international law.[153]

Transnational private regulation refers to private governance mechanisms that regulate private actors across countries in the absence of state cooperation.[154] Private governance indicates the importance of non-state actors in regulating cross-border issues that states are

323; and Balakrishnan Rajagopal, *International Law from Below: Development, Social Movements, and Third World Resistance* (New York: Cambridge University Press, 2003) at 20.

[149] Hart, *supra* note 82 at 81. See section 4.

[150] Zumbansen, *supra* note 93 at 307.

[151] See problems with national and international competition law in dealing with cross-border competition challenges in chapters 3 and 4.

[152] Miguel Poiares Maduro, Kaarlo Tuori & Suvi Sankari, eds, *Transnational Law: Rethinking European Law and Legal Thinking* (Cambridge, U.K.: Cambridge University Press, 2014) at 17.

[153] *Ibid*.

[154] Colin Scott, Fabrizio Cafaggi & Linda Senden, "The Conceptual and Constitutional Challenge of Transnational Private Regulation" (2011) 38:1 Journal of Law and Society 1 at 3.

unwilling to or unable to govern.[155] Contractor codes of conduct are transnational private rules by which lead firms participate in global governance. Due to the limits of territorial jurisdiction[156] and weak international cooperation in the competition law area,[157] many firms may not be willing to comply with competition laws of countries affected by their business but in which the firms do not have assets or conduct business. Contractor codes of conduct and contractual relationships help improve compliance with competition laws of firms operating outside the jurisdictions of countries that may capture it.[158]

The transnational effect of contractor codes of conduct derives from global networks created by lead firms. These codes transcend territorial confines and regulate not only the MNC's employees but also private actors that participate in the corporation's cross-border supply chains, such as incumbent suppliers and potential business partners.[159] Many lead firms state that their contractor codes of conduct go "beyond mere compliance with the law" and create "internationally recognized standards, in order to advance social and environmental responsibility and business ethics."[160] Lead firms rely on their transnational economic power to make contractors comply with their transnational rules.[161]

Since lead firms' contractor codes of conduct internalize national competition laws, the enforcement of the codes gives internalized national laws transnational effects. If, for example, a contractor enters into an export cartel that has adverse competitive effects for another country, the enforcement of the lead firm's contractor codes of conduct helps to enforce the competition law of the affected country in the territory of the home country. This extraterritorial enforcement relies on contractual relationships, advocacy, and economic incentives rather than public authority. Therefore, the extraterritorial enforcement of

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[155] Victor V Ramraj, "Transnational Non-State Regulation and Domestic Administrative Law" in Susan Rose-Ackerman, Peter L Lindseth & Blake Emerson, eds, *Comparative Administrative Law*, 2d ed (Edward Elgar, 2017) 582 at 586.
[156] See Chapter 3.
[157] See Chapter 4.
[158] Cafaggi Fabrizio, Andrea Renda & Rebecca Schmidt, "Transnational Private Regulation" in *International Regulatory Co-operation: Case Studies, Vol 3: Transnational Private Regulation and Water Management* (OECD Publishing, 2013) at 11.
[159] Keller, *supra* note 147 at 5. See also Fabrizio, Renda & Schmidt, *supra* note 158 at 21.
[160] Sony Supplier Code of Conduct note 103 at 1. See similar statements in the Apple Supplier Code of Conduct, note 103; and Walmart Corporation, *supra* note 110 at 3.
[161] The economic power refers to power of a corporation to enforce contractor codes of conduct discussed in subsection 5.2.

competition law through private transnational rules avoids territorial jurisdiction conflicts.[162] In addition, the extraterritorial enforcement of competition law through private transnational rules overcomes concerns about the unfair distribution of financial and administrative burdens of enforcement that can restrain international cooperation among states as mentioned in Chapter 4.[163]

One might argue that the enforcement of contractor codes of conduct makes lead firms ruling or dominant actors in global governance alongside statist hegemony.[164] Private transnational rules discussed in this dissertation, however, do not result in lead firms becoming private hegemons in global governance for three reasons. First, the internalization of national laws by lead firms differs from the globalization of national legal institutions that diffuse national law concepts to other territories.[165] For example, some authors suppose that MNCs facilitate the enforcement of American legal institutions such as intellectual property law or anti-bribery law in foreign territories.[166] According to the authors, by prohibiting private actors, especially American nationals, from bribing foreign officials in foreign territories,[167] MNCs enforce the U.S. *Foreign Corrupt Practices Act*[168] in relation to conduct

[162] See more about the conflicts of territorial jurisdiction in Chapter 3 section 4.
[163] See Chapter 4 subsections 2.2 and 3.2
[164] Statist hegemony refers to a situation in which "a powerful state can largely impose its rules and its wishes" on the others. See James N Rosenau & Ernst Otto Czempiel, eds, *Governance Without Government: Order and Change in World Politics*, 20 (Cambridge, U.K.: Cambridge University Press, 1992) at 33. Some authors assert that the world order consisting of large scale institutions such as the U.N. and the WTO is a liberal hegemonic order under the hegemonic leadership of the U.S. See Rebekka Friedman, Kevork Oskanian & Ramon Pacheco Pardo, *After Liberalism? The Future of Liberalism in International Relations* (Palgrave Macmillan, 2013) at 93.
[165] The globalization of national legal institutions has been referred to as "globalised localism." See Boaventura de Sousa Santos, "Globalizations" (2006) 23:2–3 Theory, Culture & Society 393 at 396.
[166] See this discussion in de Sousa Santos *ibid*. See also Boaventura de Sousa Santos & César A Rodríguez Garavito, eds, *Law and Globalization from Below: Towards a Cosmopolitan Legality* (New York: Cambridge University Press, 2005) at 10; and A Claire Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy* (Cambridge University Press, 2003) at 20; and Craig Scott & Robert Wai, "Transnational Governance of Corporate Conduct through the Migration of Human Rights Norms: The Potential Contribution of Transnational 'Private' Litigation" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism* (Oxford, U.K.: Hart Publishing, 2004) at 304.
[167]See US Department of Justice & US Securities and Exchange Commission, *FCPA: A Resource Guide to the U.S. Foreign Corrupt Practices Act* (2012) at 10.
[168] American *Foreign Corrupt Practices Act*, 1977, 15 USC §78dd–1 [*Foreign Corrupt Practices Act*].

that takes place completely abroad and may not have any direct, substantial, and reasonably foreseeable effects on trade or commerce in the U.S.

Internalization of national laws by lead firms can respond to situations in which a competition law violation in one country has adverse competitive effects in other countries.[169] This mechanism, therefore, internalizes laws of any countries affected by a supply chain's business, not just the laws of powerful countries. For example, lead firm codes of conduct typically provide that "when differences arise between standards and legal requirements, the stricter standard shall apply, in compliance with applicable law."[170] Lead firms can, therefore, still prohibit and remedy a transaction that takes place in the U.S. but that has negative effects in other countries even if the transaction is exempt from the *Sherman Act*.[171]

Second, the internalization of national laws by lead firms does not necessarily result in private hegemonic actors because these firms check and balance each other and the legitimacy of such internalization is recognized and overseen by civil society. The lead firm of a supply chain may be the contractor in another chain. For example, A.P. Moller Maersk is the authority in its supply chain but might be subject to the governance mechanism of Toyota when A.P. Moller Maersk provides services for Toyota. The effectiveness of this mechanism, however, is not dependent upon any critical mass of lead firms internalizing competition law because any abuse of power can also be remedied by civil society through actions such as boycotts or NGO activism.[172] In addition, corporations can be involved in collaborative governance along with states and civil society.[173] From this perspective, the internalization of national laws by lead firms allows MNCs to protect vulnerable social

[169] Assuming that the affected countries have competition law proscribing the violations of the contractor in question.
[170] See, for example Apple Inc., note 103 at 1. See also The A.P Moller - Maersk Group note 100 at 2.
[171] See exemptions for export cartels provided by American antitrust laws in Chapter 3 subsection 3.2.
[172] See, for example, Nisen, *supra* note 52. See also Macdonald, *supra* note 52 at 262–263. See more about the external aspect of the legitimacy of corporate competition governance in subsection 7.2.2.
[173] See, for example, The Coca Cola Company, *supra* note 58 at 46–47. See also Santos & Rodríguez Garavito, *supra* note 166 at 6–7.

participants such as consumers and small businesses in global society from more powerful ones such as cartel members or firms with a dominant position in relevant markets.[174]

Third, the internalization of national laws by lead firms does not replace state law, regulatory authority or result in "severe hardship, injustice, imbalance and crisis linked to the rise of private global rulers."[175] Unlike some other forms of transnational law, contractor codes of conduct internalize state law and enforce it transnationally. This helps to strengthen the regulatory power of states at the transnational level. In addition, the internalized contractor codes of conduct help to enforce law of a less powerful country in the territory of a more powerful country and thus enhance justice and fairness in international society. For example, in the P3 case, mentioned in Chapter 3 subsection 4.4, the three European shipping corporations voluntarily complied with the Vietnamese *Competition Law* when they conducted a merger in Europe that had potential effects on the Vietnamese markets. Such compliance helped to enforce the Vietnamese *Competition Law* in European territory.

7. PRIVATE AUTHORITY IN GLOBAL GOVERNANCE AND THE LEGITIMACY OF INTERNALIZED NATIONAL LAW

The enforcement of contractor codes of conduct helps to diffuse laws of a state to the territory of other countries without creating significant jurisdictional conflicts. Such an enforcement, therefore, allows lead firms to engage in governing global competition. Since corporations are not duly elected in the same way as states,[176] one might argue that lead firms do not have the regulatory legitimacy to govern private actors in society other than those that work for the corporation. This section discusses private authority in global governance and

[174] See more problems with protecting vulnerable social participants in Southern countries: Macdonald, *supra* note 52 at 259.

[175] These concerns are mentioned by Joel Bakan, "The Invisible Hand of Law: Private Regulation and the Rule of Law" (2015) 48:2 Cornell International Law Journal 279 at 283 and 298.

[176] Ruth W Grant & Robert O Keohane, "Accountability and Abuses of Power in World Politics" (2005) 99:1 The American Political Science Review 29 at 33. See also Doris Fuchs, Agni Kalfagianni & Julia Sattelberger, "Democratic Legitimacy of Transnational Corporations in Global Governance" in Eva Erman & Anders Uhlin, eds, *Legitimacy Beyond the State? Re-examining the Democratic Credentials of Transnational Actors* (Online: Palgrave Macmillan, 2010) at 44; and Jens Steffek, "Sources of Legitimacy Beyond the State: A View from International Relations" in Christian Joerges, Inger-Johanne Sand & Gunther Teubner, eds, *Transnational Governance and Constitutionalism* (Oxford, U.K.: Hart Publishing, 2004) at 91.

argues that lead firms have a plausible claim to legitimacy in the regulation of their supply chains.

7.1. MNCs and Private Authority in Global Governance

At the national level, states enjoy their sovereignty in governing society through their legal system. At the international level, states traditionally act as the legitimate and principal agents of local societies in the global society, which has long been considered a realm set aside only for statist actors.[177] Law, therefore, has been referred to as a product of states at both the national and international level.[178]

Global society, however, lacks an overarching government and is anarchic to some extent.[179] In the context of globalization, states are not the only participants in international law.[180] Private actors have been involved in governing many areas of international law such as making rules and settling disputes. [181]

Private actors play authoritative roles supplementary to those of states.[182] The traditional concept of authority refers to the "public authority" that is the accountability of the "duly elected representatives and their delegates" to prescribe behaviour.[183] Globalization, however, has given rise to private authority challenging the traditional concept of the public nature of authority.[184] Private authority, which has been said to rely on

[177] See more about these concerns at Peter Malanczuk & Michael Barton Akehurst, *Akehurst's Modern Introduction to International Law*, 7th rev. ed (London, U.K.: Routledge, 1997) at 91; and Rodney Bruce Hall & Thomas J Biersteker, eds, *The Emergence of Private Authority in Global Governance*, 85 (Cambridge, UK: Cambridge University Press, 2002) at 3.
[178] See more about this discussion at Claire A Cutler, "Constituting Capitalism: Corporations, Law, and Private Transnational Governance" (2009) 5:1 St Antony's International Review 99 at 100.
[179] See Jack Donnelly, *Realism and International Relations* (Cambridge, U.K.: Cambridge University Press, 2000) at 10. See also Joseph M Grieco, "Anarchy and the Limits of Cooperation: a Realist Critique of the Newest Liberal Institutionalism" (1988) 42:3 International Organization 485 at 492.
[180] Tony Evans, "International Human Rights Law as Power/Knowledge" (2005) 27:3 Human Rights Quarterly 1046 at 1058. See also Rosalyn Higgins, *Problems and Process: International Law and How We Use It* (Oxford, U.K.: Oxford University Press, 1994) at 39 and 50.
[181] Cutler, *supra* note 178 at 101; Fabrizio, Renda & Schmidt, *supra* note 158 at 11.
[182] Hall & Biersteker, *supra* note 177 at 4. See also Fabrizio, Renda & Schmidt, *supra* note 158 at 12.
[183] A Claire Cutler, "Private International Regimes and Interfirm Cooperation" in Rodney Bruce Hall & Thomas J Biersteker, eds, *The Emergence of Private Authority in Global Governance*, 85 (Cambridge, UK: Cambridge University Press, 2002) at 32.
[184] *Ibid* at 34.

persuasion and trust rather than compulsion,[185] refers to a mechanism in which participants voluntarily give a private actor consent to govern them.[186] Since private authority is not dictated but socially constructed, private actors can play a constructive role that supplements states in governing global society.[187]

MNCs have been playing a key role in the private governance of the global society.[188] Corporations exercise their private authority by using economic power, global market forces and networks, and private international standards as regulatory mechanisms.[189] Their interactions create transnational rules including contractor codes of conduct and private forms of international dispute resolution.[190] The literature on private authority normally discusses two mechanisms by which corporations participate in rule-making at the international level: (i) lobbying governments on making international rules that favour firms such as international trade law,[191] and (ii) developing self-regulatory regimes such as industry standards and best practices.[192] This dissertation proposes a third method by which corporations can participate in transnational rule-making—the internalization and transnational projection of widely-shared principles reflected in national competition laws within MNCs' corporate codes of conduct.

Studying private international regimes helps us perceive the functions of private actors that are relatively independent of but not competitive or alternative to statist actors.[193] This, does not suggest that MNCs will replace states to become main actors in global governance.

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[185] Hall & Biersteker, *supra* note 177 at 5. See also Cutler, *supra* note 184 at 27; and Rosenau & Czempiel, *supra* note 164 at 4.
[186] Hall & Biersteker, *supra* note 177 at 5.
[187] See the constructivist approach to law at the international level in section 3 which discusses that states are the main actors in world politics but non-state actors also influence normative change. See also Brunnee & Toope, *supra* note 63 at 26; and Guzzini, Leander, & Buzan, *supra* note 63 at 10.
[188] David L Levy & Aseem Prakash, "Bargains Old and New: Multinational Corporations in Global Governance" (2003) 5:2 Business and Politics 131 at 133. See also Detomasi, *supra* note 148 at 321.
[189] Jeremy Moon, *Corporate Social Responsibility: A Very Short Introduction* (Online: Oxford University Press, 2014) at 87–88. See also Kerr, Janda & Pitts, *supra* note 38 at 52; and Hall & Biersteker, *supra* note 177 at 4.
[190] See, for example, "International Centre for Dispute Resolution", online: <https://www.icdr.org/icdr/faces/s/about?_afrLoop=3263283246704321&_afrWindowMode=0&_afrWindowId=omxn4ai41_81#%40%3F_afrWindowId%3Domxn4ai41_81%26_afrLoop%3D3263283246704321%26_afrWindowMode%3D0%26_adf.ctrl-state%3Domxn4ai41_125>.
[191] See more this discussion at Levy & Prakash, *supra* note 189 at 140.
[192] A Claire Cutler, Virginia Haufler & Tony Porter, eds, *Private Authority and International Affairs*, SUNY series in global politics (Albany: State University of New York Press, 1999) at 200.
[193] *Ibid* at 14.

It is also not to claim that MNCs will necessarily pursue efficient enforcement only in the interests of the global society. This dissertation acknowledges that they will almost certainly behave in ways that are, at least in part, if not exclusively in their own interest even where their own interests differ from global society interests. This dissertation, however, suggests an approach to a positive role of MNCs in global governance by examining the interactions between MNCs and other actors in global society as subsection 7.2 discusses.

7.2. The Legitimacy of Internalized National Law

Legitimacy of a rule or institution has been defined as "the normative belief by an actor that [the] rule or institution ought to be obeyed."[194] Legitimacy is a social construct in which regulated social groups share beliefs with the legitimated entity.[195] The legitimacy of a mechanism, therefore, has been said to depend on a collective audience that is regulated, but not on observers who are not regulated by the mechanism.[196] Such a concept of legitimacy is narrow because it mentions only the governing entity and the regulated actors. Legitimacy, as discussed in the following subsections, could also, and more comprehensively, be understood from a broader perspective that includes the regulated people and observers who are not subject to the governance mechanism.

7.2.1. The internal aspect of legitimacy

The internal aspect of legitimacy is the belief on the part of the regulated that they ought to comply with the governing actor's rules. The internal aspect of legitimacy reflects the epistemic validity accepted by the regulated community.[197] Contractors accept the

[194] Ian Hurd, "Legitimacy and Authority in International Politics" (1999) 53:2 International Organization 379 at 381. See also Mark C Suchman, "Managing Legitimacy: Strategic and Institutional Approaches" (1995) 20:3 The Academy of Management Review 571 at 574; and Steven Bernstein, "When Is Non-State Global Governance Really Governance?" (2010) 2010:1 Utah Law Review 91 at 99.
[195] Suchman, *supra* note 197 at 574.
[196] *Ibid*.
[197] Ramraj, *supra* note 155 at 591. Epistemic validity referrers to knowledge that is regarded as valid by a wide range of subjects. See Bernstein, *supra* note 197 at 100.

legitimacy of lead firms for two reasons. First, a lead firm, in its business interactions, persuades contractors that the codes of conduct serve to create a sustainable supply chain.[198] Lead firms can persuade contractors by their expertise in internalizing law, for example, of the availability of corporate codes of conduct, an effective auditing mechanism, and a clean compliance history.[199] The processes of persuasion and trust, perhaps assisted by potential contractual enforcement, gives contractors an internal reason to comply with the codes.

A second reason for contractors to accept the legitimacy of lead firms is that contractor codes of conduct internalize legitimate national laws. Unlike other private rules such as standards or best practices, contractor codes of conduct need not prescribe any substantive obligations but can, and often do, refer to national laws including those of developed, developing, and least-developed countries.[200] Corporations complying with national laws would, therefore, accept the legitimacy of national laws internalized by lead firms.

7.2.2. The external aspect of legitimacy

The external aspect of legitimacy refers to the endorsement of observers that a governance mechanism is desirable and proper. The legitimacy of a private governance mechanism must also be understood to have an external aspect because actors in world politics are interdependent and the interaction between two participants may influence others. For example, the transactions between a lead firm and a contractor may affect the interests of some states and people therein who are not regulated by the lead firm's mechanism. The legitimacy of a lead firm, therefore, would be enhanced by taking into account the view of observers who are affected by its supply chain.

Observers of a lead firm's governance include private and public actors. These observers are demanding that responsible corporations actively engage in making a better world. Non-state actors such as consumer NGOs, anti-sweatshop NGOs, trade unions, media, local communities, and even institutional investors form transnational networks that help

[198] See, for example, Toyota Motor Corporation, *supra* note 114 at 2. See also The Starbucks Company, *supra* note 126; and The A.P Moller - Maersk Group note 100.
[199] See more about the expertise of actors claiming legitimacy by Ramraj, *supra* note 155 at 592.
[200] See more about "good practices" as a third dimension of legitimacy discussed by Ramraj *ibid* at 592–593; and Bernstein, *supra* note 197 at 102.

construct the social responsibility of MNCs.[201] For example, NGOs and consumers would punish lead firms with reputational sanctions where lead firms fail to enforce their codes of conduct. Also, the external legitimacy of lead firms is supported by public actors such as states, the U.N., and the OECD.

The Global Compact initiated by the United Nations is an example of what states and the public expect of firms in a global governance context. The initiative encourages business to share "responsibility for achieving a better world."[202] Participants in the Global Compact expect companies to comply with Ten Principles when making business decisions and encourage firms to "take strategic actions to advance broader societal goals."[203]

The principles of the Global Compact are reinforced by the Guiding Principles on Business and Human Rights ("Guiding Principles"), which was endorsed by the UN Human Rights Council on 16 June 2011.[204] The Guiding Principles address: (i) the duty of states to protect human rights,[205] (ii) the corporate responsibility to respect human rights,[206] and (iii) access to a remedy when violations of human rights occur.[207] The corporate responsibility to respect human rights requires that corporations not only avoid violating human rights but also "seek to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."[208] This means the UN Human Rights Council expects corporations to take necessary measures to prevent and mitigate violations of human rights by their contractors.[209]

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[201] Michael R Macleod, "Financial Actors and Instruments in the Construction of Global Corporate Social Responsibility" in Alnoor Ebrahim & Edward Weisband, eds, *Global Accountabilities: Participation, Pluralism, and Public Ethics* (Cambridge, UK: Cambridge University Press, 2007) at 236. See also Roger Cotterrell, "Transnational Communities and the Concept of Law" (2008) 21:1 Ratio Juris 1 at 16. See more about anti-sweatshop campaigns Macdonald, *supra* note 52 at 263. Consumers International is an example of consumer NGOs. See "Consumers International", online: <http://www.consumersinternational.org/who-we-are/>.

[202] *Homepage | UN Global Compact* at Who We Are.

[203] *Ibid*.

[204] The United Nations, *Guiding Principles on Business and Human Rights* (2011). Also called the Ruggie Principles.

[205] *Ibid* at 3.

[206] *Ibid* at 13.

[207] *Ibid* at 27.

[208] *Ibid* at 14.

[209] *Ibid* at 15.

The OECD Guidelines for Multinational Enterprises ("Guidelines") is another example of observer endorsement of the legitimate role of lead firms in global governance. The Guidelines "provide non-binding principles and standards for responsible business conduct in a global context consistent with applicable laws and internationally recognized standards."[210] The OECD members and adherents also suggest that enterprises "encourage … business partners, including suppliers and sub-contractors, to apply principles of responsible business conduct compatible with the Guidelines."[211]

Contractor codes of conduct indicate the implementation of the commitment of lead firms to the Global Compact, Guiding Principles, and the OECD Guidelines. These codes aim to align the conduct of contractors with law and globally recognized standards.[212] By requiring business partners to comply with laws and respect public interests, lead firms seek to fulfil the expectations of states, intergovernmental organizations and other actors in transnational networks that corporations should participate in global governance.

In sum, the legitimacy of lead firms is socially constructed. The internal acceptance of contractors and the demand of society to have responsible firms protecting vulnerable stakeholders entitle the MNCs to govern global competition issues.

8. CONCLUSION

In modern global governance states are no longer the only actors that possess authority. Non-state actors such as MNCs also play regulatory roles. There may be some MNCs that participate in global governance to benefit society even when the participation is not profitable. These corporations exercise their private authority by using economic power, global market forces and networks, and private international standards as regulatory mechanisms. The function of MNCs in governing the global society reflects the constructivist view that (i) international relations is a complex social system consisting of multiple actors, (ii) compliance with law is a process that includes the internalization of law by private actors, and (iii) law not only prescribes what actors should do but also enables meaningful action.

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[210] OECD, *supra* note 112 at 3.
[211] *Ibid* at 20.
[212] OECD, *supra* note 96, para 36. See also Jiang, *supra* note 100 at 77; and Herman, *supra* note 52 at 446. See, for example, The A.P Moller - Maersk Group note 100 at 1.

Through the internalization of national competition law, MNCs are increasingly making private transnational rules that have the three following fundamental attributes. First, these rules have the potential to deal with certain transnational competition problems that statist mechanisms are not likely to be able to cope with or for which the solutions are prohibitively costly. Second, the mechanism does not necessarily cause MNCs, or any particular MNC, to become a ruling or dominant force in world politics. Third, since lead firms enforce contractor codes of conduct at their own expense, MNC transnational rules overcome concerns about the unfair distribution of financial and administrative burdens of enforcement that can restrain international cooperation among states as mentioned in Chapter 4.

Chapter 6

Conclusion

Under economic globalization, anticompetitive acts transcend national borders and become a challenge for competition law. By discussing difference methods for dealing with cross-border competition problems, this dissertation contributes a number of discussions to the literature on international law, corporate governance, and transnational law.

Chapter 3 of this dissertation contributes to the literature on the extraterritorial application of competition law and shows that some countries adopt the effects doctrine as a unilateral measure to deal with cross-border competition cases.[1] This method to some extent helps some countries such as the U.S., Japan and Vietnam deal with cross-border challenges especially international cartels. Chapter 3 shows that nations take different approaches to the extraterritorial application of competition law. These differences trigger conflicts among states and can impair efforts of countries in dealing with cross-border competition cases. Chapter 3 provides a background for the discussion in Chapter 4 about international cooperation in the competition law area and the discussion in Chapter 5 about the need for private transnational regimes governing cross-border competition law problems.

Because the extraterritorial application of competition law is controversial at the international level, nations need to co-operate in dealing with cross-border competition cases. Chapter 4 of this dissertation contributes to the literature on international cooperation in competition law suggesting that a globally binding mechanism dealing with cross-border anticompetitive conduct is impossible for three reasons.[2] First, countries were not able to overcome their strong concerns for their self-interest over the unfair distribution of interests and over the cost of such an agreement. Second, international cooperation in competition law is costly, especially for developing countries. A third reason constraining an international agreement on competition law refers to two technical issues that WTO members are encountering. The WTO's national treatment and the most-favoured-nation principles could

[1] See Chapter 3 section 4.
[2] See Chapter 4 subsections 2.2 and 3.2.

constrain enforcement by a member country's competition authority, especially in transnational merger cases. In addition, setting up a dispute settlement mechanism for an agreement on competition law would be a difficult task for WTO member countries.

In the context that state-based methods dealing with cross-border competition law problems are not effective or are prohibitively costly, this dissertation suggests a private transnational regime to deal with the problems. It argues that when a multi-national corporation ("MNC") internalizes competition laws of countries as standards for its behaviours, the corporation can provide a mechanism to project those national laws at transnational level by exercising its private power in a socially responsible way. These corporations exercise their private authority by using economic power, global market forces and networks, and private international standards as regulatory mechanisms. The function of MNCs in governing the global society reflects the constructivist view that (i) international relations is a complex "social system" consisting of multiple actors, (ii) compliance with law is a process that includes the internalization of law by private actors, and (iii) law not only prescribes what actors should do but also enables meaningful action.

This dissertation contributes to the literature on the roles of corporations in society by suggesting that some corporations make business decisions that reflect what they think they should do in the public interest even if the decisions are not profitable. It does not claim that all MNCs will act in the public interest or embrace corporate social citizenship, but it examines factors suggesting that some MNCs will do so. This dissertation shows how corporations can, by internalizing social values, act in ways that are pro-social and help to advance competition law at a transnational level. It also suggests a view about corporations that if there is no evidence showing that the global society is ready to get rid of corporations, we should make them more socially responsible and encourage them to engage in meaningful actions.[3]

This dissertation also contributes to the literature on transnational law from two perspectives. While the literature on transnational law discusses private transnational rules such as best practices and good governance without explaining how these rules are made,[4]

[3] See more about meaningful actions in Chapter 5 section 3. See also Armstrong, Farrell & Lambert, *supra* note 780 at 102.

[4] Ruth V Aguilera & Alvaro Cuervo-Cazurra, "Codes of Good Governance Worldwide: What is the Trigger?" (2004) 25:3 Organization Studies 415; See also Michael A Santoro, "Beyond Codes of

this dissertation examines a process that constructs some best practices and good governance. It analyzes how lead firms internalize and enforce strictest standards among applicable competition laws.[5] For example, American antitrust laws and the Canadian *Competition Act* strictly prohibit cartels but also provide exemptions for export cartels.[6] Lead firms, however, internalize only provisions that prohibit cartels in these laws but not those that provide exemptions for export cartels. The internalization, therefore, allows for lead firms to construct best practices in competition law that consider cartels as illegal transnationally.

In addition, this dissertation shows that transnational competition law does not replace but coexists with national and international law. Non-state actors such as MNCs can supplement governance of some global economic issues. Through the internalization of national competition law, MNCs can make private transnational rules that have the three following fundamental attributes. First, the private transnational regime discussed in this dissertation has a potential to deal with certain cross-border competition problems that statist mechanisms are not likely to be able to cope with or for which the solutions are prohibitively costly. Second, the mechanism does not necessarily cause MNCs, or any particular MNC, to become a ruling or dominant force in global governance. Third, since lead firms enforce contractor codes of conduct at their own expense, MNC transnational rules overcome concerns about the unfair distribution of financial and administrative burdens of enforcement that can restrain international cooperation among states.[7]

There are some limits on the discussion of transnational law in this dissertation. First, transnational law analyzed in this dissertation does not include other forms of private rules such as industrial standards and substantive codes of conduct but focuses on only contractor codes of conduct that internalize state law.[8] Second, this dissertation merely conducts a

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Conduct and Monitoring: An Organizational Integrity Approach to Global Labor Practices" (2003) 25:2 Human Rights Quarterly, 407; and Jan Eijsbouts, "Corporate Codes as Private Co-Regulatory Instruments in Corporate Governance and Responsibility and Their Enforcement" (2017) 24:1 Indiana Journal of Global Legal Studies 181; Bondy Krista, Matten Dirk & Moon Jeremy, "Multinational Corporation Codes of Conduct: Governance Tools for Corporate Social Responsibility?" (2008) 16:4 Corporate Governance: An International Review 294.

[5] See the strictest and applicable competition laws in Chapter 5 subsection 5.1.

[6] See Chapter 3 subsections 2.1 and 2.2.

[7] See these concerns in Chapter 4 subsections 2.2 and 3.2.

[8] Examples of other forms of private rules are those of the International Organization for Standardization, "About us", online: <https://www.iso.org/about-us.html>; and IEEE Standards Association, "About Us", online: <http://standards.ieee.org/about/ieeesa.html>.

qualitative study on transnational law. It does not study the number of lead firms that set out and enforce these codes. Third, this dissertation does not examine the cost of enforcing contractor codes of conduct by lead firms, especially the enforcement against violations of contractors.

This dissertation suggests that more studies should focus on the enforcement of the internalization of national laws and how the strict enforcement of supplier codes of conduct affects the supply chain of lead firms. This dissertation also timely discusses a private mechanism dealing with cross-border challenges in the context of the rise of nationalist populism such as Brexit and American President Donald J. Trump's policies against multilateral agreements.[9] My dissertation, therefore, suggests the need for more studies on the role of private transnational governance in dealing with the negative effects of nationalist populism. The argument I have advanced uses competition law as an example to examine the internalization of law by corporations. This process may work in other areas such as human rights, labour, anti-corruption, and environmental law. For example, it suggests that corporations may take an important role in dealing with the problems of climate change in the context that some powerful countries are not willing to enforce the Paris Agreement.

[9] Oonagh Fitzgerald & Eva Lein, *Complexity's Embrace: The International Law Implications of Brexit* (Waterloo, Canada: Centre for International Governance Innovation, 2018); Keith Reader, "Brexit" (2016) 37:140 French Studies Bulletin 61; Charles Post, "The Roots of Trumpism" (2017) 29:1–2 Cultural Dynamics 100; Matthijs Bogaards, "Lessons from Brexit and Trump: Populism is What happens when Political Parties lose Control" (2017) 11:4 Z Vgl Polit Wiss 513.

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