12. Developing countries and international competition law and policy

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1. INTRODUCTION

In the last 20 years the number of countries with some form of competition law has almost doubled. Approximately 100 countries now have a competition law and as many as 75 per cent of these are developing countries (Fox, 2007: 104; Stewart et al., 2007: 4; Evans and Jenny, 2009: 10). Many other developing countries are in the process of enacting legislation and establishing competition authorities.

Much of this activity can be traced to global trends towards the liberalisation of markets and the privatisation of government utilities (OECD, 1992). As the state contracts, competition law is viewed as a last bastion of regulation required to ensure imperfectly competitive markets or residual pockets of 'market failure': the idea of 'competition as the regulator'.

In developing countries the enactment of competition laws was also a response to neo-liberal international development policies most commonly associated with the 'Washington Consensus', which prioritised pro-market structural reforms, fiscal restraint and monetary controls, and the pursuit of economic efficiency (Williamson, 1990a). Some countries, such as Indonesia, adopted competition law as a direct condition of the receipt of funding from the International Monetary Fund. For other post-Soviet and transitional economies in Eastern Europe its adoption was seen as preparation for eventual membership of the European Union (EU).

At the international level, competition policy was perceived as integral to the efficient flow of goods, services and capital in the global economy. In the absence of competition law the productivity and development benefits from trade liberalisation would be eroded by the erection of domestic barriers to competition through cartels, the structural division of markets and

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universal membership, an existing dispute resolution mechanism and the presence of existing competition provisions concerning telecommunications and intellectual property in the General Agreement on Tariffs and Trade (GATT) and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS) (Guradin and Kerf, 2004). In 1996, as a result of the Ministerial Conference in Singapore, the WTO established a Working Group on the Interaction between Trade and Competition Policy, and in 2001 the idea of a "global competition law" was placed on the agenda of the WTO as one of the "Singapore issues" of the Doha Ministerial Declaration (WTO, 2001a).

The focus of this agreement was to be on the core principles of competition policy, including transparency, non-discrimination and procedural fairness, and common approaches to anti-competitive practices with significant impact on international trade. These included provisions on hardcore cartels, international co-operation between antitrust authorities and dispute settlement to ensure domestic competition law and enforcement structures were in accordance with provisions agreed multilaterally. There was also an explicit statement regarding the need to "recognise the needs of developing and least-developed countries for enhanced support for technical assistance and capacity building in this area" (WTO, 2001a, para. 24).

But in the ensuing discussions no real consensus emerged on the form and scope of a multilateral agreement (Hookman and Holmes, 1999) and, as noted, the negotiations broke down in 2003 at the Ministerial Conference of the WTO in Cancun. A Decision was adopted by the General Council of the WTO on 1 August 2004 to abandon the Interaction between Trade and Competition Policy as part of the Work Programme set out in the Doha Declaration (WTO, 2004b).

The opposition to the agreement voiced by developing and least-developed countries was a major factor leading to the demise of the negotiations. But the United States, who had a fundamental objection to the idea that trade and competition concerns could be combined, also failed to support the idea.

Negotiated multi-party agreements face co-ordination problems and outcomes can be weakened by compromise and concession. In this case, however, the US feared that a "global competition agreement would impose more stringent rules for the regulation of anti-competitive behaviour and international mergers on US firms than those currently applied by way of domestic US antitrust law, which recently, particularly in some important US Supreme Court decisions, had been significantly enhanced by the pro-market rules of the Chicago School (Bork, 1978; Posner, 2001). The US expressed uncertainty concerning what a global regime would look like and fears that a harmonised model would more closely resemble the more interventionist EU competition law, which had been the preferred competition model adopted in many countries (Fox, 2000; Buolard, 2007: 408). At a fundamental level the US did not want sovereignty in domestic and extraterritorial competition matters to be jeopardised or curtailed by an international regime. It is not however possible to place all the blame on the US and developing countries. Multiple factors were at work, including a more simple explanation of bad political strategy. As Evenett (2007: 400) has argued, it may have been unwise to link competition as a coherent package with other "Singapore issues" such as the interaction between trade and investment and government procurement transparency. These issues were also eventually dropped from the Doha Work Programme.

1. THE OBJECTIONS TO A MULTILATERAL AGREEMENT RAISED BY DEVELOPING COUNTRIES

It was not surprising that developing and least-developed countries could not see much to benefit them in the idea of a "global competition law". The impetus for some form of multilateral agreement was always firmly based on trade liberalisation, foreign direct investment (FDI) and the facilitation of market access, hence the choice of the WTO. Measures to ensure the efficiency of global commerce were not a priority for developing and least-developed countries who were not active participants in global mergers or joint ventures. They were also wary of yet further international measures to facilitate access to their domestic markets when they already faced significant trade deficits. Some believed it was hypocritical for developed countries to pursue another market access scheme when they failed to dismantle their own agricultural subsidies and industrial state aid which severely impacted...
access to global commodity markets for developing countries. They were suspicious too of the possibility of yet another global agreement through the WTO and the proposed safeguards for developing nations, when agreements such as TRIPS and the WTO dispute settlement process were perceived as unfair by many developing countries. TRIPS strengthened the rights of the owners of intellectual property rights, the majority of which are from developed countries, to impose restrictive conditions on licensing (including purchaser and distributional restrictions) which may adversely affect competition. While the TRIPS agreement does permit members to take appropriate measures to prevent abuse of intellectual property rights, these are dependent on functioning and effective competition enforcement agencies, which may not be established in developing and least-developed countries. The TRIPS agreement offers limited guidance on the narrowly construed areas of intellectual property abuse which often require a complicated rule of reason analysis and a certain level of competency in competition issues (Bhattacharjea, 2006: 302).

The pursuit of a global competition agreement by developed countries was also regarded as somewhat disingenuous when they had in place export cartels which had detrimental effects on global commerce. Legislation such as the US Webb-Pomerene Act exempts from US antitrust laws 'export cartels' created by US firms who gain by the ability to collude and increase prices on international markets, as long as the conduct does not adversely affect US consumers. Export cartels are predominately formed to provide opportunities to participate in export markets for small and medium-sized firms, sometimes within trade associations, who individually would not have the resources to engage in this activity (Heckman and Holmes, 1999: 4). They are therefore thought incapable of raising competition concerns because they would not have sufficient market power to exploit foreign markets (Bradford, 2007). But it is the aggregate effect of these cartels which is likely to import nations such as developing and least-developed countries who are often unable to protect themselves against this activity. At the very least, the exemption for export cartels sends a symbolic message that developed countries are only concerned about the impact of cartels on their own domestic markets (see discussion in Section 7 below).

The merits of the wholesale pursuit of the pro-market, neo-liberal agenda of the Washington Consensus, even before the current global financial crisis, were also already beginning to be questioned when the promised outcomes for developing countries did not readily materialise (Kennedy, 2006). This free market approach could entrench inequalities and wealth transfers from consumers to producers in the highly concentrated markets in developing countries and in circumstances where consumers had little relative power (Stewart et al., 2007). The 'efficiency' or 'aggregate wealth' goals of competition law were regarded by developing nations as perhaps inappropriate to their context because of the tendency of free-market policies to disproportionately advantage the already advantaged in every game played' (Fox, 2007: 215).

Where 20 per cent of the world’s population (and in sub-Saharan Africa this figure rises to more than 40 per cent) live on less than one dollar a day (Fox, 2007: 218), developing and least-developed countries had other priorities such as access to water and electricity and the right to an adequate standard of living, including food, clothing and housing. Competition law was seen to have little to say about distribution issues and inequalities and it was these other non-competition policy aims, such as that represented by the first of the United Nations' (eight) Millennium Development Goals (MDGs) – to halve the percentage of the world’s severely poor by 2015 – which would need to be prioritised (UNGA, 2000).

4. THE REJECTION OF A ‘ONE SIZE FITS ALL’ MODEL OF COMPETITION LAW FOR DEVELOPING COUNTRIES

Developing countries were primarily concerned about the model of competition law this proposed multilateral agreement could impose on them. They questioned how institutional models of competition law, enacted over long periods in globalised and fully developed economies such as the EU and the US, would translate to markets in developing economies which faced arguably wholly different circumstances of highly concentrated domestic markets, strong commodity based economies with extensive non-traded sectors, weak institutional governance structures and enforcement mechanisms, and poor technical capacity.

These concerns were expressed at a Workshop organised by the Southern and Eastern African Trade Information and Negotiations Institute (SEATINI) in April 2003 in Tanzania. African trade officials from Angola, Kenya, Lesotho, Malawi, Mozambique, Tanzania, Uganda, Zambia and Zimbabwe set out a statement opposing negotiations on the competition issues:

Our understanding of competition policy from the development perspective is that there is a need for government to assist and promote local firms so that
Developing countries were concerned that the WTO principle of ‘non-discrimination’ would not permit them to exempt certain firms from applying in ways to benefit the economy and grant concessions to particular state or state owned monopolies (Stewart, 2004; Bradford, 2007: 411-12). It could also prevent them from imposing duties on essential utilities such as telecommunications firms to achieve more distributional outcomes such as universal service obligations or universal access (see discussion in Section 9 below). They wanted the autonomy to apply a more contextual, flexible approach to competition law - analogous to the existing ‘special and different treatment’ regime of the WTO (Bradford, 2007: 420).

The retention of the right to formulate exceptions more conducive to their stage of development was partly derived from what developing countries had observed in the operation of competition law throughout history in developed countries. For example, the current global priority being given to the detection, prosecution and criminalisation of cartel activity is only a recent occurrence in developed countries (other than the US) (Evans and Jenny, 2009: 10). In the early part of the twentieth century, European cartels were not merely tolerated but embraced as a necessary aid to the stabilisation of market prices during industrialisation. Successive European governments encouraged and even participated in cartel behaviour through public enterprises in order to stabilise markets or control them through means such as the ‘total cartels’ of Nazi Germany (Harding and Joshua, 2003: ch. 3).

Developing countries maintain that at their stage of industrialisation they prefer a competition policy which protects, and thereby permits, the development of national champions; larger firms which can take advantages of economies of scale and productive efficiencies so that they are better prepared to eventually compete on the international market. This requires more permissive scrutiny of domestic mergers and/or allows domestic firms special freedoms or exemptions to exercise market power (Gal, 2003).

It was always acknowledged however that WTO members could seek exceptions from any binding agreement in the event of any substantial

5. THE CONSEQUENCES OF REJECTION OF THE AGREEMENT

What were the consequences for developing countries of the failure of the multilateral negotiations? International cartels, mergers which create anti-competitive effects and the abuse of market power by foreign multinationals, if unconstrained, can be hugely detrimental to consumer welfare in these emerging and developing economies. It is also true that the welfare benefits from the increased detection and eradication of global cartels go beyond the mere facilitation of market access’ (Evnett, 2007: 408). Surely enhanced efforts to coordinate the eradication of this behaviour would be beneficial for developing countries.

International cartels have a disproportionate effect on developing countries because they are highly exposed to international trade. This is partly due to the fact that many import substitution schemes have been unsuccessful. Developing countries are also generally ‘price takers’ on world markets (Haeckman and Holm, 1999: 10; Gal, 2004), that is, they have no real buyer market power which they can use to affect prices.
Levenstein and Suslow (2004) estimated that for 19 selected products, the value of ‘cartel-affected imports’ to developing countries in 1997 was $18.7 billion (an amount which exceeded the amount of all foreign aid to developing countries that year) and that the price of these imports by reason of the price-fixed overcharge was elevated by at least 10 per cent (ibid: 811–16). These goods represented 6.7 per cent of imports and 1.2 per cent of GDP in developing countries. While it is true that competition policies are more directly linked to pro-market agendas than distribution concerns, it is a reality that international cartel activity has directly increased the price of many staple commodities. This has had a real impact on the consumer purchasing power and thereby the poverty levels of developing countries. At its most extreme, pricing of essential commodities can create shortages, which have potential spillover effects in social and political disruption. The anti-competitive effects remain largely unregulated however because competition laws are under-enforced by developing countries which either do not have a competition regime or lack the resources to enforce it (Bradford, 2007: 389).

The abandonment of negotiations to formulate a global agreement also meant that efforts to co-ordinate a response to international anti-competitive behaviour were transferred to strengthening bilateral or regional competition agreements for the exchange of information, issues of comity and co-ordinated enforcement, and voluntary soft law options such as the International Competition Network (ICN).

The ICN was established in 2001 as a forum for competition agencies to cooperate and exchange information concerning ‘best practice’ and the identification of frameworks for the harmonisation of competition rules and procedures. Today its membership includes 107 competition agencies and hundreds of non-governmental advisors (NGAs). The ICN has assisted with financial support for delegations from developing countries and ensured that they have a role in heading working groups within the organisation such as those on Competition Policy Implementation and the Judiciary (Brazil and Chile) (Sokol, 2007: 106). It has also implemented a pilot project whereby volunteering agencies agree to provide a partnership role or to be on call to answer questions and provide information for less experienced and newer agencies. Its major policy work programme, however, has tended to focus on issues of most concern to developing countries such as reducing the regulatory burden for cross-border mergers and the investigation of international cartels. Thus, developing countries still participate largely as ‘recipients’ of technical advice and capacity building rather than directly contributing to the development of an optimum model of competition law, where the debate is still dominated by either the EU or the US.

What is perhaps most surprising is that while developing and least-developed countries have opposed the multilateral competition agreement, they have been willing to enter into preferential trade agreements and regional trade agreements which require signatories to adopt domestic competition laws and to apply these extraterritorially to cross-border transactions which have anti-competitive effects. But, as Bhattacharjaya points out, there is a crucial difference between these agreements and the one proposed by the WTO, which partly explains the willingness of developing countries to participate in them, in that there is no mandatory dispute settlement mechanism (ibid: 315). Rennie argues that the competition provisions in these regional trade agreements largely lack ‘functional definition’ and would require further negotiation and domestic commitment to their implementation, which is often lacking, to operate effectively (Rennie, 2009: 11, 71). Developing countries often lack the institutional support of a strong domestic competition agency to take an active part in reciprocal information sharing and enforcement which forms part of these competition agreements. But, as Bhattacharjaya argues, ‘once competition laws are in place, there will be an increasing pressure for them to be enforced’ which may result in a de facto multilateral agreement which has the potential to undermine opposition to a future multilateral agreement by developing countries (Bhattacharjaya, 2006: 323).

Developing countries may have also been reluctant to support a multilateral agreement on competition law which failed to address one of the fundamental issues which impacts unfairly on their ability to engage in international trade: the imposition of anti-dumping duties. While a reassessment of anti-dumping duties was originally on the agenda for negotiation of the multilateral agreement, it was excluded from the final Doha Declaration.

Article VI of the General Agreement on Tariffs and Trade (GATT) 1994

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permits the imposition of duties on imported goods 'when the export price of the commodity is below the "normal value" given by the comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country'. Anti-dumping duties are intended to counter 'undertaking between different geographical markets' (Neufeld, 2001: 1).

Developing countries are subject to 42 per cent of all anti-dumping investigations, an increase from 20 per cent in the 1980s (Neufeld, 2001: 4). Developing countries are increasingly taking advantage of these measures to protect their domestic industries against lower priced imports (often the result of currency devaluations) from developed countries. There have long been calls to align these anti-dumping duties with competition law principles so that they can be assessed on a firmer economic basis, namely the effect of these prices on competition in the market and consumer welfare rather than the protection of domestic competitors. Many anti-dumping duties would not be classed as 'predatory', and therefore illegal, under competition law principles because they do not amount to 'price discrimination' or 'predatory pricing' (Vermulst, 1999).

The assessment of the anti-dumping duty on technical, narrow and administratively burdensome price comparisons, with reference to comparable constructed value determinations often on historical data, is analytically related to an intent to harm the equally efficient competitor and/or to gain market power. The excessive duration of the final measures, which can remain in force for an average of six to nine years (Neufeld, 2001: 8–9), is also contrary to competition law principles where courts favour structural remedies in order to avoid the ongoing supervision of the commercial transaction.

The failure to assess these prices under competition principles grants those countries with the requisite technical expertise and legal resources to successfully invoke them an effective protectionism instrument for their domestic industries which encourages market distortions and rent-seeking. These often excessively lengthy investigations create uncertainty which often lack the technical and financial capability to successfully defend these investigations (Neufeld, 2001: 14). Often the mere threat of a challenge is sufficient for exporting countries to alter their behaviour and withdraw from markets.

While Article 15 of the WTO Anti-Dumping Agreement requires that 'special regard must be given by developed country Members to the special situation of developing country Members when considering the application of anti-dumping measures', it is rarely applied. Bhattacharyea (2006: 101) argues that developed countries have abused the anti-dumping provisions and that these actions are spiralling out of control. The multilateral agreement on competition may have provided an opportunity to expose the apparent unfairness, economic unsoundness and somewhat arbitrary application of these duties. The increasing use of these protectionist measures by developed countries against developing countries also exposes, once again, the somewhat disingenuous nature of their simultaneous calls for greater market access and trade liberalisation.

6. A COMPETITION POLICY FOR DEVELOPING COUNTRIES

After the failure of the multilateral competition agreement the question remains: should the enactment of domestic competition laws be a priority for developing countries? A number of studies, particularly those in transition economies, have concluded that strong competition policy is conducive to economic growth (Cook et al., 2007). A study of the two countries which have experienced the most rapid recent growth, China and India, may prove otherwise. China did not have a competition law until 2008 and India experienced its highest-ever growth rates during the period (2003–08) when its competition law was in abeyance while new legislation was being drafted (Bhattacharyea, 2008: 27–62). It has also been argued that, because domestic antitrust enforcement is generally designed to maximise consumer welfare and excludes producer surplus, it is not clear one would expect desirable antitrust enforcement to increase GDP (Elbauge and Geradin, 2007: 1110). Nevertheless, strong competition law and policy in developing countries should provide the necessary incentive for foreign and domestic investment. In this way, as Fox argues, competition law operates in the opposite direction to regulatory competition in tax and corporate law as states are not in direct competition to have the most desirable competition law (Fox, 2000: 1788–9).

In the absence of a multilateral agreement, developing and transition economies have, of course, the autonomy to determine their own competition rules even if these are considered contrary to the interests of foreign companies. For example, the Anti-Monopoly Law of the People's
Republic of China came into effect on 1 August 2008. China's first major ruling under its new competition law was to reject Coca-Cola's 373 million bid to buy the Chinese maker Huayuan. The economic reasoning and market definition applied by the Chinese Ministry of Commerce (MOFCOM) drew much criticism from the US. The potential market share of the merged company was estimated to be 20.3 per cent of the Chinese juice market. It was argued that this would present no competition issues in the US or the EU, which would require a market share of at least 40 per cent before concerns could be raised. The decision was considered to be one which merely protected Chinese domestic juice producers from a foreign competitor (Chovance, 2009). It is unclear whether the Chinese authority would retain the right to make a similar decision if it signed up to a multilateral competition agreement or whether, according to Fox's argument, this decision will also discourage further foreign merger activity in China.

Foreign direct investment has not only increased the presence of foreign firms but also strengthened domestic rivalry in developing countries. But anti-competitive practices have been observed in many markets (UNCTAD, 2004a; 2008c). Fox (2007) notes that there is evidence of rampant buying cartels and bidding cartels for state contracts in developing countries in staple commodities. Such arrangements exploit domestic small farmers and producers:

Sellers target basic necessities, including staples of diet. In Peru, poultry farms and their trade association conspired to eliminate competitors and prevent entry. In Kenya, owners of minivans sought monopolies over lucrative routes... (and) the fertilizer manufacturers organized a secret bidding cartel in their tenders to the government buying authority, which impoverished the farmers who needed an increased number of supplies. In many countries, numerous vertical agreements have tied up scarce channels of distribution. (Ibid: 255)

Markets in developing countries are highly concentrated, which makes them particularly susceptible to abuses of dominance or monopolisation. As Brusick and Evenett (2008) point out, concentrations of market power are frequent because geographical conditions and poor transport links often result in small and fragmented markets. Merger policy conducive to the creation of national champions may also produce dominant firms which may not be subject to competitive discipline. The presence of a large informal market sector can also lead to narrowed markets and exaggerated measurements of market power.

In many countries, one may also encounter a failure to restructure and introduce contestability to elements of state monopolies prior to privatisation. The state monopoly may have been merely transferred to private hands to maximise treasury receipts (Brusick and Evenett, 2008: 276). The state may have been to the highest bidder rather than one following an assessment of any anti-competitive effect on existing markets. There may have been instances of non-competitive bidding and/or corruption where the sale was made to interests associated with the government. The close relationship between the new owners and government may facilitate the exploitation of market power in key infrastructure industries such as transport (ports, freight) or communications (control of local loop). Many poor countries are either inland or landlocked countries, and efficient transportation infrastructure are a prerequisite for the inexpensive distribution of domestic- and foreign-produced goods and for fast exportation, both of which foster economic development. (Ibid: 275)

There may be very little competition between ports and each may be served by a single shipping line which enables them, and the port authorities, to extract excessive charges and monopoly profits in key export and import sectors. Truck-drivers' unions may also operate as a cartel to fix prices for freight transportation (Ibid). Foreign multinational companies may also be monopy (or sole) buyers in key sectors such as supermarkets where they can impose restrictive conditions on, and extract lower prices from, local suppliers. This has a huge impact on developing countries because of the large numbers engaged in the agriculture sector (Ibid: 284, 291).

The strong presence of the state in public services and utility ownership means it can intervene in the bidding process for public works and the awarding of contracts. The powerful position of the state may also mean that it is able to negotiate extremely favourable contracts for the provision of services from utilities (Ibid: 277) leaving them undercapitalised or near bankruptcy.

Competition regulation could be used to establish discipline in these domestic markets. Certainly, there has been a huge growth in recent years in the number of competition regimes in developing countries but many of these laws remain unenforced. As noted, any domestic competition policy faces the major political challenges of weak institutional capacity and lack of financial resources, and rent-seeking by public and private enterprises.

Given these complex issues, the key question remains what model of competition law is best suited to developing countries. What is clear from an examination of the political and economic context is that a model of competition law based on US antitrust, as dominated by the Chicago
School is not appropriate. The Chicago School goal of economic efficiency as 'total welfare' (whereby producer surplus and consumer surplus are maximized under a utilitarian calculus) and belief in 'self-correcting markets' are not appropriate to the different issues and problems facing developing and least-developed economies with conditions of highly concentrated markets and specially protected sectors.

The Chicago School idea of 'self-correcting' markets is based on the idea that monopoly power is fragile and temporary. As barriers to entry are considered minimal and the capital market is perfectly competitive, monopoly profits will be competed away as new players enter the market. But, as we have seen, markets are often small and fragmented in developing countries. They are also dominated by the state, which significantly raises barriers to entry. The financial markets are also far from perfectly competitive. Access to funds for a firm trying to adopt a counter-strategy in response to predation (such as predatory prices), or to gain entry to a new market, is severely limited. The banking sector is highly concentrated and 'access to finance, distribution networks, information about customers, and the necessary approvals from state bodies often frustrate the extent to which dominant firms will be disciplined in this manner' (Brusick and Evenett, 2008: 277). In India, for example, Bhattacharjya (2005: 24) observes that the 'capital market is far from perfect, and small and medium firms have been credit-constrained by a banking system that systematically ignores future profitability in lending decisions'.

As Fox (2007: 213) concludes, developing economies require a competition policy which is mindful of 'the opacity, blockage and political capture of...[their] markets, and includes some measure of helping to empower people economically to help themselves'. A model consistent with development economics (ibid: 211) is not one where the role of the state is very much a residual one confined to regulating instances of 'market failure'.

Competition law in the context of developing economies should not be on the side of liberalised markets which may protect entrenched interests and inequality, but should attempt to impose market discipline and increase incentives for entrepreneurship for small and medium-sized businesses by levelling the playing field and ensuring 'competition on the merits'. This includes the incorporation of notions of fairness and the protection of smaller competitors from the predatory actions of larger firms.

These ideas are broadly in agreement with Amartya Sen's (1999) discussion of the 'freedom to compete', which goes beyond the purely neo-liberal concerns of efficient markets to link it to the broader concerns of human rights and human flourishing (Kennedy, 2006). Competition law can have a direct effect in this area, not through the implementation of 'command and control' mechanisms to control prices or by the protection of small enterprises for their own sake but by, for example, providing access to telecommunications networks for smaller mobile operators, which, by facilitating communications, can also have important democratic and cultural implications (Clarke and Wallsten, 2002; McMahon, 2009), the opening up of vertical distribution channels, and the challenging of bidding and predatory strategies (Bolton et al., 2000).

A competition law model more closely resembling that of the EU, notwithstanding more recent attempts at modernisation which some may argue have brought it closer to that of the US, may therefore be a more appropriate one for developing countries. The EU model, as embedded in Articles 101 and 102 of the Treaty on the Functioning of the European Union (TFEU) (formally Articles 81 and 82 of the EC Treaty), is more traditionally associated with rules to safeguard the totality of the competitive process rather than the US embrace of efficient outcomes and 'total welfare'.

EC competition law has its theoretical foundations in the political and economic ideas of 'ordoliberalism', which originated in the 1930s in the University of Freiburg, Germany (Gerber, 1998: ch. 7). The state has an important but limited role in safeguarding individual economic freedom against the exercise of private power (Gormsen, 2007). Under this view, competition is a value in itself and allocative efficiency is 'but an indirect and derived goal' (Mähl, 2001: 4). Competition law has an essential role in the maintenance of the ideal of an 'economic constitution' whereby 'the effectiveness of the economy depended on its relationship to the political and legal systems' (Gerber, 1998: 246). It strives to maintain a system which permits neither unconstrained private power nor discretionary governmental intervention in the economy (Jones and Sufrin, 2008: 34-5).

The EC focus is on preserving rivalry, preventing foreclosure and ensuring 'competition on the merits' (OECD, 2005) and is derived from an institutional and political hierarchy which prioritised market integration and set out a system ensuring that competition in the internal market was not distorted (formally Article 3(1)(g) of the EC Treaty, of Article 3(1)(b) of the TFEU; Schwetzer, 2008: 119). Its rules aim to achieve short-run competitive rivalry rather than the Chicago School goal of economically efficient outcomes based on 'self-correcting' markets. For example, a competition rule designed to facilitate the licensing of intellectual property may increase competition in the short run by introducing new products to the market but may be ultimately detrimental to investments incentives in the long run. As Gerber notes, the development of the 'abuse' concept

See, for example, the EU Court of First Instance decision in Case T-201/04 Microsoft v. Commission.
under Article 102 of the TFEU (formally Article 82 of the EC Treaty) has been particularly concerned with the protection of small and medium-sized firms and the ability of large firms to extract unfair prices and conditions from smaller enterprises (Gerber, 1998: 368). He refers specifically to competition law where a firm does not have sufficient and reasonable possibilities to shift to another purchaser, supplier or distributor (Ibid: 315-16).

Certainly it is this more interventionist EU model of competition law which has been more readily adopted over the US model in post-liberalised more complex and highly concentrated economies as they dismantle state monopolies and require closer regulation of previously privatised utilities and networks.

Yet, as Fox (2007: 214) points out, movement away from rules and a 'one size fits all' model, to a more contextual, discretionary one, can increase regulatory costs and requires a level of technical expertise which may be absent in developing countries. This may be true, for example, if the authority wishes to establish block exemptions based on safety harbours calculated by reference to market shares. Such market share data may be unavailable or unreliable and this increases uncertainty for the firm (Bhattacharjea, 2008: 29).

Competition agencies need institutional support through technical training and capacity building so that they can make independent and transparent decisions (Gal, 2004). Adequate funding, which is difficult when there are so many competing demands, is essential to the autonomy of these agencies. The structuring of government utilities and their privatisation and/or corporatisation, the implementation of competitive neutrality between public and private enterprises, the enactment of sector-specific regulation in areas of market failure, including access to essential facilities, and finally, the enactment of competition law (Hockman and Holmes, 1999).

Fostering competition is not always politically expedient in developing countries because it may result in loss of employment as some firms exit the market (Bhattacharjea, 2008: 29). This may have an immediate impact on the poor, especially in the absence of a welfare net. Competition agencies can therefore have an important role in competition advocacy where they can promote the development of government policy to reassess and dismantle highly interventionist industrial policy and anti-competitive state measures, such as restrictive licensing, and implement competitive neutrality (Hockman and Holmes, 1999: 12; UNCTAD, 2000a; Gal, 2004: 22).

Regulatory review for anti-competitive legislation should also be implemented to ensure that barriers to competition incorporated in legislation and administrative measures are assessed from an economic perspective (UNCTAD, 2001b) but also by the 'public interest'. In this way a competition authority in a developing country can also assume some of the broader functions normally undertaken by sector-specific regulators in many other countries of licensing, standard-setting, access to essential facilities and consumer protection legislation (Gal, 2004: 35).

7. EXISTING INTERNATIONAL AGREEMENTS WHICH REGULATE COMPETITION

Competition provisions are of course already enforced internationally through the extraterritorial reach of domestic competition laws and are incorporated in particular international agreements such as GATS and TRIPS, in addition to regional and bilateral agreements. In the remaining two sections of this chapter the impact on developing countries of

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some of these existing mechanisms will be examined in the context of two cases: the WTO decision in Telmex and the US Supreme Court decision in Empagran.

1. The Telecommunications Annex and the Telmex decision

The 2004 Telmex (George, 2004; WTO, 2004d; WTO Panel Report, 2004) decision by the Dispute Settlement Panel of the WTO concerning the interpretation of the Telecommunications Annex of GATS provides a useful context for the apparent opposition between the application of international competition law provisions and an attempt by a developing country to provide concessions or protection to a monopolist to achieve distributional or other public aims.

The GATS agreement includes, in addition to general obligations that apply to all WTO members to liberalise and open access to telecommunications services on a non-discriminatory basis, a Telecommunications Annex which contains specific commitments to market access, full national treatment and pro-competitive regulatory principles (Reference Paper). The Reference Paper commits members to maintain appropriate measures to prevent anti-competitive practices by 'major suppliers', defined as those that can materially affect the terms of participation in the relevant market for basic telecommunications services as a result of control over essential facilities or use of their position in the market to achieve 'anti-competitive' may also be applied to services listed in a WTO member's 'Schedule of Commitments'.

The Telecommunications Annex makes specific provision for measures affecting access to and use of public telecommunications networks and services. Members may only impose conditions that are necessary to safeguard the public service responsibilities of the suppliers of public networks, such as a universal service obligation. WTO members who fail to make the necessary legislative or regulatory changes to implement their commitments, or permit acts, policies or practices in their markets that run counter to those commitments, are subject to an action. Parties may request the establishment of a Panel by the Dispute Settlement Body (DSB) of the WTO, which, while not a judicial body, can make recommendations where the actions of a Member State are inconsistent with the terms of the relevant agreement.

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9 The Fourth Protocol to the GATS, generally referred to as the WTO Basic Telecommunications Agreement, 5 February 1998.

10 It is, of course, the only WTO dispute panel decision dealing with the telecommunications industry.

11 The accounting rate is a wholesale rate representing the agreed cost of transmitting each unit of traffic between the calling parties.
in developed countries, such as the US, and terminating in developing countries requires the US to pay a large above-cost subsidy to foreign carriers. Similar apparent imbalances are perceived by US operators for internet peering settlements (due to the large net outflow of data from the US to other countries). Such settlements have resulted in large payments to developing countries. These cross-subsidies and imbalances have met resistance, as being in violation of GATS. The WTO has specifically promoted the move towards International Benchmarks, transparent tariffs and conditions and more “cost-oriented” accounting rates.

In the Telmex case the US claimed that the Mexican legislative rules for the termination of cross-border telephone calls had effectively permitted Telmex (the privatized monopoly telecommunications company) to impose a uniform and excessive settlement rate on its competitors and thereby operate a cartel contrary to the competition law principles in the Reference Paper. The US argued that the Mexican provisions on termination were not in accordance with the principles of ‘cost-orientation’ and were in breach of Section I.1 of the Reference Paper, which requires that appropriate ‘measures shall be maintained for the purpose of preventing anti-competitive practices’.

Mexico argued a ‘state action’ defence but the WTO Dispute Panel stated that this could not be used to insulate a national champion and permit it to harmed cross-border trade by discriminating against international competitors. Mexico further argued that regulatory sovereignty over domestic infrastructure and advance its economic development (including universal service provision) (Kariyawasam, 2007: 75–80). However the Panel ultimately ruled that this outcome could not be achieved by anti-competitive measures, and that the price charged for terminating incoming international calls was not in accordance with the principles of ‘cost-orientation’ and was contrary to the competition principles in the Reference Paper (WTO, 2004a; WTO Panel Report, 2004). Fox claims the decision is a victory for ‘cosmopolitan antitrust over narrow nationalism’ (Fox, 2006a: 77, 2006c) because exploitive pricing and protection from competition induces inefficiency and reduces output. It is also argued that the Mexican government may have had an interest in granting favours and concessions to Telmex’s billionaire owner, Carlos Slim. Previous attempts by the Mexican competition authority to regulate Telmex’s abuse of dominance had often been subject to chal-

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12 For a profile of Carlos Slim, see Wright (2009).
The use of competition provisions within international trade agreements to mandate the implementation of ‘cost-oriented’ accounting rates and the removal of cross-subsidies may ultimately prove detrimental to the interests of developing countries in key sectors such as telecommunications. As Silby (1997: 227–8) argues, ‘the conventional narratives of globalization erode the possibilities of justice’.

Criticism was also directed at the WTO Dispute Panel for the manner in which it dealt with the substantive competition law issues. The Reference Paper does not define ‘anti-competitive practices’. Those terms that are defined, such as ‘major supplier’, apply to a much broader set of firms in the telecommunications industry than those in a ‘dominant position’ as identified under competition law principles. The WTO Panel referred to or competition in the market’. The Panel also referred to further secondary documents, such as OECD recommendations which classed cartels and ‘price-fixing’, none of the forms of conduct subject to the action were not subject to agreement by the parties. The competition provisions are conduct than that regulated by competition law.

There are legitimate disputes among courts, legislatures and competition agencies concerning the characterisation of anti-competitive conduct. These are informed by differing views as to the economic theory to be applied, the context of the particular market under investigation and the political theory governing the relationship between the state and the market. To ignore these issues and determine these terms by dictionary definitions is problematic in an international agreement and raises real costs (Kariyawasam, 2007: 79–80).

While efforts to negotiate a multilateral competition agreement may have usefully exposed these shortcomings in the interpretation of the existing competition provisions within the WTO agreements, the manner in which these issues were determined by the Dispute Panel raises stark warning. Countries may have been right, in the wake of the电信 decision, to be wary of an international competition regime which may ultimately diminish their ability to prioritise domestic industrial policy over competition concerns, including the right of monopolists to price discriminate and provide cross-subsidies for distributional or other public purposes. For example, as para. 7.244 of the Panel Report sets out, international commitments made under the GATS ‘for the purpose of preventing a supplier

from engaging in or continuing anti-competitive practices are designed to limit the regulatory powers of WTO Members’ (WTO Panel Report, 2004).

II. The Extraterritorial Application of Competition Laws and the Decision in F. Hoffman-La Roche Ltd v. Empagran

In the absence of a multilateral agreement on competition law, other international legal options, beyond the ‘soft law’ approach of the ICN, can be harnessed in order to alleviate the effects of global cartels and other anti-competitive behaviour by foreign firms in developing countries as they seek to enact their own competition regimes, develop technical capacity and strengthen enforcement.

While developed countries could, of course, be encouraged to do more to investigate and penalise export cartels, minor efforts to investigate and punish participants in global cartels have increased considerably in recent years. There have been expanded efforts to coordinate the exchange of information (although much of this information remains subject to commercial confidentiality), strengthen civil and criminal penalties, and implement immunity and leniency programmes to encourage participants to come forward with information.

These efforts have positive spillover effects for developing countries as more international cartels are deterred, investigated and eliminated. However, an equally likely effect of this increased scrutiny will be the movement of these illegal activities and their anti-competitive impact to developing countries where they are more likely to escape detection. As Evenett (2007: 408) points out:

Failure to enforce a national cartel law can make a jurisdiction a safe haven for organizing regional or worldwide cartels, creating adverse knock-on effects for the nation’s trading partners. Evidence about the cartel’s formation and organization can be stored in the safe haven without risk of seizure and being sent to competition agencies abroad.

Many have argued that greater use could be made of the extraterritorial effect of competition laws in developed countries to deter and prevent the pernicious effect of global cartels on foreign markets. Can victims of international cartels, and other anti-competitive behaviour, sue in foreign courts with more developed competition regimes to claim redress against the harmful effects of this behaviour?

The US courts with the prospect of treble damages, criminalisation and strong procedural remedies are very attractive for foreign victims of anti-competitive conduct. The US antitrust provisions which apply to
commerce . . . with foreign nations' have always had a strong extraterritorial application and have been applied to any foreign conduct which has a general domestic effect. The doctrine was given a statutory basis in the Foreign Trade Antitrust Improvements Act 1982 (FTAIA) which provides that the Sherman Act only applies to foreign conduct if (a) such conduct has a direct, substantial, and reasonably foreseeable effect on the US market, and (b) such effect gives rise to a claim under the provisions of the Sherman Act.

In cases such as Hartford Fire Insurance Co. v. California the US Supreme Court has generally applied the FTAIA to permit these foreign actions notwithstanding the international law rules on comity which require reciprocal deference to the sovereign interests of other countries. These rules on comity have been construed narrowly and applied only where there was a true conflict between the domestic and foreign law. A true conflict was deemed not to exist if a person subject to regulation by two statutes could comply with the laws of both.

More recently, however, the Supreme Court has construed the FTAIA extraterritorially to permit foreign actions. In F. Hoffman-La Roche Ltd v. Empagran SA foreign victims of antitrust injury under section 1 of the Sherman Act, which prohibits agreements in restraint of trade. Vitamin manufacturers, which included US and other foreign companies, had fixed their prices over a number of years, earning estimated global profits of US$9-13 billion (Klevorick and Sykes, 2002: 363). This for damages was brought in the US by a class of plaintiffs which included the domestic US victims. Jurisdiction was clearly established for the remaining foreign plaintiffs, who had suffered their injuries outside the US market (namely in Ecuador, Ukraine, Panama and Australia), had to establish their claim under the FTAIA.

It was clear that the first part of the test (a) was satisfied: the global conduct had an effect on the US domestic market. It was unclear, however, whether the second part of the test (b) required that the plaintiffs' injury claims were subject to the Sherman Act. The foreign plaintiffs, who had purchased vitamins outside the US, argued that the inflated price due to the cartel

13 United States v. Alcoa.

was the same conduct that injured US domestic commerce, so the second part of the test was satisfied.

The DC Circuit court had held that where anti-competitive conduct has the requisite effect on US commerce, foreigners who are injured solely by that conduct's effect on foreign commerce may sue under US antitrust. On appeal, however, the US Supreme Court held that the second part of the FTAIA test was not satisfied if they suffered their injuries outside the US market and independently from effects on the domestic US market.

It was argued before the Court that the operation of global markets means that the foreign plaintiffs would not have suffered loss but for the anti-competitive effects maintained in the US. The way in which global markets are interdependent and the easy transportability of the product in question (vitamins) means that the cartel could not raise prices in foreign markets without raising them in the US and therefore the injury was not independent of the cartel's domestic effect.

However, Justice Breyer, who gave the judgment for the US Supreme Court, relied on a narrow statutory interpretation of the FTAIA, stating that Congress could not have intended to give a remedy for injuries suffered abroad. The plaintiffs who purchased abroad had no cause of action unless the challenged conduct's domestic effect "gives rise" to their claim, which requires a direct causal relationship. The same global cartel caused the high prices paid by the foreign and domestic plaintiffs, but the domestic effects must cause the other. It was not enough that the injury had a common cause with the US conduct. It was an independent foreign effect, not one ‘derived from US domestic effect'.

This is an example of the disjunction between law and economic reasoning which can arise in antitrust cases. The 'substantial effect' on US commerce is determined by an acknowledgement of the anti-competitive effects of cartel behaviour in raising prices above market price which gives rise to the domestic plaintiffs' action, enough to satisfy a 'but for' causation standard: in this way, the economic and legal arguments coincide. A further legal argument of 'insufficient causality' and 'proximate cause' is invoked to narrow the statute to deny foreign plaintiffs who have suffered as a result of the same conduct, notwithstanding that it was clearly caused by that conduct in economic terms. The reasoning fails to recognise, however, the interdependent nature of global markets whereby

14 On remand for further inquiry into whether the plaintiffs' damages were truly independent from the US market, the Court of Appeals dismissed the plaintiffs' claim: Empagran v. F. Hoffman-La Roche.
the concept of the effect in a 'separate' or purely 'domestic' market is often meaningless. Justice Breyer also invoked the international law rule of comity where to give foreign plaintiffs an action could undermine, and fail to give due deference to, the competition laws of foreign jurisdictions. Justice Breyer stated that comity 'helps the potentially conflicting laws of different nations work together in harmony - a harmony particularly needed in today's highly interdependent commercial world' (164-5).

Yet, as Kleverick and Sykes (2007: 371) point out, this view does not take into account an outcome which would maximize deterrence of global cartels:

the Court never poses to ask whether that high degree of commercial interdependence has any implications for the premise that the harmful foreign effects of the global vitamins cartel were independent of the adverse domestic ones.

The Supreme Court's invocation of comity and deference to prosecution and private actions in foreign antitrust jurisdictions also does not adequately account for developing countries where many of the harmful effects of these cartels are felt. It was, in fact, established in the Empagran case that countries that lacked competition agencies had higher overcharges due to the cartel than those that had agencies (Clarke and Evenett, 2003: 692). The principles of international comity require the US to take account of 'the extent to which enforcement by either state can be expected to achieve compliance'. While some competition regimes in developing countries such as Brazil have successfully prosecuted the vitamins cartel, many other developing countries lack the evidential material, resources or effectiveness to prosecute them and this ultimately leads to global under-deterrence.

The Empagran decision may therefore be categorised as a victory for international cartels where their global gains exceed those in the US with particular adverse impact on developing countries. Should the US Supreme Court have been more mindful of 'global welfare' in its decision? As Eleanor Fox stated in her Testimony before the Antitrust Modernization Commission:

We must contemplate maximizing world welfare... The national law governing jurisdiction and remedies should be broadened so that, for example, national authorities in a jurisdiction with the greatest contacts or the largest consumer market can provide a forum in which smaller affected nations can be heard, can take account of outside harms, and can afford relief that covers those harms. (Fox, 2000: 8)

This is not an argument that the US courts should become some sort of surrogate 'global antitrust court', because to do so would permit other countries to free ride on the enforcement costs absorbed by the US. It could also prove to be a disincentive for others to develop their own competition expertise (Kleverick and Sykes, 2007: 379). It is also true that when the US has tried in the past to extend its extraterritorial jurisdiction to foreign cartels, international comity and blocking statutes were invoked to prevent this (ibid: 390). Amicus briefs were also filed by the US Department of Justice and other nations, arguing that extensive extraterritorial jurisdiction could interfere with their own antitrust enforcement policies, especially immunity and leniency programs. Participants in cartels, it is argued, are less likely to come forward if doing so may expose them to multiple treble damage suits.

But, perhaps more importantly, US competition agencies have no incentive to prosecute or assist other competition agencies to prosecute anti-competitive conduct where the detrimental welfare effects are external to their domestic market. The conduct may also directly benefit their domestic markets. Export cartels clearly fall into this category as they enable small domestic producers to gain access to the export market and the detrimental welfare effects are external to the exporting country. The incentive to irradiate global cartels only arises when the negative net welfare effect of the higher prices on domestic consumers exceeds the supernormal profits earned by domestic firms which participate in the cartel. If the net welfare detriment is on foreign consumers rather than domestically, the individual

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15 For a critique of the methodology used in this study however, see Bhattacharyya (2006: 305-6).
17 Decision of the Conselho Administrativo de Defesa Econômica (CADE), br (accessed 11 November 2000). Section 2 of the Brazilian Competition Act Brazilian Territory.
18 Domestic effects versus foreign efficiency gains and losses, and an argument that to exclude the foreign effects could be contrary to the Canadian international obligations of non-discrimination under NAFTA and GATT, were considered in the context of a Canadian merger decision in Commissioner of Competition v. Superior Propane Inc.
19 This possibility has been removed and now a successful leniency applicant cannot be subject to a claim for treble damages: Antitrust Criminal Penalty Enhancement and Reform Act 2004.
country may actually gain from the domestic firm’s participation in the
cartel through excess profits (Klevorick and Sykes, 2007).
Developed countries may also be disinclined to prosecute anti-
competitive practices which are external to their domestic welfare when
collusion among global competitors allows them to profit from the
higher prices. Bhattacharjee (2006; 310) notes that such ‘outsourced
enforcement’ by developed countries could be obtained in return
for market-access concessions by developing countries, but also notes the

fatal asymmetry in the enforceability of this proposal. Violations of market-
access commitments can be detected and proved with relative ease. But how
a foreign cartel lacks the evidence to prove it, establish before a WTO panel

Even competition authorities in developing countries which are well
placed to prosecute this anti-competitive conduct are often constrained if
they require evidence within the exporting jurisdiction, or are dependent
on remedies only the exporting jurisdiction can impose because that is
where the assets or management are located (Elhauge and Guzman, 2007;
1012). A developing nation may also not want to pursue enforcement
against an international cartel if it does not want to discourage the cartel
from selling and investing in its country (ibid: 1014).

In Empagran it may ultimately have been the Supreme Court’s defer-
ence to the comity issues which led it to depart from its earlier, more liberal
approach to jurisdiction in these actions. Yet, at the same time, when the
court invokes comity it needs to ask the right questions and conduct the
right balancing in order to achieve optimal deterrence of global
cartels, including the disparity between the antitrust enforcement capacity of
developed and developing countries.20

20 The Supreme Court decision was followed by the Eighth Circuit of the US
Court of Appeals in In re Monsanto Ethane Antritrust Litigation (2007) to
connection between the domestic prices and the prices paid by the foreign appli-
cants’ injuries, as they constituted merely one link in the causal chain... it
is too remote to satisfy the proximate cause standard... the Sherman Act’s deter-
rence goal, although not without force, is unwavering in light of the dictates of the

8. CONCLUSION

While developing and least-developed nations were opposed to the negoti-
ation of a unilateral agreement on competition law, it is not always

evident that such a regime would have been counter to their interests.
Gorey efforts to co-ordinate the detection and elimination of global
cartels, for example, would have been highly beneficial to developing
countries where these cartels have a disproportionate impact. Negotiations
for an agreement may have also exposed the apparently unfair imposition
of anti-dumping duties on developing countries, and permitted them to be
placed on a sounder economic basis through convergence with competi-
tion principles.

Developing countries may have been right however, in the wake of the
Telmex decision, to wary of an international competition regime which may

apply dictionary and non-consensual definitions of “anti-competitive
conduct” to override their attempts to achieve particular public purposes
through domestic industrial policy. Another reading of the Telmex deci-
dion, of course, may be that international rules can assist domestic govern-
ments to resist and control powerful private interests.

It is also true that markets in developing and least-developed coun-
tries often bear the brunt of anti-competitive practices (both global and
domestic) which extract monopoly rents and diminish competitive rivalry,
resulting in productive and allocative inefficiencies in crucial infrastructure
industries. While competition policies may be more directly linked to ‘pro-
market’ policies, these anti-competitive practices can have a real impact
on the price of essential goods and services with clear and detrimental
distributional outcomes.

Domestic competition laws which are therefore mindful of the com-
plexities of markets in these developing and least-developed countries can
have a positive impact on fostering enterprise and providing a basis for the
‘freedom to compete’. The suggested model is one which recognises
the diminished role for the state and ‘self-correcting’ markets, as commonly
associated with the US model of competition law. At the same time it is
important to ensure that competition agencies do not become subject to
regulatory capture by public or private interests and that these laws do not
flounder or become inoperable through too many discretionary conces-
sions and exceptions.

The international community can also do more, whether through the
ICN or other initiatives, to assist with greater technical advice and capac-
ity building for domestic competition regimes in developing countries.
Developed countries may also assist by outlawing export cartels and coop-
erating more readily with foreign competition agencies for the exchange of
Developed countries could also apply more liberal standing rules to the extraterritorial application of their competition laws to permit foreign plaintiffs the right to sue in their courts, and competition agencies could increase their enforcement efforts against anti-competitive action with cross-border effects. But there are major obstacles to these proposals. Such actions permit foreign countries to ‘free ride’ on the enforcement capabilities of developed countries. Yet, perhaps more importantly, these agencies have no incentive to prosecute or assist other competition agencies to prosecute anti-competitive conduct where the detrimental welfare effects are external to their domestic market (Empagran).

This is an argument for a more concerted international effort to pursue the detrimental welfare effects of cross-border transactions through agencies such as the ICN. It is also an argument for domestic courts and competition agencies in their interpretation of extraterritoriality and the international rules on comity to understand that ‘global welfare’ is often inextricably linked to ‘domestic welfare’ in global markets.

13. Does the globalization of anti-corruption law help developing countries?

Kevin E. Davis*

1. INTRODUCTION

What role do foreign institutions play in combating political corruption in developing countries? This chapter attempts to shed light on this question by examining the impact on developing countries of the elaborate transnational anti-corruption regime that has emerged in recent years. The components of that regime are dedicated treaties such as the Organisation for Economic Co-operation and Development’s Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (‘OECD Convention’) and the United Nations Convention against Corruption (‘UN Convention’). However, the regime also encompasses a range of other legal instruments, including the anti-corruption policies of international financial institutions, components of the international anti-money laundering regime, international norms governing government procurement, and private law norms concerning enforcement of corruptly procured contracts.

The idea that foreign legal institutions can step in and be of assistance when their domestic counterparts are found wanting, which some might call a form of legal globalization (others might call it ‘institutional piggy-backing’), is a familiar one in modern legal thought. For instance, the international investment regime is typically justified by reference to the idea that investor-state arbitration can usefully compensate

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