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**Cross Border Transfer of Wealth –  
Reflections on Competition Law and Developing Economies**

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**I. Introduction**

Protection of consumer welfare is a central pillar of competition law enforcement. Although not the sole goal pursued by competition law, such protection – preventing unjustified transfer of wealth from consumers to producers – is a common feature of modern competition regimes.

In the domestic sphere, transfer of wealth is a consistent and clear benchmark in competition law enforcement. However this is not necessarily the case in an international setting. The assessment of “transfer of wealth” in a cross-border setting may distort competition law enforcement. While extraterritoriality and cooperation could, at times, remedy sub-optimal enforcement, this may not always be the case. Using the prism of “transfer of wealth” this paper reviews the implications of welfare externalities on developing and small economies.

The discussion begins with a short introduction to the concept of consumer welfare and transfer of wealth in competition law. The focus then shifts to the review of this concept

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in a cross-border setting, and the welfare externalities it triggers. The implications for developing and small economies are then considered.

## II. Consumer Welfare

Competition laws are often concerned with the effects that certain activities may have on consumer welfare, and on the possible transfer of wealth from consumers to corporate entities engaged in anticompetitive activity.

The focus on consumer welfare is not always immediately apparent.<sup>1</sup> Furthermore, even among those who share the core value of protecting consumer welfare, differences emerge as to the exact composition of the term and the means of achieving it.<sup>2</sup> Similarly, the measurement of welfare in competition law has also been the subject of varying approaches, from the protection of total welfare,<sup>3</sup> to a focus on consumer surplus.<sup>4</sup> While the latter has dominated the antitrust landscape in recent years in both the US<sup>5</sup> and EU,<sup>6</sup> it has been viewed by some as an imperfect proxy of consumer welfare.<sup>7</sup>

Despite the inconsistencies and variations regarding the exact scope and measurement of consumer welfare, the notion that competition law protects (among other things)

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<sup>1</sup> For a review of the wide range of goals advanced by antitrust law, see: Maurice E Stucke 'Reconsidering Antitrust Goals' SSRN working paper.

<sup>2</sup> See for example: ICN discussion document 'Competition Enforcement and Consumer Welfare' (2011) available online: <http://www.icn-thehague.org/page.php?id=78>

<sup>3</sup> The approach involves an aggregate economic welfare standard, which takes the possible effects on consumers, producers and competitors into account. Accordingly, a transaction or activity is permitted, when the total welfare gain outweighs the total loss, regardless of distributional considerations and effects on consumers. Aggregate economic welfare is also referred to as an "efficiency" or "total surplus" standard. Salop, SC: 'Question: What is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard' 22 Loy. Consumer L. Rev. 336 (2010); Ginsburg 'Judge Bork, Consumer Welfare and Antitrust Law' [2008] 31 Harvard Law Journal and Public Policy 449

<sup>4</sup> The welfare gain to consumers provides the focal point for assessment. The consumer surplus benchmark condemns conduct which reduces the welfare of consumers irrespective of any impact on sellers and competitors. Also referred to as "true" consumer welfare standard or "pure consumer welfare"; Salop, SC: 'Question: What is the Real and Proper Antitrust Welfare Standard?: Answer: The True Consumer Welfare Standard' 22 Loy. Consumer L. Rev. 336 (2010); Motta *Competition Policy* 18

<sup>5</sup> 'Many courts and the federal enforcement agencies today appear to have opted for the true consumer welfare standard.' Salop, Op Cit; Lande, Robert H: 'Chicago's False Foundation: Wealth Transfers (Not Just Efficiency) Should Guide Antitrust' 58 Antitrust L.J. 631 (1989-1990)

<sup>6</sup> In the EU, it is evident, among others, in Article 101(3) TFEU the Commission report on competition policy, the Commission's Art 102 TFEU Guidance, Article 101(3) Guidelines, Horizontal merger guidelines. See for example: *The Competition Authority v Beef Industry Development Society and Barry Brothers (Carrigmore) Meats 2008* (101 TFEU), *Microsoft v Commission 2008* (102 TFEU); *Synetairismos Farmakopoiou Aitolias & Akarnanias (Syfait) v GlaxoSmithKline 2004* (102 TFEU)

<sup>7</sup> Fn 2 above

consumers' welfare is common to all regimes. The focus on consumer harm naturally draws attention to the transfer of wealth from consumers to conspirers. If one accepts that competition law strives to enhance consumer welfare, the subsequent quest of competition enforcement is to prevent negative, unjustifiable, transfer of wealth from consumers.<sup>8</sup>

Interestingly, when applied in an international context, considerations of transfer of wealth may distort competition law enforcement and, at times, fail to protect all consumers.

### **III. Cross Border Transfer of Wealth**

Globalization has significantly affected the development of competition policies around the world. With the aid of bilateral, regional and multinational cooperation, competition regimes all over the world speak a similar lingo. Indeed, they are on a path of assimilation. These trends have resulted in increased coordination of enforcement, an assimilation of remedies, and a corresponding reduction in conflicts.

Nonetheless, these global effects by no means override the inherent domestic perspective in competition law enforcement. Competition regimes are empowered to protect competitiveness and consumer welfare in their national markets.<sup>9</sup> As such they represent islands of domestic enforcement operating in an international landscape. Thus, while competition, and the restraints on it, become increasingly transnational, enforcement remains domestic in nature.

The possible disparity between the domestic and international arenas becomes evident when viewing “transfer of wealth” from both perspectives.

In a *domestic setting*, national competition law applies to the totality of effects. Whichever goal one advances as part of the national regime, whether it be efficiency or distribution driven, the analysis is carried out in a “confined economy” where both violators and injured parties are present. On the other hand, in an *international setting*, domestic competition regimes use domestic laws and values to appraise international activities while

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<sup>8</sup> Lande, Robert H: ‘Wealth Transfers as the Original and Primary Concern of Antitrust: The Efficiency Interpretation Challenged’ 34 *Hastings L.J.* 65 (1982-1983)

<sup>9</sup> On the narrow assumption of jurisdiction, see for example Justice Breyer in *F. Hoffman-La Roche Ltd. v. Empagran S.A.*, Supreme Court of the United States, No. 03–724

predominantly focusing on competition in the domestic market.<sup>10</sup> Not surprisingly, the imperfect overlap between the effects of the conduct and the reviewing jurisdictions may trigger inconsistencies and friction. Each jurisdiction, under its own mandate, strives to protect competition in its territory and hence will focus on domestic effects.<sup>11</sup> When the effects of particular conduct span jurisdictions, the analysis does not encompass their totality and may vary from that under a “confined economy” assumption. For example, this may be the case when a jurisdiction apprises an international merger which while being globally welfare enhancing, triggers adverse effects in a local market. Similarly, a jurisdiction may refrain from challenging activities of an export cartel, despite adverse effects on consumers elsewhere. Consequently, negative, yet external, transfers of wealth remain unchallenged. Note however, that this partial analysis may be seen as a natural by-product of the domestic driven competition policies around the world.

In many cases, despite the imperfect overlap, the enforcement result overall may still reflect a desirable competition outcome, as one or more jurisdictions may curtail the anticompetitive activity. This is especially so when consumer surplus serves as the leading variant in competition law analyses.<sup>12</sup> Yet, at times, this imperfect overlap may deviate from optimal enforcement and result in over- or under-deterrence. This would be the case in particular when the positive and negative impacts of an activity are not spread equally across the jurisdictions.

As hinted above, an illustrative example for such imperfect overlap would be an *export cartel*. The term “export cartel” generally refers to anticompetitive agreements targeting foreign markets without generating domestic anticompetitive effects.<sup>13</sup> In such a scenario, the exporting state experiences an increase in producer welfare (as well as an increase in employment and revenue from taxation), with no reduction in consumer welfare.

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<sup>10</sup> The scope of analysis depends to a large extent on the definition of the relevant geographic market, being domestic, regional or global.

<sup>11</sup> An illustrative example may be an international transaction leading to different effects in different, distinct, regional markets. Each reviewing jurisdiction will focus on its local market reality. See for example: COMP/M.1630 Air Liquide/BOC [18/01/2000]. The European Commission cleared the transaction, subject to conditions, noting that the decision did not prejudge a separate decision in the United States. In the US, the FTC raised concerns as to the effect the transaction will have on the regional market. The parties abandoned the transaction.

<sup>12</sup> See: Einer Elhauge and Damien Geradin *Global Competition Law and Economics*, p 1013

<sup>13</sup> For a critical review see: D. Daniel Sokol ‘What do we really know about export cartels and what is the appropriate solution?’ [2008] *Journal of Competition Law & Economics*; Florian Becker ‘The Case of Export Cartel Exemptions: Between Competition and Protectionism’ [2007] *Journal of Competition Law & Economics* 3 (1): 97-126

On the other hand, the importing state suffers a loss in consumer welfare which is not offset by welfare gains upstream.<sup>14</sup> As these practices are not designed to generate anticompetitive effects in the domestic markets where the companies operate, some jurisdictions have adopted formal procedures which exempt these arrangements from domestic competition law.<sup>15</sup> Common justifications for exemptions have focused on cost reduction, risk sharing and the target jurisdiction being in a better position to confront and deter such activities.<sup>16</sup> In addition, it has been argued at times that some export cartels are pro-competitive when the colluding companies are small firms with no market power, which combine forces to form effective export entities - at times in order to compete with powerful cartels elsewhere.<sup>17</sup>

With the growing consensus on the need to battle cartel activity worldwide, the explicit exemption of export cartels has been criticised.<sup>18</sup> Increased international cooperation,<sup>19</sup> and the introduction of tougher and more determined policies in relation to cartel activities,<sup>20</sup> have led to a reduction in the number of such provisions.<sup>21</sup> Still, even absent formal exemptions, most competition regimes are geared, by design, to protect and appraise effects on the local markets. Subsequently, the decline in formal exemptions of export cartels does not eliminate the implicit domestic perspective. As export cartels generate anticompetitive effects in foreign, importing jurisdictions, they may not trigger the competition laws of the exporting jurisdiction as long as the harmful effects do not spill over into the domestic market.

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<sup>14</sup> Alan O. Sykes 'Externalities in Open Economy Antitrust and their Implications for International Competition Policy' [1999] 23 *Harvard Journal of Law and Public Policy* 89

<sup>15</sup> Justification for exemptions also include the size of the firms and the low likelihood of anticompetitive effects. Some regimes require notification and authorisation of the export cartel, others do not. See generally: Aditya Bhattacharjea 'Export cartels – A Developing Country Perspective' [2004] *Journal of World Trade* 38(2) 331; 'Exceptions, exemptions, and exclusions contained in members' national competition legislation' 'Note by Secretariat', WTO Doc WT/WGTCP/M/172 (2001)

<sup>16</sup> For a review of the academic debate on export cartels see: Bhattacharjea, n 15 above. The decision not to confront export cartels has been referred to as a 'sensible allocation of enforcement authority' (Einer Elhauge and Damien Geradin *Global Competition Law and Economics* p-1012)

<sup>17</sup> See US submissions to the WTO 'Report by Secretariat', WTO Doc WT/WGTCP/M/21 (2003) cited in Brendan Sweeney 'Export cartels: is there a need for global rules?' [2007] *Journal of International Economic Law*

<sup>18</sup> M. Levenstein and V. Suslow, 'The Changing International Status of Export Cartel Exemptions' <http://www.auilr.org/pdf/20/20-4-2.pdf>

<sup>19</sup> T Calvani, 'Conflict, Cooperation, and Convergence in International Competition' (2005) 72 *Antitrust Law Journal* 1127.

<sup>20</sup> C Harding, 'Business Collusion as a Criminological Phenomenon: Exploring the Global Criminalisation of Business Cartels' (2006) 14 *Critical Criminology* 181.

<sup>21</sup> Levenstein and V. Suslow, n 18 above.

As nations lack the jurisdiction (and incentive) to regulate activities which are not domestic in nature, export cartels may remain unchallenged. This sub-optimal enforcement results in welfare externalities and transfer of wealth from foreign consumers to local businesses. It can be remedied by the importing jurisdiction curtailing the anticompetitive activity, at times via extraterritorial application of its competition laws.

So far, the discussion has assumed a consistent enforcement equation which leads to a sub-optimal result due to the focus on domestic effects. A further distortion at an international level may stem from *changes* to the enforcement equation aimed at protecting domestic, rather than consumer, welfare. Due to the domestic focal point, the enforcement equation may shift from the prevention of negative transfer of wealth from consumers to conspirers, to the prevention of transfer of wealth from the domestic jurisdiction to elsewhere. In other words, in an international setting, a new variant, which may be described as “*cross -border transfer of wealth*”, may be added, which may override variants previously adopted in the domestic analysis.

To clarify, the “*cross-border transfer of wealth*” consideration is substantially different from the notion of domestic transfer of wealth, described earlier. It is not solely concerned with transfer of wealth from consumers to producers. Rather, it focuses on transfer of wealth from the domestic market to the foreign market, and vice versa. In other words, its focal point is calibrated by a desire to enhance positive transfer of wealth into the domestic market, and discourage negative transfer of wealth to the external markets. To illustrate, when the anticompetitive activity concerns limited local sales and significant exports, the exporting jurisdiction may shift from consumer welfare back to the total welfare benchmark. This is because it internalizes benefits at a corporate level and externalizes consumer welfare losses. On the other hand, when the activity harms local consumers and originates abroad (cartels or mergers) the enforcement equation is likely to emphasize consumer welfare.<sup>22</sup> Furthermore, the focus on ‘cross-border transfer of wealth’ may result in the collapse of competition analysis and the use of distorted analysis in which the outcome is determined by

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<sup>22</sup> It may be worth clarifying that in cases involving purely welfare reducing behaviour one would expect the total welfare and consumer surplus analysis to lead to the same result. This is because there are no offsetting efficiencies at the upstream market to outweigh the detrimental effect on consumer surplus. See Robert H Lande ‘Chicago’s False Foundation: Wealth Transfers (Not Just Efficiency) Should guide antitrust [1990] 58 Antitrust L. J. 631, 641

industrial or social considerations.<sup>23</sup> Needless to say, this is an inconsistent equation which is not likely to be manifested publicly. In fact, it is predominantly dependant on a lack of transparency in competition appraisal.

Coming back to the example of export cartels, a ‘cross-border transfer of wealth’ equation provides stronger justification for the exporting jurisdiction not to enforce. The added distortion is noticeable when an export cartel generates negative spillover in the exporting state. In a consumer welfare driven regime, such effects would have been likely to trigger the application of the domestic competition rules. Yet, under a ‘cross-border transfer of wealth’ equation, the exporting state may ignore the spillover.

A more subtle example concerns the tension which sometimes surrounds cross-border merger transactions. When a merger spans jurisdictions, it may permit a jurisdiction to advance local considerations and internalize many of the merger’s benefits, while ignoring the external costs laid on corporations and consumers outside its borders. A given jurisdiction may try to shield its local markets from a negative transfer of wealth, while the jurisdiction that receives the positive transfer of wealth caused by the anticompetitive behavior of its local corporations, may be reluctant to act against such behavior. Each authority, concentrating on its own domestic economic realities, may justify the differences in their decisions. Such distortions in appraisal may be amplified by social, industrial and political considerations.<sup>24</sup>

These distortions can be best dealt with by ensuring the presence of clear legal and economic benchmarks for assessment and transparent competition appraisal. Dialogue between enforcers and case-by-case cooperation can play a significant role in preventing and exposing political and industrial considerations which transform the legitimate transfer of wealth benchmark into its distorted version of “cross-border transfer of wealth.”

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<sup>23</sup> As such it is not governed by the desire to protect consumer surplus (or total welfare) but rather by industrial policies aimed at protecting the domestic market and preventing any form of negative transfer of wealth.

<sup>24</sup> Ariel Ezrachi ‘Globalization of Merger Control – A Look at Bilateral Cooperation through the GE/Honeywell Case’ 14 Florida Journal of International Law 397 (2002) 397-425

#### IV. Extraterritoriality and Cooperation

As illustrated, a focus on transfer of wealth between jurisdictions may distance competition law analysis from its core values, and result in a tendency toward both Type I errors (false positive)<sup>25</sup> and Type II errors (false negative).<sup>26</sup> Two powerful tools, however, may bring the equation closer to its origins. These are extraterritoriality and cooperation.

*Extraterritoriality* may allow jurisdictions to apply their competition laws to transactions and activities which escaped scrutiny elsewhere, yet have an impact on the domestic market. As such, it can remedy under-enforcement, by aggregating domestic enforcement. It can therefore be used to curtail negative transfer of wealth by blocking anticompetitive transactions and activities which were not challenged elsewhere.

Two qualifying comments are in order. *First*, extraterritoriality may have a detrimental impact when it is used as a tool to foster over-enforcement. This may be the case when a jurisdiction blocks a remote transaction or activity, which is overall beneficial, yet has an adverse effect within the home jurisdiction. *Second*, while effective in dealing with under enforcement, extraterritoriality cannot remedy over-enforcement by one jurisdiction, which undermines welfare gains in another. Accordingly, in an international setting, when domestic perspective results in over-enforcement, welfare loss cannot be salvaged through extraterritoriality.

On this point it is worth noting that domestic-oriented enforcement will rarely account for the totality of anti- and pro- competitive effects.<sup>27</sup> Assuming all affected competition regimes can apply their laws to the anticompetitive activity, the amalgamation of enforcement efforts will result in a similar outcome as under a “confined economy”.

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<sup>25</sup> Over enforcement - for example, a jurisdiction challenging and blocking an overall welfare enhancing international merger transaction because of negative effects within the domestic territory.

<sup>26</sup> Under enforcement - where a jurisdiction should condemn the conduct but refrain from doing so because the consumer harm mainly lies abroad. (see above discussion of export cartels)

<sup>27</sup> On this point see, eg JM Connor, ‘Extraterritoriality of the Sherman Act and Deterrence of Private International Cartels’ (July 2004) Staff Paper 04-08, Department of Agricultural Economics, Purdue University, where the author shows (on the basis of facts concerning operation and prosecution of the global Vitamins Cartel) that ‘even under ideal prosecutorial outcomes, in the absence of full extraterritoriality, the global reach of modern cartels insures that the monetary payouts of guilty international cartelists cannot succeed in disgorging all the illegal cartel profits’: at 18; Fox, below n 23 **Error! Bookmark not defined.** On the point that one ‘need a global fine to deter global harm’, see also Stucke, ‘Am I a Price Fixer? A Behavioral Economics Analysis of Cartels’ in *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (Eds Ezrachi and Beaton-Wells) 2010



Interestingly, when one or more of the competition enforcers take into account “*cross -border transfer of wealth*” the aggregated result is likely to reflect over enforcement, as the most restrictive decision triumphs. On the other hand, under enforcement, in a global setting, is only likely to occur when one or more of the affected jurisdictions fail to apply their competition provisions to the anticompetitive activity.<sup>28</sup>

*Cooperation, assimilation and harmonisation* also play a significant role in limiting the domestic perspective. Cooperation can support unilateral cross border assertion of jurisdiction. It facilitates extraterritoriality, information gathering, investigation and sanctioning. In addition, cooperation provides a valuable tool to relax the focus on cross-border transfer of wealth and to take into account comity principles.<sup>29</sup> More generally, harmonization and assimilation, fostered through cooperation, provide valuable and transparent benchmarks for assessment, and deepen the trust between competition enforcers. As hinted above, the more transparent and assimilated the analytical process is, the harder it is for non-competitive variants to find their way into the analysis.

Three main limitations of cooperation are noteworthy in the context of transfer of wealth. *First*, cooperation can relax and suppress the domestic perspective but will not override it. *Second*, the presence of cross-border transfer of wealth may create disincentives for entering into cooperative agreements. As long as the exporting jurisdiction is capable of protecting its own market from foreign anticompetitive activity, it may object to binding or voluntary frameworks aimed at curtailing its ability to foster positive, incoming transfer of wealth.<sup>30</sup> *Third*, cooperating jurisdictions may exert similar externalities as a group on non-members. This would be the case when transfer of wealth affects the position of one group relative to another. As a result, externalities between cooperation blocks may emerge, which aim to protect their own members, sometimes at the expense of non-members.

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<sup>28</sup> See discussion in Section V on small and developing economies.

<sup>29</sup> Note that comity, reciprocal deference, is a concept founded on process, not outcome. See: Testimony of Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation New York University School of Law, Before the Antitrust Modernization Commission Hearing on International Issues, Washington, D.C. February 15, 2006

<sup>30</sup> For proposals to confront export cartel at international level see: Bhattacharjea n 15 above; Sokol n 13 above; Becker n 13 above.

## V. Implications for Small and Developing Economies.

The discussion above highlights how, in a global setting, domestic regimes provide the engine for aggregated competition law enforcement. While the domestic focus may alter the transfer of wealth equation, and at times lead to an alternative ‘cross-border transfer of wealth’ equation, the effect is limited through extraterritoriality, cooperation, and assimilation.

This regained equilibrium is, however, harder to achieve in the case of small and developing economies. In other words, they may remain exposed, more than others, to externalities and negative transfer of wealth. This exposure stems, predominantly from shortcomings linked to enforcement capacity, extraterritorial powers, and cooperation. The significance of each of these variants is explored below.

### *Enforcement capacity*

Effective competition law enforcement serves as the first building block which ensures the welfare of domestic consumers and prevention of negative transfer of wealth. One should distinguish, in this context, between the mere adoption of competition provisions, possibly due to international pressure, and genuine implementation and enforcement efforts.<sup>31</sup> Evidently, some small and developing economies may wish to focus their efforts in developing local industry and economy, and may have reservations as to the merit of introducing a competition regime at an early stage. However, as it will be illustrated below, transfer of wealth in a global setting makes the adoption of a domestic competition regime a priority, irrespective of whether the jurisdiction has fully transitioned into a liberalised market economy.

Due to the domestic nature of competition law enforcement, a decision not to adopt an effective competition regime may result in exposure to negative externalities generated by other jurisdictions. In some instances, this exposure will be limited, since enforcement efforts elsewhere serve the interests of the small or developing jurisdiction. In those cases, when the interests of several jurisdictions align, one may be able to *free ride* on enforcement efforts

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<sup>31</sup> Maher Dabbah ‘Competition law and policy in developing countries: A critical assessment of the challenges to establishing an effective competition law regime’ [2010] 33 World Competition 3, 457, 459

elsewhere. However, note that the benefits in these instances are incidental in nature. Free riding will fail to provide relief in cases of under-enforcement elsewhere. As markets and economic effects differ widely between jurisdictions, a free riding policy is a perilous one.<sup>32</sup>

In addition, lack of effective domestic competition enforcement may encourage sophisticated undertakings to target the small or developing domestic jurisdictions, while avoiding scrutiny by effective competition regimes elsewhere. For example, it has been reported that due to the harsh penalties and custodial sentences, international cartels choose at times not to extend their cartel activity to US markets in an attempt to avoid US detection and sanctions.<sup>33</sup> At the same time, the characteristics of small and developing economies, such as the limited level of competition enforcement in the domestic market and the likely absence of buyer power, may attract anticompetitive activity as it is easier for foreign players to obtain market power and engage in transfer of wealth.

Linked to this is the ability to curtail the anticompetitive activity. While powerful corporations are willing to abide by the enforcement powers of powerful jurisdictions, they may refuse to acknowledge the legitimate interests of small economies. Their economic power and the income they channel into the local economy enable them to occupy a preferable bargaining position, or curtail enforcement attempts or negotiate favourable remedies. The disparity in bargaining power and the subsequent lack of a credible threat of enforcement leave the local jurisdiction exposed to anticompetitive activities. For example, some firms have been reported to set aside funds for the payment of damages and fines in large jurisdictions while perceiving the risk, and need, to allocate sums to small economies, to be negligible.<sup>34</sup> Similarly, the lack of effective enforcement may result in merger transactions being completed with no domestic scrutiny or remedies. These transactions may be subject to restrictions in other jurisdictions but may go unchallenged in developing ones.<sup>35</sup>

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<sup>32</sup> Domestic considerations may make the reliance on foreign jurisdictions as enforcement politically unpalatable. See generally J Fingleton, 'Competition Agencies and Global Markets: The Challenges Ahead' (5 June 2009) [www.oft.gov.uk/shared\\_of/speeches/2009/spe0909paper.pdf](http://www.oft.gov.uk/shared_of/speeches/2009/spe0909paper.pdf).

<sup>33</sup> SD Hammond, 'Cornerstones of an Effective Leniency Program', paper presented at ICN Workshop on Leniency Programs (Sydney, 22-23 November 2004) 8-9, or his presentation on 'Optimal Sanctions, Optimal Deterrence' at ICN Annual Conference (Bonn, 6 June 2005) 9.

<sup>34</sup> See Michal Gal, 'Antitrust in Globalized Economy: The Unique enforcement challenges faced by small and developing jurisdictions' [2009] 33 *Fordham International Law Journal* 1, 1, 28

<sup>35</sup> Terry Winslow 'OECD competition law recommendations, developing Countries, and possible WTO competition rules' [2001] *OECD Journal of Competition Law and Policy*, Volume 3, No. 1, 115, 130

Accordingly, beyond the domestic perspective, institutional growth and capacity building, which lead to an effective, independent competition enforcement regime, should be viewed as paramount goals for competition regimes at an early stage. They provide essential shielding of the domestic market from both corporate and state power which may foster negative transfer of wealth.

### *Extraterritoriality*

Small and developing economies may lack the requisite enforcement capacity, jurisdiction, or political will to support extraterritorial application of their competition laws.<sup>36</sup> Yet, as hinted above, long arm jurisdiction serves an important role in relaxing possible transfer of wealth and brings enforcement of competition law closer to its core values.

Recall that enforcement by competition agencies is aimed primarily at protecting their domestic market. As such, it is not designed to curtail anticompetitive activity elsewhere. Export cartels provide a useful illustration of this point, as exporting jurisdictions may lack the incentive to bring the competition violation to an end. Accordingly, a common assumption at the base of the global aggregated competition enforcement landscape is that each jurisdiction will protect its own market. Extraterritoriality is thus essential to curtailing anticompetitive activities of foreign corporations, which were not challenged and stopped by other jurisdictions.

Long arm jurisdiction provides more than the termination of anticompetitive actions. It also serves as a vehicle to penalize the violating corporations and increases the deterrent effect. This function is of value even if the anticompetitive activity was brought to an end by other jurisdictions. The penalty or remedy imposed by each jurisdiction aims to reflect the harm to the local market, and is therefore valuable, irrespective of enforcement elsewhere.

Linked to this is the role extraterritoriality plays at enhancing the power of the state when faced with strong multinational corporations. Absent extraterritorial powers, the ability

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<sup>36</sup> Testimony of Eleanor M. Fox, Walter J. Derenberg Professor of Trade Regulation, New York University School of Law, Before the Antitrust Modernization Commission, Hearing on International Issues Washington, D.C. February 15, 2006; Also see: Alvin K. Klevorick, Alan O. Sykes 'United States courts and the optimal deterrence of international cartels: a welfarist perspective on Empagran', *Journal of Competition Law & Economics* 2007

to enforce and deter international actors is significantly hampered.<sup>37</sup> The ability to apply competition provisions to foreign undertakings makes it harder for those corporations to ignore that jurisdiction. When backed by adequate enforcement capacity and cooperation frameworks, extraterritoriality serves as a valuable tool to curtail corporate power. That effectiveness, in turn, serves to enhance the state's position in relation to other jurisdictions and limit its exposure to negative externalities.

### *Cooperation*

Cooperation, being bilateral, regional or multinational, may support capacity building, facilitate domestic and extraterritorial enforcement, and provide a valuable tool for rebalancing the transfer of wealth equation. In the context of transfer of wealth it can be viewed both as a shield and a sword. As a shield, cooperation fosters communication, assimilation and trust between enforcers, all of which support transparent and effective competition enforcement in which a policy based on cross-border transfer of wealth, is less likely to materialise. As a sword, it can enable unilateral domestic enforcement through capacity building, convergence, cooperation and cross-border enforcement by facilitating extraterritoriality through assistance in information gathering, enforcement and sanctioning.

Yet, small and developing jurisdictions may find it difficult at times to establish *effective* cooperation in competition law.<sup>38</sup> That may be particularly so at a *bilateral level* where they may find it hard to secure meaningful agreements with strong, developed, jurisdictions. The limited level of trade between jurisdictions, the gap in enforcement capacity and competition policy, and the cost of maintaining cooperative links, render such agreements unattractive. Other variables which may affect the desirability and success of such frameworks include political and industrial parameters, interest groups, domestic politics, economic considerations, employment opportunities and political stability. One would expect to see stronger bilateral links between jurisdictions which share similarities in relation to these variables.

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<sup>37</sup> For an account on the effect of jurisdictional limitations on the enforcement of competition law in Mexico, see: Michael Wise 'Review of Competition Law and Policy in Mexico' [1999] 1 OECD J. Comp. L. & Pol'y

<sup>38</sup> To be distinguished from a decision to sign a bilateral agreement in competition as part of a political move with no prospect of meaningful implementation.

Evidently, the decision whether to establish bilateral cooperation in competition law results from a wide range of political and economic considerations, and may be contrary to the interests of both developed and developing economies. In the confined context of transfer of wealth, powerful jurisdictions may lack the incentive to establish meaningful bilateral cooperation with small and developing regimes, when such cooperation undermines externalities and ongoing positive transfer of wealth. On the other hand, they may support capacity building and cooperation with other jurisdictions when wider externalities are absorbed in the developed countries.

At the *multinational level* cooperation efforts can be distinguished based on whether they form a binding or voluntary agreement. Failed attempts to establish a meaningful *binding* wide-multinational agreement on competition law showcased their practical inferiority. The disparity of interest and the heterogeneous nature of membership crippled attempts at the WTO and earlier binding initiatives.<sup>39</sup> With the exception of the unique example of the European Union, binding multinational frameworks failed to provide a viable channel for cooperation in competition law.<sup>40</sup> Accordingly, they are unlikely to be used by small and developing economies to rebalance the transfer of wealth equation.

By contrast, *voluntary multinational agreements* have proven valuable in providing a channel for communication, assimilation and a source of support and capacity building. There are three forums which are particularly influential in the multilateral scene, advancing non-binding frameworks and promoting cooperation in competition law.<sup>41</sup> These are the United Nation Conference on Trade and Development (UNCTAD), the Organisation for Economic Cooperation and Development (OECD) and the International Competition Network (ICN). In contrast with previous unsuccessful attempts to advance binding multinational frameworks in competition law, these forums provide soft convergence and voluntary frameworks. As such,

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<sup>39</sup> Ingham, B, (1998), From ITO to WTO: Trade and Protection in a Changing World; Moore, L, (1985), The Growth and Structure of International Trade Since The Second World War, 42-50; Wilcox, C, (1949), A Charter for World Trade, Macmillan Co. New York, 103-113, 153-160; The Munich Draft International Antitrust Code; reprinted in (1993) Antitrust & Trade Regulation Report 65, No. 1628; Robert Anderson and Frédéric Jenny 'Competition Policy, Economic Development and the Role of a Possible Multilateral Framework on Competition Policy: Insights from the WTO Working Group on Trade and Competition Policy' (available online - [www.ifc.org](http://www.ifc.org)); WTO Doha Ministerial Declaration, WT/MIN(01)/DEC/1

<sup>40</sup> For a review of these frameworks see for example: Ariel Ezrachi 'Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What's in Between' in *Handbook on Trans-Atlantic Antitrust* (ed, Philip Marsden), 622-641, Edward Elgar Publishing, (2007)

<sup>41</sup> On this point see: Ariel Ezrachi 'The Role of Voluntary Frameworks in Multinational Cooperation' 36 *George Washington International Law Review*, (2004) 433-451

they serve as a valuable tool for small and developing economies since they foster slow processes of assimilation and enable valuable interaction between jurisdictions. Participation in initiatives advanced by these forums provides a voice for small and developing economies, which form part of an evolving international consensus on competition law enforcement. In the context of transfer of wealth, processes which stem from this dialogue serve to relax externalities through cooperation and the strengthening of the domestic enforcement regimes.

Another level of cooperation which is worthy of note in the context of small and developing economies is that of *regional or focused multinational agreements*.<sup>42</sup> In principle, the move from wide-multilateral, to focused-multinational, or regional, facilitates the finding of common ground. Alignment of political, trade and economic interests, allows such initiatives to provide a more concrete framework for cooperation. In the context of competition law enforcement and transfer of wealth, such initiatives may play a particular role in enhancing the international standing of members and facilitate the enforcement of competition law.<sup>43</sup> By being part of a wider homogeneous group, each jurisdiction is empowered by the regional framework, in its interaction with foreign private and state actors. These entities may find it harder to ignore the enforcement efforts of a jurisdiction, where such a move would have consequences within other members of the regional alliance. Similarly, the aggregation of power may tilt the transfer of wealth equation between jurisdictions. The regional group may be able not only to block the negative transfer of wealth but, at times, to inflict it. The ability of the group to externalize costs onto other jurisdictions increases the incentive of others to cooperate with the group. As such it not only serves to shield members from external transfer of wealth, but also facilitates cooperation which may further reduce the likelihood for unchallenged externalities.

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<sup>42</sup> For example: Southern Common Market (MERCOSUR), Caribbean Community (CARICOM), Common Market for Eastern and Southern Africa (COMESA) and the West African Economic and Monetary Union (UEMOA).

<sup>43</sup> On the benefit of regional competition agreements – see: Michal Gal Regional Competition Law Agreements: An Important Step for Antitrust Enforcement 2010) 60 University of Toronto Law Journal 239

## VI. Concluding Remarks

Global enforcement of competition law relies, primarily, on the amalgamation of domestic enforcement regimes and cooperative frameworks between them. This is borne out of reality, rather than from a belief in the superiority of such an approach. Past attempts to advance a truly global antitrust enforcement regime have been blocked by the harsh truth of jurisdiction, politics and sovereignty.<sup>44</sup>

The unilateral approach has been supplemented by cooperation at bilateral, regional and multinational levels. These frameworks, being binding or voluntary, have provided a valuable channel for increased convergence, assimilation, coordination and facilitation of competition enforcement activities.<sup>45</sup> Cooperation has also proven crucial in limiting friction between jurisdictions in their domestic and extraterritorial application of their competition regimes.

Cooperation, however, cannot override the domestic nature of competition enforcement. In a global setting, when faced with cross-border activity, the domestic focal point may sometimes fail to account for the totality of effects and as such divert the analysis from an optimal level of enforcement.

Exploring these processes through the view point of transfer of wealth provides valuable insights: First, the consideration of transfer of wealth yields different results when faced with cross-border activity. While the enforcement equation remains the same, the imperfect overlap between the effect and the jurisdiction, leads to a sub-optimal enforcement equilibrium. Second, the focus on domestic welfare may result in a transition from transfer of wealth between consumers and producers, to transfer of wealth between jurisdictions. Third,

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<sup>44</sup> From the Havana Charter, through the Munich Draft International Antitrust Code and to attempts at the World Trade Organisation, the international community was unable to reach meaningful binding agreements on competition law and policy. On the Havana Charter see: Ingham, B, (1998), *From ITO to WTO: Trade and Protection in a Changing World*; Moore, L, (1985), *The Growth and Structure of International Trade Since The Second World War*, 42-50; Wilcox, C, (1949), *A Charter for World Trade*, Macmillan Co. New York, 103-113,153-160; On the Munich group initiative see The Munich Draft International Antitrust Code; reprinted in (1993) *Antitrust & Trade Regulation Report* 65, No. 1628. On efforts within the WTO see: Drexler, J., (2004), 'International Competition Policy After Cancun: Placing a Singapore Issue on the WTO Development Agenda', *W. Comp.*, 27 (3), pp. 419-457; WTO Working Group on the Interaction between Trade and Competition Policy (2004) WT/WGTCP/W/246.

<sup>45</sup> Ariel Ezrachi, *Merger Control and Cross Border Transactions – A Pragmatic View on Cooperation, Convergence and What's in Between* in *Handbook on Trans-Atlantic Antitrust* (ed, Philip Marsden), 622-641, Edward Elgar Publishing, (2007)



since each competition regime is not likely to take account of the totality of effects, the global enforcement landscape is based on the premise that each jurisdiction will protect its domestic market, at times through extraterritorial application of its competition laws.

As illustrated, in a global economy, domestic competition law serves a vital role in protecting the local market from harmful externalities. Effective competition enforcement, backed by long arm jurisdiction, can serve to remedy under-enforcement elsewhere. It increases bargaining power when dealing with multinational corporations and foreign states. Cooperation at bilateral or wider multinational levels enables capacity building and facilitates unilateral enforcement. It also serves a crucial role in communication and assimilation, all central to reducing the likelihood of over-regulation and externalities.

From a small or developing economy's perspective, the need to promote effective competition enforcement should therefore not only be viewed from a domestic perspective or stem from external international pressure to foster market mechanisms. Rather, it should stem from the realization that irrespective of domestic challenges, the global competition landscape necessitates it.