

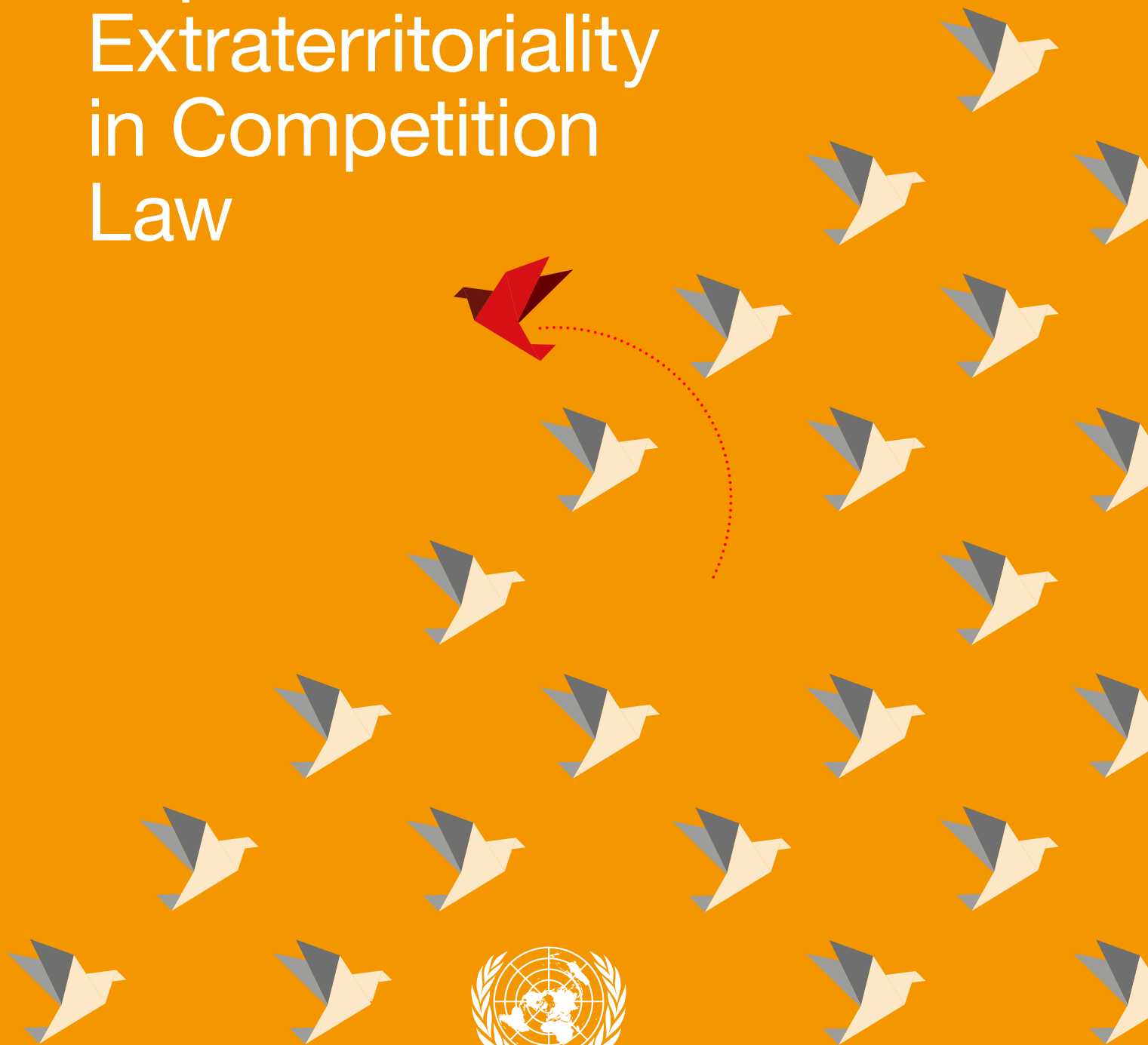


Developing Countries' Experience with Extraterritoriality in Competition Law





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NOTE

Considering the important role of research and policy analysis in the development of appropriate policies and legislation in the areas of competition and consumer protection, UNCTAD created the Research Partnership Platform (RPP) in 2010. The UNCTAD RPP is an initiative that aims at contributing to the development of policies and best practices to promote effective law enforcement for competitive markets and inclusive development. The RPP is coordinated by Ebru Gökçe, under the general guidance of Teresa Moreira.

The RPP brings together research institutions, universities and civil society, and provides a platform for joint research and exchange of ideas amongst scholars and practitioners on the issues and challenges in the area of competition and consumer protection faced particularly by developing countries and economies in transition.

The role of UNCTAD is to facilitate and provide guidance on the research and analysis to be undertaken by members of RPP. UNCTAD benefits from the research findings in responding to the challenges faced by developing countries through its technical assistance and capacity-building activities.

This paper is written by Dr. Marek Martyniszyn, Senior Lecturer in Law, Queen's University Belfast. It benefited from guidance of Ebru Gökçe, RPP Coordinator, and overall supervision of Teresa Moreira, Head, Competition and Consumer Policies Branch, UNCTAD. This research project was conducted in the framework of the UNCTAD Research Partnership Platform.

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INTRODUCTION

This study addresses the question of extraterritoriality (extraterritorial jurisdiction) in the area of competition law. That is, it examines whether or not domestic competition legislation applies to foreign entities that may not be present in the forum¹, but whose conduct harms or may harm local consumers or producers. It also analyzes existing enforcement track record and hurdles involved in such cases. Transnational conduct can take the form of price-fixing among foreign producers, an abuse of dominant position, or a merger between foreign firms.

Transnational violations of competition law cause significant harm. Connor estimates that between 1990 and 2016, the private international cartels that were detected affected sales of over \$51 trillion worldwide.² The overcharges exceeded an estimated \$1.5 trillion globally.³ While inflated margins are endemic to cartels, international cartels overcharge much more than similar domestic arrangements.⁴ Furthermore, unlike in a domestic setting, such competitive harm is not just a matter of redistribution of resources between producers and consumers. It also constitutes an extraction of wealth from the affected state to the state hosting violators. Given most transnational enterprises are located in the global North, competitive harm can be seen as illegal transfers of wealth to shareholders in developed states. Hence, transnational anticompetitive conduct may be further deepening the divide between developing and developed countries, which the international community endeavours to address.

Hitherto, extraterritorial enforcement of competition law was analyzed mainly from the perspective of well-established competition law systems,⁵ hence

predominantly developed states, which were the first to use extraterritoriality to protect their markets. Broader comparisons of legal systems were made from only limited perspectives, largely due to the lack of empirical data.⁶ This study contributes to narrowing the gaps in our knowledge of the nature and gravity of challenges involved in dealing with transnational anticompetitive practices in transition economies. It examines existing frameworks and practices of developed countries and transition economies⁷ and provides an overview of the key practical and systemic challenges faced by enforcers in such countries.

These empirical findings support the design of workable solutions that can be implemented to strengthen domestic competition systems. They also help identify areas requiring further collective efforts. The gathered data is qualitative in nature and suffers from the usual related limitations, for example it is not comprehensive. However, it provides a unique examination of the situation on the ground across the developing world.

METHODOLOGY AND SCOPE

This study relied on a short semi-structured questionnaire to gather the data under analysis (see Annex 1). The questions focused on: (1) acceptance of extraterritoriality in competition law systems, (2) experience with extraterritorial enforcement, (3) differences between transnational

¹ 'Forum' is a legal term. It means a place of jurisdiction where remedies afforded by the law are pursued; where a case is brought, or conduct investigated.

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

³ Ibid, at 30.

⁴ John M Connor and Yuliya Bolotova, 'Cartel overcharges: Survey and meta-analysis', 24(6) *International Journal of Industrial Organization* 1109 (2006); Florian Smuda, 'Cartel overcharges and the deterrent effect of EU competition law', 10(1) *Journal of Competition Law and Economics* 63 (2013).

⁵ See, for example, Eleanor M Fox, 'Extraterritorial Jurisdiction, Antitrust, and the EU Intel Case: Implementation, Qualified

Effects, and the Third Kind', 42 *Fordham International Law Journal* 981 (2018); Florian Wagner-von Papp, 'Competition Law, Extraterritoriality and Bilateral Agreements' in Ariel Ezrachi (ed), *Research Handbook on International Competition Law* (Edward Elgar, 2012); Marek Martyniszyn, 'Japanese Approaches to Extraterritoriality in Competition Law', 66(3) *International and Comparative Law Quarterly* 747 (2017).

⁶ For example, Wong-Ervin Koren, and Andrew J Heimert, 'Extraterritoriality: Approaches Around the World and Model Analysis' in Eleanor Fox: *Liber Amicorum* (Concurrences, forthcoming 2020). For an overview in a number of selected jurisdictions see further Andrew T. Guzman (ed), *Cooperation, Comity, and Competition Policy* (OUP, 2011).

⁷ Country classification is based on the United Nations methodology as per the World Economic Situation and Prospects (WESP) classification. WESP 2020, available at <https://www.un.org/development/desa/dpad/wp-content/uploads/sites/45/WESP2020_FullReport.pdf>.

Figure 1: Countries participating in the study



and purely domestic cases, and (4) factors hindering enforcement in a transnational context. Hence, the survey collected data about existing legal frameworks and enforcement experiences. It also helped to gather information about the factual (that is, already encountered) and anticipated difficulties in competition law enforcement. The questionnaire was disseminated among competition law national experts availing of the broad UNCTAD network. The survey's results were supplemented and further corroborated by means of doctrinal research and follow up queries.

The 40 jurisdictions that participated in the project were: Albania*, Argentina, Armenia*, Belarus*, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, El Salvador, Eswatini, Guyana, Honduras, India, Indonesia, Jamaica, Kenya, Malawi, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russian Federation*, Saudi Arabia, Serbia*, South Africa, Turkey, Ukraine*, United Republic of Tanzania, Viet Nam, Zambia, and Zimbabwe (* denotes transition economies using the United Nations terminology). That is a large and geographically diverse group that encompasses small and large states of various income levels and different pre-existing experience with competition

law enforcement. Hence, the study provides a representative overview.

All received contributions are gratefully acknowledged. It should be underscored that any such data requests are low-priority matters, coming on top of the busy workloads of often-understaffed agencies. This partly explains the long period needed for data collection, involving three separate rounds of requests and various follow-up reminders, with data collection ending in July 2019. The UNCTAD's Research Partnership Platform was instrumental in making this study possible.

EMBRACEMENT OF EXTRATERRITORIALITY

In 34 out of the 40 jurisdictions participating in the survey, domestic competition law is applicable extraterritorially, that is, to foreign entities that are not present in the forum but whose conduct harms local consumers or producers. Except for Chile, domestic legislation provides appropriate textual basis for extraterritoriality. In Chile, the extraterritorial application has been inferred from the statute by the judiciary.⁸

⁸ See below notes 50-52 and accompanying text.

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Table 1: Is domestic competition law applicable to the conduct of foreign entities which are not present in your jurisdiction but whose conduct harms local consumers or producers?

Yes: 34	Albania, Argentina, Belarus, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, Eswatini, Honduras, India, Kenya, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russian Federation, Saudi Arabia, Serbia, South Africa, Turkey, Ukraine, United Republic of Tanzania, Viet Nam, Zambia, Zimbabwe
No: 6	Armenia, El Salvador, Guyana, Indonesia, Jamaica, Malawi

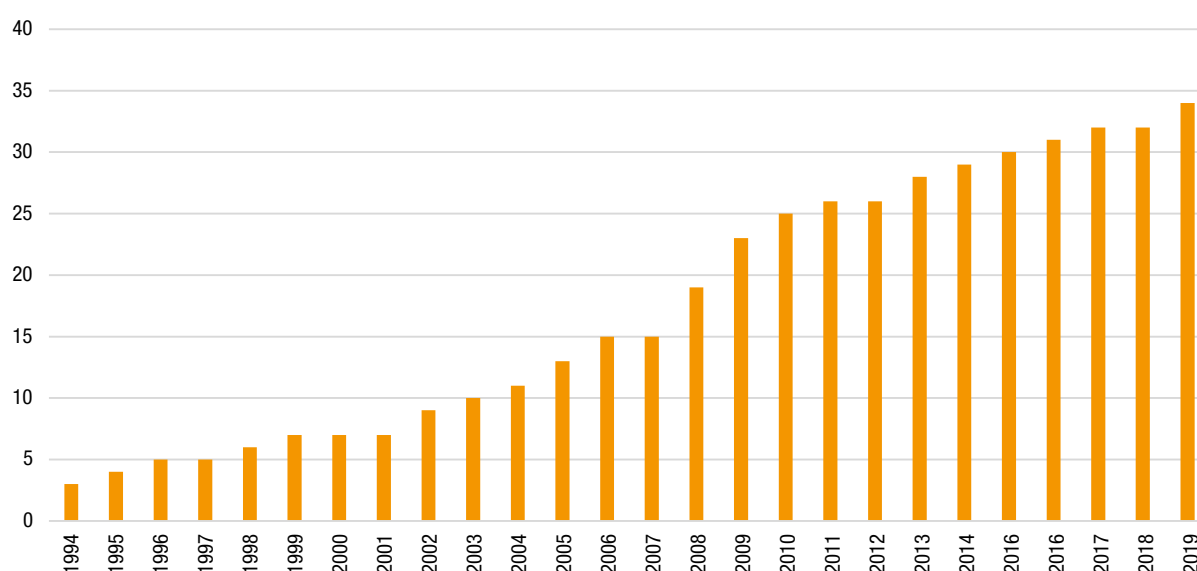
Embracement of extraterritoriality in competition law has been a gradual process. Among research participants, the earliest adopters were Brazil, Costa Rica and Turkey, which did so in 1994. However, it should be noted that some countries provided for extraterritoriality earlier but have since fallen into a different country classification.⁹

Among the most recent adopters are Nigeria and Viet Nam (2019). Draft amendments to Indonesian legislation, pending parliamentary considerations, would provide for extraterritoriality in that jurisdiction, making it the last G20 country to embrace this element of competition law.

Table 2: Timing of extraterritoriality's adoption

Decade	Adopting country
1990s	<u>7 countries:</u> Albania (1995), Argentina (1999), Brazil (1994), Costa Rica (1994), South Africa (1998), Turkey (1994), Zimbabwe (1996)
2000s	<u>16 countries:</u> Botswana (2009), China (2008), Colombia (2009), Egypt (2005), Eswatini (2008), Honduras (2006), India (2002), Namibia (2008), Nicaragua (2006), Papua New Guinea (2003), Peru (2008), Russian Federation (2009), Saudi Arabia (2005), Serbia (2009), Ukraine (2002), United Republic of Tanzania (2004)
2010s	<u>11 countries:</u> Belarus (2014), Chile (2013), Dominican Republic (2017), Kenya (2011), Malaysia (2016), Mexico (2013), Nigeria (2019), Pakistan (2010), Philippines (2015), Viet Nam (2019), Zambia (2010)

Figure 2: The embracement of extraterritoriality by the developing countries across time (number of adopters over time, cumulatively)



⁹ For example, Poland embraced extraterritoriality already in 1987, per Art. 1 of the Law on Counteracting Monopolistic Practices in the National Economy of 28 January 1987.

However, it is no longer classified as a developing country or an economy in transition.

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Extraterritorial jurisdiction is provided for by means of recognition of in-forum effects of foreign conduct as a sufficient nexus for the sake of jurisdictional assertions. That is, by adopting some form of the effects doctrine. Particular formulations of jurisdictional tests vary between countries. Table 3 presents framing of jurisdictional tests, currently in force, in a number of selected countries. Typically, a forum's jurisdiction is claimed in relation to conduct that has or is likely to have effects on the domestic market. The facilitating provisions tend to

be general in nature, casting a wide jurisdictional net. However, legislation in some fora incorporates qualifiers, potentially making assertion of extraterritorial jurisdiction more difficult than in a domestic context. For example, Indian competition law requires showing of an actual or potential 'appreciably adverse' effect on the Indian market. Overall, framing extraterritoriality provisions in a general manner is in line with the practices of leading developed jurisdictions, especially the European Union, Japan and the United States of America.¹⁰

Table 3: Examples of jurisdictional provisions in selected developing countries

Country	The jurisdictional test	
	As promulgated	English translation
Argentina: Competition Law, 25.15, Art. 3	Quedan sometidas a las disposiciones de esta ley todas las personas físicas o jurídicas públicas o privadas, con o sin fines de lucro que realicen actividades económicas en todo o en parte del territorio nacional, y las que realicen actividades económicas fuera del país, en la medida en que sus actos, actividades o acuerdos puedan producir efectos en el mercado nacional.	All natural or artificial, public or private, profit or non-profit persons, performing economic activities in whole or part of the national territory and those performing economic activities outside the country, to the extent their acts, activities or agreements affect the national market, are subject to the provisions of this law. ¹¹
Brazil: Law nº 12.529 of 30 November 2011, Art. 2	Aplica-se esta Lei, sem prejuízo de convenções e tratados de que seja signatário o Brasil, às práticas cometidas no todo ou em parte no território nacional ou que nele produzam ou possam produzir efeitos.	This Law applies, without prejudice to the conventions and treaties of which Brazil is a signatory, to practices performed, in full or in part, on the national territory, or that produce or may produce effects thereon. ¹²
China: Anti-monopoly Law of the People's Republic of China of 30 August 2007, Art. 2	中华人民共和国境内经济活动中的垄断行为·适用本法；中华人民共和国境外的垄断行为·对境内市场竞争产生排除、限制影响的·适用本法。	This Law is applicable to monopolistic conducts in economic activities within the territory of the People's Republic of China; and it is applicable to monopolistic conducts outside the territory of the People's Republic of China, which serve to eliminate or restrict competition on the domestic market of China. ¹³
Egypt: Law No. 3 of 2005 Promulgating the Law on the Protection of Competition and the Prohibition of Monopolistic Practices, Art. 5	لأعمال أجنبية أو لى عون أو نقل أو اذم مأكح أيسرت ببترت اذ ج راخال يف بكترت يتل اهدي يقت وأة سفانلما ةيرح عنم اهليلع لكشت يتل او صرم يف اهب راضرللا وأ نون اقل اذهل اقبط مئارج	The provisions of this Law shall apply to acts committed abroad should these acts result into the prevention, restriction or harm of the freedom of competition in Egypt and which constitute crimes under this Law. ¹⁴
India: Competition Act 2002, 12 of 2003, Sec. 32	The Commission shall, notwithstanding that,— (a) an agreement referred to in section 3 has been entered into outside India; or (b) any party to such agreement is outside India; or (c) any enterprise abusing the dominant position is outside India; or (d) a combination has taken place outside India; or (e) any party to combination is outside India; or (f) any other matter or practice or action arising out of such agreement or dominant position or combination is outside India, have power to inquire 56 in accordance with the provisions contained in sections 19, 20, 26, 29 and 30 of the Act into such agreement or abuse of dominant position or combination if such agreement or dominant position or combination has, or is likely to have, an appreciable adverse effect on competition in the relevant market in India and pass such orders as it may deem fit in accordance with the provisions of this Act.	

¹⁰ See n 4.

¹¹ Translation per the OECD Competition Law and Policy in Argentina: A Peer Review (2006), 35.

¹² Translation per the Administrative Council for Economic Defense (CADE), available at <<http://en.cade.gov.br/topics/legislation/laws/law-no-12529-2011-english-version-from-18-05-2012.pdf/view>>.

¹³ Translation per the Ministry of Commerce of the People's Republic of China, available at <<http://english.mofcom.gov.cn/article/policyrelease/Businessregulations/201303/20130300045909.shtml>>.

¹⁴ Translation per WIPO Lex, available at <<https://wipolex.wipo.int/en/legislation/details/7409>>.

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Country	The jurisdictional test	
	As promulgated	English translation
Russian Federation: Federal Law No. 135-FZ of 26 July 2006 on Protection of Competition, Art. 3(2)	Положения настоящего Федерального закона применяются к достигнутым за пределами территории Российской Федерации соглашениям между российскими и (или) иностранными лицами либо организациями, а также к совершаемым ими действиям, если такие соглашения или действия оказывают влияние на состояние конкуренции на территории Российской Федерации.	Provisions of this Federal Law are applicable to the agreements reached between Russian and (or) foreign persons or organizations outside the Russian Federation, as well as to actions performed by them, if such agreements or actions affect the state of competition in the Russian Federation. ¹⁵
South Africa: Competition Act No. 89 of 1998, Sec. 3	(1) This Act applies to all economic activity within, or having an effect within, the Republic, except – (a) collective bargaining within the meaning of section 23 of the Constitution, and the Labour Relations Act, 1995 (Act No. 66 of 1995); (b) a collective agreement, as defined in section 213 of the Labour Relations Act, 1995; and (c) [Para. (c) deleted by s. 2 (a) of Act No. 39 of 2000.] (d) [Para. (d) deleted by s. 2 (a) of Act No. 39 of 2000.] (d) concerted conduct designed to achieve a non-commercial socio-economic objective or similar purpose. (1A) (a) In so far as this Act applies to an industry, or sector of an industry, that is subject to the jurisdiction of another regulatory authority, which authority has jurisdiction in respect of conduct regulated in terms of Chapter 2 or 3 of this Act, this Act must be construed as establishing concurrent jurisdiction in respect of that conduct. (b) The manner in which the concurrent jurisdiction is exercised in terms of this Act and any other public regulation, must be managed, to the extent possible, in accordance with any applicable agreement concluded in terms of sections 21 (1) (h) and 82 (1) and (2). [Sub-s. (1A) inserted by s. 2 (b) of Act No. 39 of 2000.]	
Turkey: Act on the Protection of Competition, Act No. 4054, Art. 2	Türkiye Cumhuriyeti sınırları içinde mal ve hizmet piyasalarında faaliyet gösteren ya da bu piyasaları etkileyen her türlü teşebbüsün aralarında yaptığı rekabeti engelleyici, bozucu ve kısıtlayıcı anlaşma, uygulama ve kararlar ile piyasaya hâkim olan teşebbüslerin bu hâkimiyetlerini kötüye kullanmaları ve rekabeti önemli ölçüde azaltacak birleşme ve devralma niteliğindeki her türlü hukukî işlem ve davranışlar, rekabetin korunmasına yönelik tedbir, tespit, düzenleme ve denetlemeye ilişkin işlemler bu Kanun kapsamına girer.	This Act covers all agreements, decisions and practices which prevent, distort or restrict competition between any undertakings operating in or affecting markets for goods and services within the borders of the Republic of Turkey; abuse of dominance by dominant undertakings in the market; any kind of legal transactions and behaviour having the nature of mergers and acquisitions which may significantly decrease competition; and transactions concerning the measures, observations, regulations and supervisions aimed at the protection of competition. ¹⁶
Ukraine: Law of Ukraine on the Protection of Economic Competition, Law No. 2210-III of 11 January 2001, Art. 2(2)	Цей Закон застосовується до відносин, які впливають чи можуть вплинути на економічну конкуренцію на території України.	The present Law shall be applied to such relations that ensue from or can have an impact on economic competition in the territory of Ukraine. ¹⁷
Viet Nam: Competition Law, Law No. 23/2018/QH14 of 12 June 2018, Arti. 1	Luật này quy định về hành vi hạn chế cạnh tranh, tập trung kinh tế gây tác động hoặc có khả năng gây tác động hạn chế cạnh tranh đến thị trường Việt Nam; hành vi cạnh tranh không lành mạnh; tổ tụng cạnh tranh; xử lý vi phạm pháp luật về cạnh tranh; quản lý nhà nước về cạnh tranh.	This Law sets forth anti-competitive practices, economic concentration that causes or may cause anti-competitive effects on the market of Vietnam; unfair competition practices; competition legal proceedings; sanctions against violations of competition law; state management of competition. ¹⁸

¹⁵ Translation per the Federal Antimonopoly Service (FAS), available at <[http://en.fas.gov.ru/upload/documents/Federal%20Law%20%20C2%ABOn%20Protection%20of%20Competition%20BB%20\(as%20amended%20in%202016\).pdf](http://en.fas.gov.ru/upload/documents/Federal%20Law%20%20C2%ABOn%20Protection%20of%20Competition%20BB%20(as%20amended%20in%202016).pdf)>.

¹⁶ Translation per the Turkish Competition Authority, available at <<http://www.rekabet.gov.tr/Dosya/geneldosya/act4054-08-2020-pdf>>.

¹⁷ Translation per the Anti-Monopoly Committee of Ukraine, available at <<http://www.amc.gov.ua/amku/doccatalog/document;jsessionid=C1C7AB1FABB574BD5805320F15BCEACC?id=94745&schema=main>>.

¹⁸ Translation per LuatVietnam, available at <<https://english.luatvietnam.vn/aw-no-23-2018-qh14-dated-june-12-2018-of-the-national-assembly-on-competition-164727-Doc1.html>>.

Often, the legal basis for extraterritoriality was provided for in the first enacted competition legislation, especially in more recently introduced competition legislation. That was so, for example, in case of the 2015 Philippines¹⁹ and the 2019 Nigerian²⁰ competition legislation. However, such embracement should not be taken for granted. For instance, that was not the case in India (the 1969 Monopoly and Restrictive Trade Practice Act was mute on this issue and extraterritoriality was explicitly embraced only per Sec. 32 of the 2002 Competition Act) or in Viet Nam (the 2004 Competition Law was limited in its scope of application; extraterritoriality was embraced per Art. 1 of the 2019 Competition Law).

The lacking provision for extraterritoriality in some of newly adopted competition legislation might reflect the fact that international competition law templates are mute on this issue. In particular, UNCTAD's Model Law on Competition, an influential legislative template originally adopted in 2004, even in its most recent iteration of 2010, in its substantive part I, is silent on possible extraterritorial application of competition legislation.²¹ This issue is raised briefly in part II (commentaries), but only in relation to cross-border mergers. It is noted that such transactions might have direct or indirect effects in a forum, irrespective of where the underlying activities occur.²² The commentaries contain a paragraph on international and export cartels. However, these are approached from the perspective of their legality in home jurisdictions, not their actionability in the harmed markets.²³ That said, in 1995 the UNCTAD secretariat prepared a note on dealing with transnational anticompetitive

conduct,²⁴ in the context of the review of the UN Set on Competition.²⁵ That document presented a number of transnational cases, often relying on the effects doctrine for jurisdictional purposes. By the mid 1990s, the doctrine was considered as 'generally, although not universally accepted'.²⁶ The outlined cases showed various difficulties in transnational enforcement affecting, in particular, developing countries. Yet, despite such preparatory work, no exemplary provision on extraterritorial jurisdiction was included in the Model Law as it developed.

At present the widespread provision for extraterritorial application of domestic competition legislation indicates not only the current nearly universal acceptance of anticompetitive behaviour as a global issue, but also a willingness to avail of extraterritoriality for the sake of protection of domestic interests from inbound anticompetitive harm. Notably, the group of countries that reported providing for extraterritoriality is by no means homogenous. In particular, it includes a variety of low- and high-income states. From a systemic perspective, it indicates that extraterritoriality is broadly seen as a useful tool in the state's toolbox.

The wide embracement of extraterritoriality follows also a departure from the previously held reservations about it by parts of the developing world. For example, in 2004 the Group of 77 and China expressed protest, on the UNCTAD's forum, against extraterritorial application of domestic laws as incompatible with international law.²⁷

¹⁹ Sec 3 of the Philippine Competition Act (PCA), R.A. 10667 stipulates: 'This Act shall be enforceable against any person or entity engaged in any trade, industry and commerce in the Republic of the Philippines. It shall likewise be applicable to international trade having direct, substantial, and reasonably foreseeable effects in trade, industry, or commerce in the Republic of the Philippines, including those that result from acts done outside the Republic of the Philippines.'

²⁰ Art. 2(1) of the Federal Competition and Consumer Protection Act (FCCPA) 2019 provides: 'Except as may be indicated otherwise, this Act applies to all undertakings and all commercial activities within, or having effect within, Nigeria.'

²¹ See UNCTAD Model Law on Competition (2010), Part I, Chapter II(II) 'Scope of application'.

²² See UNCTAD Model Law on Competition (2010), Part II, points 120-122.

²³ See UNCTAD Model Law on Competition (2010), Part II, point 36.

²⁴ 'Restrictive business practices that have an effect in more than one country, in particular developing and other countries, with overall conclusions regarding the issues raised by these cases. Note by the UNCTAD secretariat', 4 September 1995, TD/RBP/CONF.4/6.

²⁵ UNCTAD Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices (1980), TD/RBP/CONF/10/Rev.2, <https://unctad.org/topic/competition-and-consumer-protection/the-united-nations-set-of-principles-on-competition>

²⁶ Restrictive business..., n 23, 17.

²⁷ UNCTAD, Communication from the Group of 77 and China Regarding the Application of Coercive Economic Measures and Unilateral Sanctions Against Developing Countries, TD/411 (2004), available at <http://www.unctad.org/en/docs/td411_en.pdf>. Group of 77 is an intergovernmental organization established by 77 developing states in 1964, with over 130 members. It usually acts and takes positions together with China. For more on the Group see <<http://www.g77.org/>>. Similar protests against extraterritoriality by developed countries subsided a decade earlier. Marek Martyniszyn, 'Foreign States' Amicus Curiae Participation in U.S. Antitrust Cases', 61(4) Antitrust Bulletin 611 (2016), 630-631.

ENFORCEMENT EXPERIENCE

Extraterritoriality comes into play when firms violating competition law are not present in the forum. It is typically relevant in a significantly smaller number of circumstances as compared with violations committed by locally present entities. Their relative rarity may be misperceived as an indication of their irrelevance. Yet, as indicated above,²⁸ they can be very significant in economic terms. The intrinsic cross-border transfer of wealth makes them particularly salient from the political economy perspective.

Despite the variety of challenges involved, 24 participating countries reported having some practical experience in dealing with transnational cases. The fact that such experience is being gained is encouraging, especially given that enforcement efforts of developing countries suffer from under-reporting by news outlets and mainstream scholarship, often due to linguistic differences. It is worth noting that the group reporting active enforcement is heterogeneous, encompassing a range of countries across the income spectrum. The protection of domestic markets against transnational anticompetitive conduct therefore need not be the domain of developed countries and it should not be perceived as such.

Table 4: Participating countries with some experience of transnational enforcement

Income categorisation	Country
High income	Argentina, Chile, Saudi Arabia
Upper-middle income	Botswana, Brazil, China, Colombia, Malaysia, Mexico, Peru, Russian Federation, Serbia, South Africa, Turkey
Lower-middle income	Egypt, Eswatini, India, Kenya, Nicaragua, Pakistan, Papua New Guinea, Philippines, Ukraine
Low income	United Republic of Tanzania

Initial experiences with extraterritorial jurisdiction tend to focus on merger review. This is unsurprising. In most systems the review is prospective. The necessary data is provided by the parties seeking permission to complete an anticipated transaction. While merger cases may be, therefore, easier from an investigatory perspective, they remain significant—allowing domestic agencies to protect

their markets from possible anticompetitive effects of offshore transactions. In more general terms, gaining experience in merger review is a useful step on a new agency's learning curve.²⁹ Reviewing mergers in the transnational context carries additional benefits of acquainting case handlers with some of the peculiarities of such cases, which can be helpful when conducting investigations.

However, developing countries' experience with extraterritoriality goes beyond merger control. At least 14 participating countries have some experience with cases involving restrictive agreements (multi-party conduct), typically cartels. These are Brazil, Chile, China, Colombia, India, Kenya, Malaysia, Mexico, Pakistan, Peru, Russian Federation, Serbia, South Africa and Turkey. The list is dominated by larger jurisdictions.

The earliest reported conduct cases go back to the 1990s. Two of them relate to operations of the American Soda Ash Export Cartel (ANSAC). While the United States imposes criminal sanctions on anticompetitive conduct harming the United States market, arrangements affecting only foreign markets are perfectly legal (as in most competition systems). The conduct of ANSAC, a publicly registered export cartel,³⁰ was investigated in a number of jurisdictions.³¹ For example, in 1990 it was found in breach of European Union competition law and it amended its operations accordingly.³² However, when challenged in India and South Africa, ANSAC adopted a very different stance.

In 1996 ANSAC was the subject of a complaint from an Indian firm alleging predatory pricing. Following an inquiry, India's competition agency issued an injunction against ANSAC, which the American firm

²⁸ See above notes 1-3 and accompanying text.

²⁹ David Lewis, *Thieves at the Dinner Table: Enforcing the Competition Act*, a Personal Account (Jacana Media, 2012) 76-77; Marek Martyniszyn and Maciej Bernatt, 'Implementing a competition law system—Three decades of Polish experience', 8(1) *Journal of Antitrust Enforcement* 165 (2019), 210-211.

³⁰ The listing of formally registered, under the Webb-Pomerene Act, United States export cartels is available at <<http://www.ftc.gov/os/statutes/webbpomerene/index.shtml>>.

³¹ For a detailed analysis of both cases and their broader ramifications see: Marek Martyniszyn, 'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15(1) *Journal of International Economic Law* 181 (2012), 199-208.

³² European Commission, 91/301/EEC, Decision of 19 December 1990 relating to a Proceeding under Article 85(1) of the EEC Treaty, IV/33.016- Ansac, OJ L152 54-60 (1991).

challenged.³³ The case reached India's Supreme Court. ANSAC argued that Indian competition legislation did not apply extraterritoriality. In 2002 the court found in its favour.³⁴ The relevant provision of the Indian competition law was not explicit in relation to its extraterritorial reach. The court was unwilling to accord it more expansive interpretation. While the case was ongoing, significant political pressure was put on India. In particular, the United States Trade Representative (USTR) intervened on various levels and ultimately threatened to withdraw trade preferences should India refuse to provide 'equitable and reasonable market access to United States goods'.³⁵ After the case was concluded in ANSAC's favour, the USTR considered its outcome to be the result of his actions.³⁶ Simultaneously, India amended its competition legislation to explicitly provide for extraterritorial jurisdiction.³⁷ This case proves that jurisdictional basis must be clearly and explicitly addressed to eliminate similar protracted legal battles, which can be an enormous drain on competition agency budgets, without the satisfaction of reviewing the merits of the case. It also points to possible political dynamics and extralegal responses of states hosting violators.

In South Africa the case against ANSAC was initiated by a Botswanan competitor in 1999. The South African competition legislation explicitly provided for its extraterritorial reach, relying on the effects doctrine. However, ANSAC challenged it, arguing that the requirement of 'deleterious' effects should be read into the statute. It appealed on this point to the Supreme Court of Appeal, which found in favour of the South African agency.³⁸ As the case was proceeding on merits, in 2008, ANSAC settled with the authorities,

agreeing to pay a substantial fine.³⁹ The case was concluded after nine years or, in the words of Justice Madlanga, 'a Methuselah of proceedings'.⁴⁰ The South African ANSAC case proves that developing countries can protect their markets against transnational anticompetitive conduct. However, it also highlights difficulties involved in challenging well-resourced foreign violators.

The first transnational anticompetitive conduct case in South America was initiated in 1996 in Mexico. The authorities launched an *ex officio* investigation of the international lysine cartel. It followed similar proceedings in the United States and benefitted from the documents made publicly available in that case. In 1998 Mexican authorities found two firms, ADM and Kyowa—active in the Mexican market—in breach of the law.⁴¹ The case serves as an early example of a successful follow-on enforcement (that is, of an investigation in one jurisdiction being initiated after the underlying transnational violation had been uncovered and successfully challenged in another jurisdiction).

In a similar fashion Brazil initiated its first international conduct case in 1999 in relation to the international vitamins cartel. The investigation followed similar actions in the European Union and in the United States. In fact, in this case Brazilian competition agency (CADE) availed of the materials from both jurisdictions, inclusive of plea agreements negotiated by the violators with the United States Department of Justice.⁴² The investigation concluded with the imposition of considerable fines on foreign perpetrators—Hoffmann La Roche, BASF and Aventis—in 2007.⁴³ Since then, CADE has successfully conducted a number of similar international cartel investigations. For example, it fined members of international cartels controlling the manufacture of optical disk drives (ODD),⁴⁴ dynamic

³³ Alkali Manufacturers Association of India v American Natural Soda Ash Corporation & Others, Order from September 9, 1996 (1998) 3 Competition Law Journal 173 M RTPC.

³⁴ Haridas Exports v All India Float Glass Manufacturers' Assn, 6 SCC 600 (The Supreme Court 2002).

³⁵ 'US to Review Grant of GSP to India', Businessline, 31 January 2001.

³⁶ 'International Trade and the Impact on the US Soda Ash Industry', Hearing before the Subcommittee on International Trade of the Committee of Finance, United States Senate, 15 April 2004, HRG 108-527, available at <<http://finance.senate.gov/library/hearings/>>.

³⁷ Per Section 32 of the Competition Act, No. 12 of 2003.

³⁸ American Natural Soda Ash Corp v Competition Commission (Soda Ash- the Supreme Court of Appeal), Case 554/03 (The Supreme Court of Appeal of South Africa 2005).

³⁹ Order of the Competition Tribunal Confirming the Settlement Agreement of 4 November 2008, Competition Commission v American Natural Soda Ash Corp (Soda Ash), Case 49/CR/Apr00.

⁴⁰ Reasons and Order of the Competition Tribunal of 13 August 2008, American Natural Soda Ash Corp v Competition Commission (Soda Ash), Case 49/CR/A pr00, para 1. Methuselah is a biblical character who lived 969 years.

⁴¹ Communication from Mexico to the WTO Working Group on the Interaction between Trade and Competition Policy (14 August 2002), WT/WGTCP/W/196, 7-8.

⁴² Eduardo M Gaban and Juliana O Domingues, Antitrust Law in Brazil: Fighting Cartels (Wolters Kluwer, 2012), at 8.3.1.2.

⁴³ Administrative Proceeding n° 08012.004599/1999-18.

⁴⁴ Administrative Proceeding n° 08012.001395/2011-00.

random access memory chips (DRAM),⁴⁵ refrigeration compressors,⁴⁶ marine hoses,⁴⁷ sodium perborate,⁴⁸ cathode ray tubes (CRTs),⁴⁹ and gas-insulated switchgear (GIS)⁵⁰. In each case, these investigations followed enforcement in other jurisdictions (in particular, in the European Union and the United States) and in most cases benefitted from leniency applications.

Among more recent successful enforcement efforts of non-BRICS jurisdictions, it is worth mentioning the Chilean authorities' investigation of the international refrigeration compressor cartel.⁵¹ In 2009 it transpired that authorities in Brazil, the European Union and the United States were investigating the underlying conduct, leading to its termination. Some of the perpetrators agreed to pay fines in these jurisdictions.⁵² After a follow-on case was brought by Chile, the perpetrators challenged jurisdiction. Whirlpool (Embraco) and Tecumseh, the relevant violators, were responsible for 97 per cent of sales of the products on the Chilean market, setting up a landmark case. The law was not explicit on the question of the scope of its application. However, the Competition Tribunal explicitly recognized the effects doctrine as a jurisdiction principle of Chilean competition law, refusing arguments of one of the perpetrators, Whirlpool, to the contrary. Chile is the only developing country where extraterritoriality was recognized by means of a judicial interpretation, rather than by an explicit provision in a statute. The investigation also benefitted from a leniency application. This was, in fact, the first ever leniency application in the Chilean competition system. In 2013 the judgment was upheld by the Chilean Supreme Court.⁵³

The lead taken by larger jurisdictions, in particular the BRICS, in transnational conduct cases is unsurprising. They have blazed a trail for such investigations in the developing world. Given the resource-intensity of transnational cases, the larger agencies are better positioned to handle such investigations. Moreover, their economic might may be contributing to better responsiveness and ultimate compliance of foreign perpetrators, although the Indian ANSAC case shows the limitations of such supposed leverage.

A rare example of a transnational unilateral conduct case is the Ukrainian investigation of Gazprom, a Russian gas exporter. In 2016, the firm was found to have abused its dominant position, as a buyer, on the Ukrainian natural gas transmission market.⁵⁴ However, it has reportedly refused to accept Ukrainian jurisdiction and face consequences of its conduct.⁵⁵

Despite the preceding catalogue of examples, extraterritorial cases remain relatively rare, partly due to the complexity arising from the transnational nature of the underlying conduct.

IDENTIFIED HURDLES

This research has identified some deficiencies in the current global regulatory framework and hurdles encountered by enforcement agencies in surveyed countries. As part of this study, agencies were asked to point to differences between enforcement of competition law domestically and transnationally. They were also asked to identify any factors hindering transnational enforcement. The key hurdles reported can be divided into more practical and more general issues. The key practical issues identified related to:

- procedural rules, especially relating to service of process
- collection and sharing of evidence
- dealing with non-compliance/non-cooperation during investigations

⁴⁵ Administrative Proceeding n° 08012.005255/2010-11.

⁴⁶ Administrative Proceeding n° 08012.000820/2009-11.

⁴⁷ Administrative Proceeding n° 08012.001127/2010-07.

⁴⁸ Administrative Proceeding n° 08012.001029/2007-66.

⁴⁹ Administrative Proceeding n° 08012.005930/2009-79.

⁵⁰ Administrative Proceeding n° 08012.001376/2006-16.

⁵¹ Sentencia No 122, FNE v Whirlpool S.A., TDLC Rol: C 207-10 (14 June 2012), available at <https://www.tdlc.cl/nuevo_tdlc/wp-content/uploads/sentencias/Sentencia_122_2012.pdf>.

⁵² Comparereporting:forBrazilsee<[http://en.cade.gov.br/topics/multilateral_cooperation_archives/2009annualreport-1.pdf](http://en.cade.gov.br/topics/multilateral_cooperation_archives/2009annualreport-1.pdf@@download/file/2009annualreport-1.pdf)>, for the European Union see <https://ec.europa.eu/competition/elojade/isef/case_details.cfm?proc_code=1_39600>, for the United States see <<https://www.justice.gov/opa/pr/panasonic-corp-and-whirlpool-corp-subsiary-agree-plead-guilty-role-price-fixing-conspiracy>>.

⁵³ Supr. Ct. (24 September 2012), available at <https://www.fne.gob.cl/wp-content/uploads/2013/09/secs_xx_2013.pdf>.

⁵⁴ Decision of the Antimonopoly Committee of Ukraine of 22.01.2016 n° 18-p.

⁵⁵ Gazprom considers penalty of Ukrainian antimonopoly committee as "pressure", TASS, 22 January 2016, available at <<https://tass.com/economy/851621>>. It is noteworthy that the European Union's investigation of Gazprom conduct nudged enactment of legislation aimed at hindering any such external proceedings. Marek Martyniszyn, 'Legislation Blocking Antitrust Investigations and the September 2012 Russian Executive Order', 37(1) World Competition 103 (2014).

- absence and/or insufficiency of existing international instruments regarding enforcement
- enforcement/execution of rendered decisions/judgments (inclusive of collection of any imposed fines).

The above obstacles effectively occur at all stages of an investigation. They reflect the entirety of the chain of enforcement. One cannot forge ahead if an issue arising at an earlier stage is not dealt with. If one breaks the chain an investigation collapses. Therefore, effective preparation for extraterritorial enforcement requires reflecting on the entire enforcement process holistically, inclusive of applicable procedural rules, which may be more generic in nature (that is, they may not be specific to competition investigations).

In this context, hurdles present at the onset of investigations are particularly worrying. They may not only hinder any enforcement actions, but also contribute to transnational misconduct remaining in the shadow of the law, away from scrutiny by other potentially affected jurisdictions. A range of agencies experience such challenges. For example, Brazilian CADE continues to encounter such problems despite its numerous successful investigations of international cartels. To illustrate, in 2017 CADE reported that half of the investigations launched after 2010 were still pending notification.⁵⁶ Attempts to serve legal notice abroad often fail. Turkey reported having looked into anticompetitive pricing on coal imports, examining both domestic and European Union-based companies. Multiple efforts to serve process abroad failed and only the domestic parties faced sanctions.⁵⁷ In various cases the Turkish agency faced problems with service abroad already internally, when seeking assistance of the Ministry of Justice and/or the Ministry of Foreign Affairs.⁵⁸ Similarly, Colombian authorities—after opening their first transnational case and undertaking to investigate an auto-parts cartel—ultimately terminated the proceedings due to both ineffective service of process and various procedural

errors.⁵⁹ The multilateral service route, the Hague Service Convention,⁶⁰ seems to be of very limited, if any, practical use in competition law proceedings.

Procedural rules, especially those relating to service of process, are purely internal matters. They can be amended domestically, without any need of international negotiations. In particular, there is no reason why domestic law could not provide for notification by means of publication should other, more common means of service prove ineffective. For example, the European Commission can avail of standard mail for service purposes⁶¹ and the Japanese rules have recently been amended to facilitate service by publication, if other means fail.⁶²

Of the other practical issues identified, some are more complex and require collaborative solutions. For example, the issue of accessing, collecting and sharing of evidence continues to hinder transnational enforcement and

is a long-standing issue. UNCTAD identified this as a problem in 1995.⁶³ It has still not been successfully addressed, greatly contributing to an enforcement lacuna. The result is that offshore anticompetitive conduct escapes scrutiny due to the impossibility of securing admissible evidence.⁶⁴ International instruments that seek to aid actual enforcement actions are widely considered as insufficient (in particular, the OECD Recommendation on Cooperation⁶⁵ or the Hague Convention on Evidence⁶⁶). In this context, it is likely that the economic importance of a particular

⁵⁶ Enhancing international cooperation in the investigation of cross border competition cases: Tools and procedures. Contribution by Administrative Council for Economic Defense (CADE), UNCTAD Intergovernmental Group of Experts on Competition Law and Policy, 6 July 2017, at 9-10.

⁵⁷ Case No: 06-55/712-202, Case No: 06-62/848-241.

⁵⁸ For example, in the glass containers sector investigation, case No: 07-17/155-50; or in the airline transportation sector, case No: 11-54/1431-507.

⁵⁹ Pierre Horna, *Fighting Cross-Border Cartels: The Perspective of the Young and Small Competition Authorities* (Bloomsbury Publishing, 2020), 161.

⁶⁰ Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters (15 November 1965).

⁶¹ In *Geigy* the European Court held that, even if contrary to the law of the other state, such service is legal so long as it is established that 'the addressee took cognisance of the objections held against him'. Case 52/69, *Geigy AG v Commission* [1972] ECR 787, 823-4.

⁶² Martyniszyn, 'Japanese Approaches...', n 4, fn 75.

⁶³ Note by the UNCTAD secretariat (1995), n 23, 18.

⁶⁴ For analysis of internationally available mechanisms see Marek Martyniszyn, 'Inter-Agency Evidence Sharing in Competition Law Enforcement', 19(1) *International Journal of Evidence and Proof* 11 (2015).

⁶⁵ OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings (2014), C(2014)108 - C/M(2014)10.

⁶⁶ Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters (18 March 1970), reprinted in *Recueil des Conventions: 1951-2009* (Conference de La Haye de Droit International Prive, 2009).

market from the violator's perspective becomes relevant in securing cooperation and compliance. This problem is related to dealing with non-compliance/non-cooperation in the scope of investigations, which constitutes a separate, although connected issue. Such non-cooperation, while potentially not detrimental, may adversely affect proceedings, at the very minimum leading to unnecessary protraction.

Assuming the above challenges do not pose a difficulty or are overcome in a particular case, the final obstacle concerns enforcement and execution of any rendered decision or judgment, following an investigation establishing a breach. Here again appropriate international instruments are missing. There is no single international agreement providing for recognition of decisions and judgments in competition law matters, apart from the award of damages (i.e., money judgments) which may—depending on context and circumstances—be recognizable abroad.⁶⁷ When it comes to the most common type of sanction in conduct cases—that is, levying fines—an agency may be left with no effective means of collection should violators have no assets in the forum. However, that in itself should not dissuade agencies from taking action. While fines may not always be collectible in particular cases, any decisions or judgment serve as a general deterrence. Having fines issued sends the necessary signal to current and potential violators that the forum in question will not tolerate anticompetitive harm.

While the above problems can pose considerable, sometimes insurmountable obstacles, examples of successful extraterritorial enforcement by a range of developing countries show that such practical problems can be overcome, or need not arise in individual cases. Hence, potential stumbling blocks should not guide the enforcement decisions of competition agencies in states affected by transnational anticompetitive conduct. Potential cases should be assessed in their own, particular context.

Apart from the practical challenges, respondents raised a number of more general issues. In particular, they have pointed to differences in levels of experience and skills between agencies, making cooperation

more cumbersome. Some agencies noted the lack of bilateral ties to facilitate such engagement. The possibility of external political pressure and interference have also been named as factors that could affect domestic enforcement in the transnational context (such as that occurring in the Indian ANSAC case⁶⁸). The highest-level, meta issue reported was the lack of trust between agencies, a cornerstone of all cooperative efforts. These general challenges call for intensified and sustained collaborative efforts. They also point to the usefulness of platforms such as UNCTAD, which provide for voluntary engagement and facilitate knowledge sharing and trust building between different agencies. Given its inclusive membership, UNCTAD carries significant potential in this context.

CONCLUSIONS

Transnational restrictive business practices continue ungoverned at the multilateral level. The significant economic harm they cause led numerous states to begin using extraterritorial application of domestic competition legislation. Developed countries took the lead in this regard. However, as this research study has shown, extraterritoriality has now been embraced by a large number of developing countries. Of 40 countries responding to the author's survey on extraterritoriality, 34 jurisdictions provide for it, typically by means of having enacted a clear textual basis. Extraterritoriality in competition law is now universally accepted in the developing world.

Twenty-four developing countries reported having some practical experience with applying their competition law extraterritorially. In most cases that experience begins with review of offshore mergers. Apart from safeguarding domestic markets, this approach helps agencies develop capacity in dealing with transnational businesses. In addition, at least 14 countries have experience with cases involving restrictive agreements, typically cartels. Larger jurisdictions, especially BRICS states, blazed the path to such enforcement. Many of the identified enforcement efforts relied on publicly available documents, or materials made available in the course of proceedings in other jurisdictions, where the same

⁶⁷ A notable bilateral exception is the Agreement between the Government of Australia and the Government of New Zealand on Trans-Tasman Court Proceedings and Regulatory Enforcement of 24 July 2008, in effect since October 2013. This framework provides for full recognition of a judgment after its registration in the other country's court.

⁶⁸ See above notes 32-36 and accompanying text. For broader analysis of reactions to transnational investigations see Marek Martyniszyn, 'Foreign State's Entanglement in Anticompetitive Conduct', 40(2) World Competition 299 (2017).

underlying anticompetitive conduct faced scrutiny. Moreover, leniency programmes continue to be a very useful instrument in transnational enforcement efforts.

The study helped identify a number of hurdles hindering extraterritorial enforcement. The prime issue is procedural rules, especially those relating to service of process on foreign violators. However, there is no reason why service by publication should not be acceptable when other, traditional means of service prove ineffective. Domestic rules should not shield foreign violators by disallowing service of process by publication. Among other significant hurdles to effective enforcement are rules on collection and sharing of evidence and enforcement or execution of the outcomes of any such investigations (inclusive of collection of any imposed fines). These are areas still awaiting resolution in international fora.

Reassuringly, the existing track record of transnational cases investigated by a number of agencies in developing countries proves that, despite the continuing formidable challenges involved in such enforcement, success is possible. The potential difficulties should not lead agencies to deprioritize undertaking such actions, especially given the transnational transfer of wealth involved in any transnational violations of competition law. Viability of enforcement should be assessed on a case-by-case basis.⁶⁹

Apart from various practical aspects potentially hindering enforcement, there is a need for continued collaborative efforts between competition agencies. The lacuna in enforcement coordination validates the need for platforms, such as UNCTAD, which facilitate the sharing of good practices and allow mutual trust and respect to build among peers.

⁶⁹ For further discussion see Marek Martyniszyn, 'Competitive Harm Crossing Borders: Regulatory Gaps And A Way Forward', *Journal of Competition Law & Economics* 2021, available at <<https://doi.org/10.1093/joclec/nhaa034>>.

ANNEX 1: THE QUESTIONNAIRE

QUESTION 1: Can your competition law apply to the conduct of foreign entities which are not present in your jurisdiction but whose conduct harms local consumers or producers?

For example, think of a foreign price-fixing cartel or a foreign-to-foreign merger affecting markets in your jurisdiction.

Yes	<p>If yes, what is the legal basis for it?</p> <p><input type="checkbox"/> explicit statutory provisions</p> <p>Could you please identify and include below (if possible) the relevant provisions?</p> <p>When were such provisions adopted for the first time?</p> <p><input type="checkbox"/> an interpretation of the existing provisions which are not explicit with regard to the scope of their application</p> <p>Could you please identify when such interpretation was adopted and by which body?</p>
No	<p>If no, please check this box <input type="checkbox"/> Thank you for your input.</p>

If you answered YES to **QUESTION 1**, please continue completing this questionnaire. If you answered NO to **QUESTION 1**, please do not answer any further questions. Thank you.

QUESTION 2: Have there been any cases of extraterritorial enforcement of your competition law?

Note: all types of cases are of interest, including, for example, transnational cartels, foreign-to-foreign mergers and unilateral practices of foreign firms based outside your jurisdiction that affect customers or competitors inside.

Yes	<p>Could you please list and briefly describe them? Please, include both success stories as well as any unsuccessful enforcement attempts.</p>
No	<p>Could you please outline what you consider to be the key reasons behind lack of such enforcement?</p>

If you answered YES to **QUESTION 2** please continue completing this questionnaire. If you answered NO to **QUESTION 2**, please do not answer any further questions. Thank you.

**Developing Countries' Experience
with Extraterritoriality in Competition Law**

QUESTION 3: From your experience, how does transnational enforcement differ from enforcement in a domestic context?

QUESTION 4: Can you think of any factors hindering enforcement in the transnational context? Please, list any such factors beginning with the most significant one.

