



Free Movement of Judgments: Increasing Deterrence of International Cartels Through Jurisdictional Reliance

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Introduction

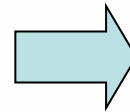
- International trade → more international cartels
 - “No [country] is an island, entire of itself.”
- Significant harmful effects
- Limited sanctions
 - Fines: Vitamins cartel— less than 11%!



Effective Deterrence

Sanction * probability of punishment > profits

❖ Atomistic enforcement



Depends on each country's sanctions

Problematic:

❖ Probability of cartel detection is low

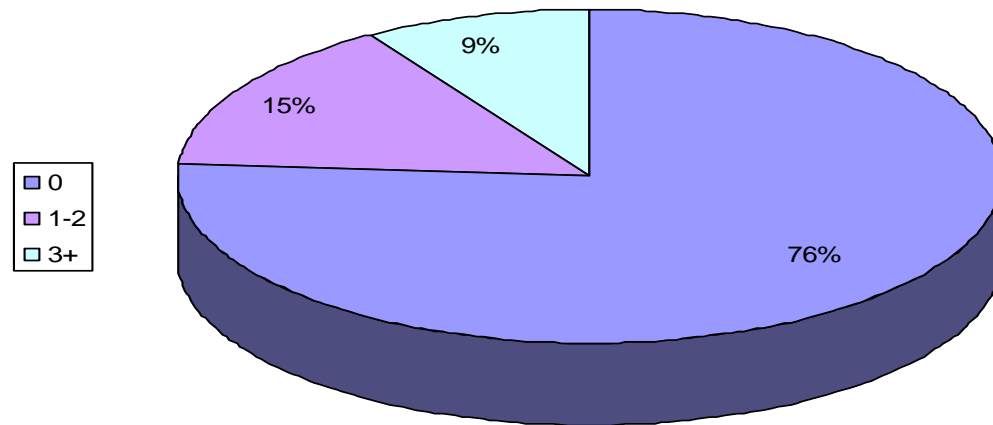
❖ Duplicative costs

❖ Most countries do not bring suits

❖ Sanctions generally based on harm to jurisdiction

Country	Populati -on in Millions	Year Compe -tition Agency Establi -shed	Stage of Develo -pment	Internat- ional cartel cases	Abuse by interna- tional firm	Internati -onal mergers
Faroe Islands	0.05	1997	dd	0	0	0 (authority since 2008)
Jersey	0.09	2001	dd	0	0	9 (8 approved. 1 conditional Approval)
Barbados	0.27	2003	dd	0	0	1 (local subsidiary)
Malta	0.4	1995	dd	0 (out of 3 that reached the court)	0 (11 reached the court)	16 (involving international firms. All approved)
Cyprus	0.76	1990	dd	0 (No authority in relevant period)	2 (local subsidiaries)	9 (8 approved, 1 conditional approval)
Fiji	0.85	2000, dismantled and re-established in 2001	dg	0	0	0
Jamaica	2.7	1993	dg	0	2 (local subsidiaries)	0 No authority
Panama	3.3	1996	dg	0	0	1 (approved)
New Zealand	4.1	1986	dd	5	Data not available	25 (5 prohibited)
Singapore	4.5	2005	dd	0	0	4 (out of 5. Involving foreign partners. None prohibited)
Israel	7	1959	dd	1	0	Approx. 110 (none prohibited.)

Country	Populati -on in Millions	Year Compe -tition Agency Establi -shed	Stage of Develo -pment	Internat- ional cartel cases	Abuse by interna- tional firm	Internati- onal mergers
Armenia	3.2	2001	dg	0 (no authority)	1 (local subsidiary)	0
Senegal	11	1964-2003	dg	0 (out of 3 cases)	1	0 (no merger policy)
Chile	16	1973	dg	0	0	0
Lithuania	3.4	1999	dg	0 (out of 10)	3 (local subsidiaries; out of 9)	4 (with local subsidiaries) out of 307
Zimbabwe	12.1		dg	0	0	0
Philippines	87		dg	0	0	0
WAEMU members: Benin, Burkina Faso, Cote D'ivoire, Gunea-Bissao, Mali, Niger, Senegal. Togo	6.7 10.8 15.3 1.4 9.8 13 11 5.3	2003 (date regulations came into effect)	dg dg dg dg dg dg dg	0	0 (out of 0 cases)	0 (part of abuse of power prohibitions)



Number of international cartel cases brought by small and developing jurisdictions over a period of 5 years

Michal S. Gal, "Antitrust in a Globalized Economy: The Unique Challenges of Small and of Developed Economies, 33 *Fordham International Law Journal* 1-56 (2009)

Causes of Under-Deterrence

- Limited human and financial resources
 - Expensive and difficult lawsuit
 - Cartels armed with top lawyers
 - Costs not affected by size of economy
- Deterrence of local cartels
- International cartel activity stopped elsewhere
- Political influences

Why problematic?

- Country level
 - No compensation for harm
 - Stronger incentive for harmful conduct
- Global level
 - OECD: “Unless a multinational cartel participant is prosecuted and fined in most or all of the countries in which the cartel had effects, the cartel still might have been profitable after paying fines in only some of the countries affected.”
 - Duplication

Suggested solution

- Recognition of Judgments Mechanism
 - International issue estoppel
 - Prove only local elements
 - Precondition: fair venue
 - Reduces human and financial resource limitations
 - Partial solution to political economy influences
 - Increase of total welfare
 - Limiting duplication
 - Increased deterrence
 - Compensation for harm
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What makes it work?

- Negative effects on all jurisdictions
- Similar factual questions
- Non-rivalrous: enforcement with positive externalities
- No need for collective action

Fairness

- Decision in accordance with foreign law
- Final
- Clear factual finding
- Resolution essential to decision
- Judicial competence
 - List of countries?
- Full and fair opportunity to litigate
- Burden of proof and sanctions as high
- No clashing decisions



Limitations and corrective solutions

- Harm to sovereignty
 - Voluntary and unilateral decision
 - Not basis for criminal prosecution
 - Other reliance mechanisms (PCT, Hague)
- Over- enforcement
 - Mostly theoretical; possibility for exclusion
- Under-enforcement
 - No change in existing situation
- Fairness
- Reduced incentives for leniency

Legislative Proposal

Section 1. [*Definition*]

In this Act "foreign judgment" means any judgment, decision, decree, or order of a foreign [Competition Authority or] court with regard to the existence, scope and duration, and possibly also to the harmful effects, of an international cartel, which affected both the foreign as well as the domestic market. It is not required that the domestic market be specifically mentioned in the foreign decision, so long as it is clear from the foreign judgment that the international cartel affected the domestic market.



Section 2. [Recognition of a Foreign Judgment]


- (a) The competition Authority and the courts shall be allowed to base their decisions with regard to the existence, scope, duration and harmful effects of an international cartel on the factual findings of a foreign judgment made by a Competition Authority or a court in a jurisdiction listed in List A below; This requirement shall be satisfied by a certified copy of the foreign judgment.
- (b) A domestic decision based on foreign judgment shall be enforced or satisfied in a like manner to any other domestic decision.

Section 3. [*Grounds for Non-recognition*]

(a) A foreign judgment should not be recognized should one of the following be proven:

- (1) The foreign judgment was not made in accordance with foreign law;
- (2) The foreign decision-maker did not have personal jurisdiction;
- (3) The decision-maker did not have jurisdiction over the subject matter;
- (4) The foreign judgment was obtained by fraud;
- (5) The trial was not fair or took place in an incompetent foreign court;
- (6) The defendant did not receive due notice of the proceeding;
- (7) The foreign country's judicial system is not likely to have secured impartiality between the parties;
- (8) The [claim for relief] on which the foreign judgment is based is contrary to the public policy of the domestic jurisdiction;
- (9) The judgment conflicts with another final judgment which meets all the conditions for recognition;
- (10) The existence of the cartel was not essential to the foreign judgment. Yet it is not required that the cartel's existence outside the foreign jurisdiction be essential to the foreign judgment;
- (11) The foreign judgment is not final where it was rendered.

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Section 3. [*No Basis for Criminal Sanctions*] The foreign judgment shall not serve as a basis for criminal sanctions in the domestic jurisdiction.

Section 4. [*Leniency Application*] In case the foreign judgment is based on a successful leniency application, and such a decision is applied in the domestic jurisdiction in accordance with Section 2 above, the entities granted leniency in the foreign jurisdiction will be granted equal leniency treatment in the domestic jurisdiction.

Section 5. [*Extension*] Should the Competition Authority [or a plaintiff] wish to base their case on a foreign judgment in accordance with Section 2 above, and the decision is not final within the time limits for bringing such cases, the Competition Authority or the relevant court shall be allowed to stay the proceedings until the foreign judgment becomes final. The potential defendants shall be notified of this extension by the decision maker.

Thanks!

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