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

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Developing Countries' Experience with Extraterritoriality in Competition Law

Dr Marek Martyniszyn

10th Meeting of the UNCTAD Research Partnership Platform
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Project's focus

- Extraterritoriality: applicability of domestic competition law to foreign entities which are not present in the forum, but whose conduct harms/ may harm local consumers or producers (eg, foreign price-fixing cartels, or foreign-to-foreign mergers)

Aims

- to fill the gaps in our knowledge about the existing frameworks and practices of developing countries and transition economies in relation to such conduct
- to identify the relevant key challenges faced by the enforcers
- to consider and formulate feasible, workable solutions to address these challenges

Method

- a short questionnaire
- doctrinal research

40 jurisdictions
took part
in the project

Albania*, Argentina, Armenia*, Belarus*, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, El Salvador, Guyana, Honduras, India, Indonesia, Jamaica, Kenya, Malawi, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russia*, Saudi Arabia, Serbia*, South Africa, Swaziland, Tanzania, Turkey, Ukraine*, Viet Nam, Zambia, Zimbabwe

* economies in transition

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

Yes: 34

Albania, Argentina, Belarus, Botswana, Brazil, Chile, China, Colombia, Costa Rica, Dominican Republic, Egypt, Honduras, India, Kenya, Malaysia, Mexico, Namibia, Nicaragua, Nigeria, Pakistan, Papua New Guinea, Peru, Philippines, Russia, Saudi Arabia, Serbia, South Africa, Swaziland, Tanzania, Turkey, Ukraine, Viet Nam, Zambia, Zimbabwe

No: 6

Armenia, El Salvador, Guyana, Indonesia, Jamaica, Malawi

What's the formal position?

- **extremely wide recognition** of in-forum effects of foreign conduct as a sufficient jurisdictional nexus for the sake of assertion of forum's jurisdiction over foreign conduct
- all but for Chile provide for extraterritoriality based on statutory provisions; Chile relies on a court's interpretation
- **a gradual process:**
 - early adopters: Brazil, Costa Rica & Turkey – 1994
 - recent adopters: Nigeria & Viet Nam – 2019
 - about to adopt: Indonesia

1990s	7 jurisdictions
2000s	17 jurisdictions
2010s	10 jurisdictions

What about enforcement?

- providing for extraterritoriality ≠ having experience in enforcement
- however, **at least 22 participating jurisdictions have some such enforcement experience**
 - 17 jurisdictions – foreign-to-foreign mergers
 - 13 jurisdictions – multi-party conduct (such as transnational cartels)
- jurisdictions without such experience refer to:
 - domestic procedural difficulties
 - inadequacy of existing international instruments in this area
 - novelty of such a possibility (e.g. Nigeria & Viet Nam)

Challenges faced by the agencies

- Domestic procedural rules problematic (esp. related to service)
- Collection and gathering of evidence
- Domestic rules making seeking and rendering assistance in relation to evidence impossible
- Insufficiency of currently existing international instruments re cooperation in enforcement
- More demanding domestic rules
- Enforcement/execution of rendered decisions/judgements (when no in-forum assets), lack of cooperation in this regard

- Time
- Knowhow/experience differences between agencies
- Lacking cooperation agreements
- Trust


Challenges at different stages of the chain of enforcement



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Note: one cannot move down the chain if an issue earlier up is not dealt with

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Note: one cannot move down the chain if an issue earlier up is not dealt with
Some issues are internal matters – they can be addressed domestically

Systemic issues remain

- Collection and gathering of evidence
- Insufficiency of currently existing international instruments re cooperation in enforcement
- Enforcement/execution of rendered decisions/judgements (when no in-forum assets), lack of cooperation in this regard
- Knowhow/experience differences between agencies
- Lacking cooperation agreements
- Trust

- Further collaborative efforts needed
- Robust bilateral / regional frameworks needed to address specific enforcement related problems
- Usefulness of such platforms like UNCTAD corroborated



Thank you

All comments are gratefully received
at m.martyniszyn@qub.ac.uk
Access my research via [SSRN](#), [LinkedIn](#), or [Google Scholar](#)

You may find useful:

'Inter-Agency Evidence Sharing in Competition Law Enforcement' (2015) 19(1) Int'l J of Evidence and Proof 11, available freely at:
<https://ssrn.com/abstract=2436467>

'Japanese Approaches to Extraterritoriality in Competition Law' (2017) 66(3) ICLQ 747, available freely at:
<https://ssrn.com/abstract=3116898>

'Foreign State's Entanglement in Anticompetitive Conduct' (2017) 40(2) World Competition 299, available freely at:
<https://ssrn.com/abstract=3116910>

'Export Cartels: Is it Legal to Target Your Neighbour? Analysis in Light of Recent Case Law' (2012) 15(1) JIEL 181, available freely at:
<https://ssrn.com/abstract=2012838>