Sabbatical leave programme 2017

"PROBLEMS IN MULTI-JURISDICTIONAL CARTEL INVESTIGATIONS AND SOME WAYS TO TACKLE THEM"

Name of staff member:
Pierre M. HORNA

Institution:
OXFORD UNIVERSITY

Academic supervisor's name and title:
Ariel EZRACHI

Slaughter and May Professor of Competition Law and a Fellow of Pembroke College, Oxford. Director of the University of Oxford Centre for Competition Law and Policy.

Date: 27 June 2017

Endorsement by academic supervisor

This is to certify that this report is based on the research undertaken by PIERRE M. HORNA during the period of 16 January 2017 to 15 May 2017 at Centre for Competition Law and Policy (CCLP) part of the Institute of European and Comparative Law (IECL) of the Faculty of Law, Oxford University under my supervision. Mr. Horna had also a "senior associateship" at Pembroke College and was officially an "Academic visitor" at Oxford University.

Signature:

Name: Ariel Ezrachi

Title: Slaughter and May Professor of Competition Law and a Fellow of Pembroke College, Oxford. Director of the University of Oxford Centre for Competition Law and Policy.

Date: 28 June 2017

Contents

Abstract

Objective of the Research
The aim of the research is to assess the main issues (legal, institutional, and practical) that young or small competition regimes around the world face when dealing with Cross-Border Cartels (CBCs). The issues are of diverse nature and would depend on how developed the competition law system of the competition authority that wishes to investigate CBCs is.

Rationale of the research

There is enough empirical evidence that suggest the negative effects of CBCs in economic development and international trade. CBCs are particularly harmful to developing countries and economies in transition. Following the complexity of international business activities and the transformation of global practices to more regional and even sub-regional business activities, CBCs can take the form of multinational, transnational, regional, export and import cartels. In this connection, the research puts forward a classification that better reflects how young and small competition authorities worldwide can better tackle the types of CBCs that are most harmful to their economies and markets.

Research Focus
The research focuses on two scenarios: first, the relationship between mature/large competition authorities and young/small competition authorities; and, second, the relationship among young/small competition authorities. As a result of this particular focus, two sets of proposals are put forward to solve the issue of multijurisdictional cartel investigations: how to deal with Transnational CBCs and Regional CBCs.

General Approach and methods used
The general approach of the Research has three distinct parts:

Part I presents the overall framework of cartels, enforcement of anti-cartel laws in a selected jurisdiction (Latin America) and then it presents the theory and practice of international cooperation that will cover all the efforts made by mature competition authorities and international organizations to tackle the problem of CBCs. A review of the latest developments of young and small competition authorities is also presented at the end of part I.

Part II present the most recurrent issues that young and small competition authorities can face when dealing with the five types of CBCs presented in Part I. The issues at stake are of different nature but mainly legal and institutional issues. A sample of the substantive and procedural issues is provided in this report.

Part III critically assess the past solutions proposed to the most recurrent issues and on the basis of previous attempts, the research puts forward two sets of novel proposals to solve the problem of cooperation/coordination in transnational/regional CBCs, respectively.

As for the methodological framework, the research reviews the great number of international cases by mature, large, young and some small competition authorities. In addition, there is a great variety of reports from major international organizations dealing with this topic as well as the top-academic literature on international cooperation in cartel enforcement, including books, journal articles, and theses in different languages (English, Spanish and French). In addition, a considerable increasing number of presentations on the subject matter provided by enforcers in several conferences, events throughout the world are also reviewed. Last but not least, the research provides experimental solutions for better addressing the effects of transnational and regional cartels based on two hypotheses presented at the end. Needless to say, both hypotheses were contrasted with interviews carried out at the latest International Competition Network (ICN) Annual Conference held in Portugal from 10 to 12 May 2017 and other ad-hoc interviews made in January and beginning of June 2017.[1]

Pertinent results

The results of the research are promising for selected young but large competition authorities in the developing world, in particular those authorities coming from the BRICS countries. The reason for this is that their ability and capacity to counteract the effects of transnational CBCs are significant because of the large size of their markets (e.g. China, India, or Russia).

In addition, in the relationship between mature/large and young/small competition authorities, a number of competition authorities still need to develop their domestic capacity in the fight against domestic cartels before they go "international". It transpired from the conducted interviews that many of these young and small competition authorities do not have the resources (financial and human) to understand and act upon complex international conspiracies affecting their own consumers.

Conclusions

The research provides the following conclusions:

(1) CBCs have brought about tremendous damage to economies. The effects of cartels in developing countries are particularly pronounced with these countries importing in billions in goods from industries involved in a price-fixing conspiracy.

[1] The enforcers interviewed came from 20 jurisdictions coming from mature, large, young and small competition authorities, including Latin American competition authority officials. See the bibliography section at the end of this Research.

(2) Various international cooperation efforts have been made to address CBCs. However, despite the efforts made by young and small competition authorities to deal with CBCs (e.g. enactment of domestic laws and signing bilateral and regional cooperation agreements), experience shows that, due to a number of factors (legal, procedural, institutional and behavioral), CBCs (in their 5 different types) are difficult to be detected, prosecuted and sanctioned.

Recommendations of the Research

(1) In the fight against **Multinational CBCs**, younger and small competition authorities would need to refrain from investigating those CBCs because of the limited ability to counteract the harmful effects of these CBCs and let the mature and large competition authorities to deal with these Multinational CBCs as it has been the case in the last years.
(2) When referring to **Transnational CBCs,** younger and smaller competition authorities would have a better chance and possibilities to work together with selected mature or even younger but large competition authorities. Because of the targeted effects of these cartels, the combined efforts of younger regimes with mature ones would be beneficial and optimal for the effective deterrence of these cartels.
(3) Young and small competition authorities in certain regional and economic groupings need to develop more trust-building activities in order to better understand each other and start coordinating their domestic enforcement activities against the impact of **Regional CBCs**.

Recommendations to the UN

Taking into account the experience of the author working with young and small competition authorities in the last 15 years in the United Nations Conference on Trade and Development (UNCTAD), including the research undertook for UNCTAD's Intergovernmental Expert (IGEs) meetings in the area of international cooperation[2], as well as the recent interviews carried out in 2017 for the purposes of the research, the incumbent recommends the following:

(1) Strengthen the "traditional role" of UNCTAD in enhancing international cooperation in investigations by young and small competition regimes. These activities are ranged from the following categories:

[2] The topic of international cooperation in UNCTAD has been discussed in several IGE meetings since the Sixth Review Conference of 2010. See the IGE background notes on: (1) "Cross-border anticompetitive practices: The challenges for developing countries and economies in transition". 19 April 2012. TD/B/C.I/CLP/16; (2) "Modalities and procedures for international cooperation in competition cases involving more than one country". 26 April 2013. TD/B/C.I/CLP/21; (3) "The impact of cartels on the poor" 24 July 2013. TD/B/C.I/CLP/24/Rev.1; (4) "Informal cooperation among competition agencies in specific cases". 28 April 2014. TD/B/C.I/CLP/29: and (5) "International cooperation in merger cases as a tool for effective enforcement of competition law". 27 April 2015. TD/RBP/CONF.8/4

- Promoting better understanding of each other's law, assessment criteria and design of remedies and sanctions such as the activities organised for the regional liquid oxygen cartel in Latin America in March 2013.[3]
- Building human and technical capacities of young competition agencies to enforce competition law through the regional and individual programmes such as COMPAL and MENA.
- Developing guidelines and best practices for cooperation agreements based on what works well and what does not work
- Putting in place work plans and capacity-building programmes to implement and report on the competition provisions contained in bilateral, regional and international agreements

(2) Nonetheless, given the complexity of the subject matter and taking into account the current trends and proposals provided by emerging competition authorities and international organisations, UNCTAD universal membership could be an asset that should be able to expand the traditional activities carried out so far since the adoption of the UN Set in 1980. In this regard, provided the specific request of the member States, a possible role for UNCTAD could be initially to facilitate the following initiatives:

- A combined framework between ICN and UNCTAD mechanisms for voluntary consultations for a coordinated enforcement between two competition agencies of similar institutional setting and enforcement experience, in particular when it comes to facilitate investigations in **Transnational CBCs**.
- Further efforts from UNCTAD to young and small competition regimes to facilitate consultations and experiences on how to operationalise ICN and UNCTAD mechanisms.

[3] See *Unctad.org | International Bid-Rigging Workshop: The Cases of Liquid Oxygen in Latin America*, available at http://unctad.org/es/Paginas/MeetingDetails.aspx?meetingid=272 (last visited 16 June 2017].

Introduction

Despite all the extraordinary efforts by lead jurisdictions such as US, EU, Japan among other large or mature jurisdictions throughout the world, it is believed that a great number of cross-border cartels (CBCs) remain undetected. Between 2000 and 2016, 75 new multinational cartels were uncovered each year. More than 100,000 companies (7200 named) were found liable for international price fixing, with gross cartels overcharges exceeding USD 1.5 trillion, 60% of which are attributed to cartels.[4] CBCs, as a result, can make substantial profits worldwide, and in some cases, the deterrence provoked by heavier sanctions in mature or large jurisdictions might be insufficient to successfully deter the occurrence of these cartels.[5]

In addition, evidence shows that harm caused by these international unlawful business activities have severely impacted not only consumer welfare of all developing and developed countries, but also producers' welfare, notably from the developing world and countries in transition. These cartels have caused tremendous damage to economies, especially emerging markets, as cartels limit the benefits from international trade[6] and access to global supply chains. The effects on developing countries are particularly pronounced with these countries importing billions in goods from industries involved in a price-fixing conspiracy.[7] These imports represented 6.7% of imports and 1.2% of gross domestic product (GDP) in developing countries. For the poorest developing countries, cartels represent an even larger percentage of trade, namely, 8.8% of imports. The actual effect on developing countries may even be more profound, considering that the foregoing figures suffer from a downward bias, as they pertain only to discovered cartels and cover the effects of only that one anticompetitive practice.[8]

> *"…For most people, CBCs bring to mind collusion in drug, oil and diamond, certainly not in vitamins or bromine, or seamless steel tubes…"* [9]

How can you catch the uncatchable?

The difficulty in detecting cartels is attributable to a number of reasons, one of which is that many of the cartels detected involved intermediate goods[10] that are not well known or interesting to the general public, particularly those in jurisdictions which have relatively young competition regimes. It does not help that the term "cartel" has been associated with drug cartels. Indeed, the industries involved in cartels are so alien to the public, these cartels become relatively obscure and interesting for only a select group of individuals, such as public policy makers, competition authorities, and practitioners. The *Lysine Cartel, Liquid Oxygen* or *Cement Cartels*, which have impacted Latin American markets for years, remain unfamiliar to many.

---

[4] Connor, 'International Cartel Stats: A Look at the Last 26 Years', *Browser Download This Paper* (2016) , available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862135 (last visited 26 January 2017].

[5] Michaels, 'Supplanting Foreign Antitrust', 79 *Law and Contemporary Problems* (2016) 223 , at P. 236.

[6] The relationship between CBCs as obstacles to international trade was well studied ever since 1944. See Edwards, 'CBCs as Obstacles to International Trade', 34 *The American Economic Review* (1944) 330.

[7] Evenett, Levenstein and Suslow, 'International Cartel Enforcement: Lessons from the 1990s', *World Economy* (2001).

[8] C. Noonan, *The Emerging Principles of International Competition Law* (2008), at P. 59-68.

[9] Y. Yu, 'The Impact of Private CBCs on Developing Countries' (2003) (/available at https://pdfs.semanticscholar.org/6d71/34ef780b0574706a66437eba056fbb94a938.pdf), at P. 3.

[10] M. S. LeClair, *Cartelization, Antitrust and Globalization in the US and Europe* (2011).

In the illusive quest to enhance our enforcement efforts, noteworthy is the role of cooperation amongst mature and large jurisdictions so as to together increase the world deterrence of these activities. The pressing need for international cooperation efforts to restrain the harmful effects of CBCs has prompted policy makers from different jurisdictions to react with the execution of cooperation agreements between competition authorities.[11] There has also been an increased enactment of competition laws and institutions in the emerging economies and countries in transition across continents. By 2017, almost 140 jurisdictions already have with competition laws and institutions.[12] With more and more competition authorities coming in, mature competition authorities and international organizations[13] have taken the lead in shaping the path of international cooperation. This dynamics of the cooperation between the jurisdictions may be classified into two ways: mature/large-to-young/small competition authorities and young/large-to-young/small competition authorities.

Despite the great strides made by competition community, there remain significant barriers that hamper attempts to unleash the full potential of international cooperation in multijurisdictional cartel investigations (MCI). Recurrent issues are often mentioned by competition authorities as to why cooperation fails, particularly in the relations between mature/large-to-young/small and young-to-young competition authorities.

How can we improve?

The research sets to explore the complex and sometime inconsistent enforcement landscape and the range of incentives at stake. Its aim is to consider means to empower young and small competition authorities and improve their capacity to cope with MCI. Its ultimate goal is to propose experimental solutions from an inter-disciplinary approach to young and small competition authorities particularly located in developing countries and countries in transition, targeted countries of the UN work on Competition issues carried out by UNCTAD in Geneva.

A notable challenge is the complexity of investigating CBCs by young or small competition authorities and the way they interact with their mature or larger competition peers. To discuss in-depth this problem, the research proposes to disaggregate the types of CBCs into 5 distinctive categories: multinational, transnational, regional, export and import CBCs.

Turn a paper tiger into an effective hunter

With this in mind, the research puts forward novel proposals to mainly transnational and regional cartel investigations due to specific reasons that are explained in the research referred to the optimal level of deterrence of multinational cartels as well as the political considerations of export

[11] Beyond the attempts to include an international authority to deal with competition matters worldwide such as in the Havana Charter in 1948 and then in WTO in 1996.

[12] Fox, 'Competition Policy: The Comparative Advantage of Developing Countries', 79 *Law and Contemporary Problems* (2016) 69.

[13]There are likewise important efforts on international cooperation at the multilateral level between international organizations, such as the Organization for Economic Cooperation and Development (OECD), the United Nations Conference on Trade and Development (UNCTAD), and successful international networks of competition agencies, such as the International Competition Network (ICN). These international actors have played an unprecedented role in providing assistance, advisory services and valuable reflections on improving international cooperation amidst the enactment of competition laws across the globe. In practice, however, these efforts have not always translated into effective collaboration, especially when small economies and agencies are involved. OECD, ICN and UNCTAD can be regarded as the main international networks that work at the global basis for further coordination and technical assistance activities.

and import cartels and the relatively smooth solutions proposed by mature authorities and international organizations elsewhere.

In this regard, the research provides a three-building block process on how to solve the puzzle of cooperation between mature/large and young/small competition authorities in transnational cartels. It provides, therefore, the following three building blocks:

(1) How to create trust and mutual understanding between mature and young competition authorities, taking into account and building on the attempts, including technical assistance, made earlier by competition authorities
(2) How to deal with confidential information and the assumptions made to foster an international benchmark of "non-confidential information" or "sharable" information to be exchanged
(3) How to maximize and streamline the instruments for international cooperation provided by the International Competition Network (ICN) and the United Nations Set on Principles on Competition. This research proposes the amalgamation of these two instruments with a feature that could be triggered by any member of the United Nations including those that are not member of the ICN.

The research concludes with a proposed a two-tier stage to foster regional cooperation in Latin America between young but large authorities and young and small competition authorities. Therefore, the novel proposal deals with the following two building blocks:

(1) How to create a more in-depth trust (or knowledge-based trust) amongst young/relatively advanced competition authorities and younger ones in Latin America, taking into account the sub-regional efforts made so far in the last years.
(2) How to solve the coordination problem in young competition authorities wishing to work together against regional CBCs, beyond sub-regional efforts such as the Andean Community of Nations that has already a sub-regional authority in place.

Body of the report

The research needs to take into account the following preliminary observations when dealing with the substantive and procedural legal issues which young and small competition authorities can face in multijurisdictional cartel investigations:

(1) Technical assistance and capacity building: Young or small competition authorities face a variety of issues that are inter-linked and would depend on how the competition regime has developed over time. Heretofore, there is an issue that relates to the lack of in-depth expertise of competition officials in young and small competition authorities to deal with multijurisdictional cartel cases. As a result, the inevitable discussion of technical assistance as an instrument to strengthen the human factor comes into play in this equation. Better trained officials in young or small competition authorities would have a more comprehensive absorptive capacity to deal with the great amount of technical assistance being provided by mature competition authorities through international networks such as ICN and others, as well as international organizations that work for developing countries in this field such as UNCTAD and the World Bank. In any case, this structural problem of lack of expertise are present across all the research as they are an essential prerequisite for a number of institutional and enforcement activities that goes beyond the scope of the present research.

(2) Not differentiating between substantive and procedural issues: Part two of the research tries to avoid drawing a line between substantive and procedural issues. In fact, there is a blurry differentiation between substantive and procedural issues in competition law analysis because of the complicated and drawn-out processes that emerge. As indicated by *Terhechte,* the "adjective *and substantive law not only shows its existence in the procedure, but in many cases comes into existence because of it…*"[14]

A final word on the presentation of the issues here: the analysis assumes two important premises:

(a) That joint investigation and cooperation is needed to further strengthen and streamline the work of young competition authorities at large; and
(b) Investigation involves the cooperation of two or more competition authorities

[14] Terhechte, 'International Competition Enforcement Law Between Cooperation and Convergence - Mapping a New Field for Global Administrative Law', Working Paper CCLP (L) 26 *The University of Oxford Centre for Competition Law and Policy* , available at https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l._26.pdf (last visited 15 March 2017] , at P. 12.

Section 1: Substantive legal issues

1. Differences (legal standing) in Cartel Enforcement Regimes among Jurisdictions

Legal standing with respect to criminalization of cartels differs from jurisdiction to jurisdiction.[15] These differences in legal standing in cartel offenses has been regarded as a major impediment to cooperation in all stages of multijurisdictional cartel investigations because of the different nature of the proceedings that imply having a criminal vs. administrative standing to investigate and sanction cartel offenses. As a result, the distinguished characteristics of criminal law (burden of proof, legal presumptions, among others) would be different from the classic approach of administrative proceedings which has been normally adopted by young competition regimes to enforce cartel laws.[16] In addition, beyond the economic harmfulness of CBCs, there is an international and ongoing debate on why cartels should be criminalized to encompass moral and social acceptance.[17]

Indeed, when there are commonalities between the legal standing of the mature authorities, there will be more incentives to cooperate. Unfortunately, the tendency to criminalize cartels has developed asymmetrically worldwide.[18] For instance while at the level of the EU member states, some countries such as France, the Netherlands, Austria and Luxembourg have decriminalized their enforcement of competition laws, others such as Ireland and United Kingdom have criminalized their competition laws.[19] In here, it should be noted that the influence of the US Antitrust Laws have been more clearly linked with those jurisdictions that share the same legal tradition, the common law tradition, rather than the more continental tradition of civil law systems being characterized by the German and French jurisdictions.[20]
On the whole, diversity in the legal standing has the following important implications when it comes to international cartel investigations:

[15] For a comprehensive assessment of the legal and economic implications of criminalising cartel laws, See: K. J. Cseres et al., *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (2006).
[16] The characteristics are related to criminal penalties, criminal intent, moral condemnation, less strict relationship between penalty and harm, criminal rights of defence. See W. P. J. Wils, *Is Criminalization of EU Competition Law the Answer?*, SSRN Scholarly Paper, ID 684921 (2005), available at https://papers.ssrn.com/abstract=684921 (last visited 19 March 2017], at P. 5-7.
[17] Beaton-Wells and Ezrachi (eds.), 'Criminal Sanctions for Cartels-the Jury Is Still out', in *Research Handbook on International Competition Law* (2012) 266 , at P. 289.
[18] Ezrachi and Kindl, 'Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus', *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011) 419 , at P. 421.
[19] Wils, *supra* note 16, at P. 23-25.
[20] Common law and civil law systems are approaches on how law should be applied and the usual distinction between the two systems is referred as follows: whereas common law system tends to be case centred and hence judge centred, allowing scope for a discretionary, ad-hoc pragmatic approach; the civil law system tends to be a codified body of general abstract principles which control the exercise of judicial discretion. However, in practice both systems have a moderate level of judicial discretion whereby a convergence of interpretation of law between civil law and common law principles can take place. For instance, the European Court of Justice, being a civil-law based court, is increasingly recognising the benefits of establishing a body of case law or stare decisis. G. Slapper and D. Kelly, *English Legal System* (4th ed, 1999), at P. 3.

a. Dual criminality and protection of own citizens as common requirements for extradition law in many countries:

In countries where cartel offences are criminal in nature, competition agencies would rely on extradition to prosecute foreign cartelists worldwide.[21] Hence, examining the impact of extradition rules in multinational cartel investigations would mean, reviewing the universal principle recognized by the majority of States across the world: the duality of offenses or the threshold requirement of "double criminality" that underlies a basic precept in extradition law reflected in extradition statutes and bilateral treaties.[22]

Double criminality principle suggests that a criminal offence must be considered punitive in both States, reflecting the paramount principle of criminal law *nulla poena sine lege* which must be observed in both jurisdictions.[23] In multijurisdictional cartel investigations, there is a risk of having two or more legal systems that fundamentally are different in terms of how the dual criminality is treated. Even in countries that share the same legal tradition as Canada, US, and UK, differences in approach between interpretation of extradition treaties and statutes and how should be interpreted under international law or domestic law considerations.[24] Definitions of cartel by different jurisdictions[25] might have an impact on how courts assess the "analogy" the crime are across two jurisdictions.[26]

Even if the principle of dual criminality is satisfied, several jurisdictions have laws that prevent the extradition of their own citizens.[27] In the multinational CBC of Marine Hoses *,* Mr. *Romano Pisciotti*, a former senior executive of Parker ITR, a marine hose manufacturer based in Italy, was arrested in Germany based on an extradition request made by US authorities with the support of Interpol and

[21] '*...Many indicted foreign executives have assessed the risk of extradition and made a calculated decision to give themselves up,22 and the US has so far criminally charged more than 60 foreign nationals.::*' C. Thomas and G. De Stefano, *Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance* (2016), available at https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/hogan_lovells_ab_extra_30_09_16.ashx (last visited 28 March 2017], at P. 3.

[22] Williams, 'The Double Criminality Rule and Extradition: A Comparative Analysis', 15 *Nova L. Rev.* (1991) 581 , at P. 582.

[23] '*...The dual criminality requirement has undergone a tremendous change in the last 100 years. In the late nineteenth century the requirement was intended to force a requested State to justify its denial of an extradition request in order to protect the individual facing extradition from unjust prosecution. However, in this century dual criminality has become an unwanted barrier to extradition to both requesting and requested States*...' See more in: Hafen, 'International Extradition: Issues Arising Under the Dual Criminality Requirement', *BYU L. Rev.* (1992) 191.

[24] For a comprehensive and comparative analysis of how treaties and statutes should be interpreted under English, US and Canadian Laws, see: Williams, *supra* note 22.

[25] Between US and Canada, cartel offences differ from being rule of reason approach in Canada and per se rule in US. See : L. S. Branch, Canadian Competition Act, 1985 & Fifty-first Congress of the United States of America, At the First Session, US Sherman Antitrust Act, 2 July 1890.

[26] For example, in Wright v. Henkel, the British government requested the extradition of a man who had committed a fraudulent scheme and fled to US. The question of this extradition was whether the dual requirement was satisfied and whether the slightly difference of definitions between English and US laws can be 'substantially analogous' despite differences in the wording. Hafen, *supra* note 26, at P. 200.

[27] The Law Library of US Congress has published a chart containing information on the terms that apply to the extradition of citizens in 157 jurisdictions around the globe. The statistics are available at: http://www.loc.gov/law/help/extradition-of-citizens/chart. php/?locr=bloglaw. Of the countries surveyed, 60 were found to have laws that prevent the extradition of their own citizens. Other requirements may apply in different countries, or they may have a provision that simply allows a government minister to refuse the extradition of a citizen. Thomas and De Stefano, *supra* note 21, at At footnote 14.

extradited to a US prison in 2014.[28] The extradition of Mr. Pisciotti's, an Italian national, was an outright violation of the non-discrimination principle prescribed by Article 18 of the Treaty of the Functioning of the European Union (TFEU) under which there shall be no discrimination between EU citizens and nationalities within the union and this principle was not observed when the Mr. Piciotti was extradited to the US because he was not a German but Italian citizen.

In any case, the critical issue here is the Extradition is not an easy task in multijurisdictional cartel investigations and without the same legal standing between competition regimes as per cartel offenses; it would be an impossible task to undertake the extradition process. Indeed, to explain why is a difficult task, if two competition authorities are willing to cooperate, a checklist of specific issues should be observed to successfully extradite foreign national in international competition cases: (1) existence of an extradition treaty between the countries at stake; (2) the alleged cartel offense must be considered punishable under criminal laws of both requesting and giving-up jurisdictions; (3) the nationality of the defendant may prevent or reduce the chance of extradition as countries protect their own citizens from extradition; (4) other legal and procedural specific requirements depending on each jurisdiction's laws.[29]

b. Implementation of Mutual Legal Assistance Treaties (MLATs):

In connection to the dual criminality aspect discussed above, Mutual Legal Assistance Treaties (MLATs) have been instrumental to channelize cooperation and assistance amongst its signatory countries as they allow generally for the exchange of evidence and information in criminal and related matters. For instance, in areas beyond competition law enforcement such as money laundering cases, MLATs are extremely useful to obtain banking and other financial records abroad.[30]

In the area of competition enforcement, competition authorities such as the US have been using often MLATs to gather evidence abroad[31] based on the US International Antitrust Enforcement Assistance Act (IAEAA) of 1994.[32] Nonetheless, not all MLATs can be used for competition matters due to explicit exclusion (US-Swiss MLAT or Canada-Germany MLAT) or because there is the

[28] *Ibid.*, at P. 2.
[29] *Ibid.*, at P. 3-4.
[30] For example, the US has signed a great number of MLATs in the area of narcotics such as Antigua & Barbuda, Argentina, Australia, Austria, the Bahamas, Barbados, Belgium, Belize, Brazil, Canada, Cyprus, Czech Republic, Dominica, Egypt, Estonia, France, Germany, Greece, Grenada, Hong Kong, Hungary, India, Ireland, Israel, Italy, Jamaica, Japan, Latvia, Liechtenstein, Lithuania, Luxembourg, Malaysia, Mexico, Morocco, the Kingdom of the Netherlands (including Aruba, Bonaire, Curacao, Saba, St. Eustatius and St. Maarten), Nigeria, Panama, Philippines, Poland, Romania, Russia, St. Lucia, St. Kitts & Nevis, St. Vincent & the Grenadines, South Africa, South Korea, Spain, Sweden, Switzerland, Thailand, Trinidad & Tobago, Turkey, Ukraine, United Kingdom (including the Isle of Man, Cayman Islands, Anguilla, British Virgin Islands, Montserrat and Turks and Caicos), Uruguay, and Venezuela. BUREAU OF INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *Treaties and Agreements*, U.S. Department of State, available at http://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm (last visited 28 March 2017].
[31] U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017, p. P. 49.
[32] *[USC07] 15 USC Ch. 88: INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE*, available at http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter88&edition=prelim (last visited 28 March 2017].

requirement of criminal status (legal standing) in both jurisdictions.[33] It is worth noting that in some MLATs the requirement of dual criminality "theoretically" is not needed to apply the MLATs, such as the case of US-Spain and US-Italy.[34] However, the fact that has not been used so far perhaps reflects that means of cooperation may not be available for parties to realise the assistance provided by the MLAT.

Another problem with MLATs besides the issue of being only applicable to criminal cartel cases in both jurisdictions seeking for assistance, the provisions of the MLATs "… *do not necessarily override domestic rules governing confidentiality, therefore not all competition authorities may be able to share information obtained through their own enforcement measures…"* [35]As a response of that the IAEAA mentioned above was an effort to the US to overcome this limitation but up to date only one agreement has been signed under this 1994 scheme, the one US-Australia in1999.[36] Strong criticism received the application of IAEAA in countries because of the fear of entering into an agreement with a jurisdiction that has far-reaching extraterritorial jurisdiction over foreign and crystalizing it through this legal instrument would be detrimental to the national interests of the foreign State.[37]

c. Limitations of the use of information gathered only for the purposes for which it was collected:

Another problem that arises when cartels have different legal standings in different jurisdictions is the treatment of information gathered from a dawn raid considering that the purposes and goals of criminal vis-à-vis administrative investigations differ markedly. For instance, under EU administrative proceedings and pursuant to numeral 2 of article 12 of Regulation 1/2003: "[I]*nformation exchanged shall only be used in evidence for the purpose of applying Article 81 or Article 82 of the Treaty and in respect of the subject-matter for which it was collected by the transmitting authority…*"[38]

Thus, in gathering data secured from inspections in competition cases, the inspectors would only be allowed to take copies of the documents relevant to the purpose of their investigation. They cannot take other documents that may be incriminating in other jurisdictions but will definitely fall outside the scope of the administrative investigation under EU competition rules.[39]

---

[33] ICN, *Co-Operation between Competition Agencies in Cartel Investigations* (2006), available at http://ec.europa.eu/competition/international/multilateral/2006.pdf (last visited 28 March 2017], at P. 15.

[34] *Ibid.*

[35] M. Martyniszyn, *Discovery and Evidence in Transnational Antitrust Cases: Current Framework and the Way Forward*, SSRN Scholarly Paper, ID 2142978 (2012), available at https://papers.ssrn.com/abstract=2142978 (last visited 23 February 2017], at P. 39.

[36] US & Autralian Governments, *AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF AUSTRALIA ON MUTUAL ANTITRUST ENFORCEMENT ASSISTANCE*, 27 April 1999, available at https://www.justice.gov/sites/default/files/atr/legacy/2015/01/15/311076.pdf (last visited 11 April 2017].

[37] Martyniszyn, *supra* note 35, at P. 41.

[38] Official Journal of the European Communities, COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, No. 1/2003, 4 January 2003, p. P. 11.

[39] The limitation seeks to ensure that the functioning of the European Competition Network will not empty of their substance the procedural guarantees concerning the limitation on use of the evidence. See B. E. Hawk, *International Antitrust Law & Policy: Fordham Corporate Law 2004* (2005), at P. 527.

For instance, in 2004, pursuant to Article 28 of Regulation 1/2003, the EU negatively responded to a request for information submitted by the Turkish Competition Authority in relation to the evidence collected in a cartel investigation on the electrical equipment market.[40] The party information provided in the foregoing formal investigation was considered protected and could not be shared with third parties unless waivers were secured.

d. Diversity in the level of protection of due process rights:

Even in the most integrated and sophisticated regional cooperation network of national competition authorities, the European Competition Network (ECN), procedural rules across national member states differ. *Stucke* observes that the "*…notion of level of due process rights is inherently ambiguous…"*[41]

A domestic competition authority which secures evidence from outside its jurisdiction would need to know if such evidence was gathered in accordance with the due process rules that are applicable in each Member State[42]. The diversity of procedural rules in the different phases of investigation would heavily impact the outcome of the cooperation because competition authorities need to provide safeguards that should be equivalent between each other and that is not necessarily the case between mature and young competition authorities. The business community has been very vocal in stressing that competition authorities must protect and respect due process rights, especially in light of recent technological developments which makes the capture of great quantities of data possible.[43]

e. Differences across jurisdictions in the conceptualization of cartels and goals that competition policy and law should pursue

While there is a worldwide consensus on the conceptualization of hard-core cartels, the political, economic, and social situation of the jurisdiction wherein the cartel activity takes place can also influence and shape the domestic contextualization of such definition. This domestic contextualization happens in two different ways.

First, through the adoption of "competition plus-objectives" or objectives that may go beyond the promotion of competition, consumer welfare, and efficiency, competitive process. This includes the protection of small and medium-sized enterprises that may be relevant to traditional community economies, national economic development considerations or industrial policy goals.[44]

---

[40] M. M. Dabbah, *International and Comparative Competition Law* (2010) & Martyniszyn, *supra* note 563, at P. 35.

[41] Stucke, 'Discovery in a Global Economy', in J. Basedow, S. Francq and L. Idot (eds.), *International Antitrust Litigation: Conflict of Laws and Coordination* (2012) 315 , at P. 378.

[42] Mehta, Kirtikumar, 'Interview with the Former Director of the Cartel Directorate, DG Competition of the EU Commission.', (2017).

[43] Business and Industry Advisory Committee to the OECD (BIAC), *Discussion on International Co-Operation and the 1995 Recommendation: Next Steps* (2013), available at http://biac.org/wp-content/uploads/2014/05/11-120613_BIAC_Note_to_WP3_on_International_Cooperation.pdf (last visited 28 March 2017], at P. 2.

[44] "Competition laws and regulations in some jurisdictions such as China, Hungary, Poland and South Africa specifically mention that public interest is an important element to be considered, especially in assessing the competitive impact of mergers. For example, when a merger is considered, section 12 A (1) of the South Africa Competition Act, 1999, requires the Competition Commission or Competition Tribunal to initially determine both the competitive and public interest impacts of the merger. In this

Second, even when there is no explicit reference in the competition law to other objectives, competition policy can be "polluted" with social, ethical and moral concerns that can be attributed to the association with national champion considerations (industrial policy), regulation and rent-seeking activities. [45]

f. Diverse set of rules concerning the powers of investigation

An essential and neuralgic part of any competition authority's enforcement capacity is its ability to conduct effective investigations. Many competition authorities worldwide invest in getting technical assistance from mature competition authorities to get the best international practices in investigation. Despite efforts made by the international community to recommend best practices for the conduct of investigations,[46] rules on powers of investigation in the majority of young competition authorities across jurisdictions, from the inspection of business premises up to seizing and gathering evidence, remain diverse.[47] Notably, when the EU and Switzerland decided to move forward from their original traditional competition cooperation agreement to a second generation of competition agreements, one of the matters addressed was the harmonization of their rules concerning powers of investigation.

g. Diverse adjudication techniques

Assuming that a young competition agency successfully reaches the post-investigatory phase after the foreign evidence was gathered, assessed, and ultimately admitted under their own domestic legal system (being part of the file), the next challenge that it faces is the adjudication of the case against the cartelists and the imposition of sanctions and remedies.

---

regard, though there may be cases where a merger is likely to substantially prevent or lessen competition, it may be approved on substantial public interest grounds. In other instances, despite substantial potential impacts on competition, a merger may not be approved on public interest grounds UNCTAD, *Model Law on Competition (2015) – Revised Chapter I*, TD/RBP/CONF.8/L.1 (2015), available at http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8l1_en.pdf (last visited 15 March 2017], at Paras. 10 and 11.

[45] Ezrachi, 'Sponge', 5 *Journal of Antitrust Enforcement* (2017) 49 , at P. 50.

[46] See ICN, *Investigative Tools Report* (2013), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc893.pdf (last visited 5 April 2017].

[47] For instance in the Balkan region where the majority of competition authorities are young or small, including two EU competition authorities (Croatia and Bulgaria), the efforts to converge investigation rules on inspections have been relatively successful. For instance, '...All Balkan competition authorities are authorized to carry out inspections at the premises of any legal entities and natural persons performing economic activities. Under almost all Balkan competition regimes the formal authorization has to specify the legal basis and the purpose of the inspection as well as the addressees and objects of the inspection. Only under half of the Balkan competition regimes the timeframe to carry out an inspection on spot is determined in the authorization decision and the persons empowered to conduct the inspection are specifically designated. The main differences are related to the power to inspect non-business premises as well as to the art of the inspection authorization...' Sofia Competition Forum, *Comparative Overview of the Balkan Competition Regimes in the Field of INSPECTIONS ON SPOT* (2015), available at http://scf.cpc.bg/uploads/data/2015/report%20SCF%20inspections.pdf (last visited 5 April 2017], at P. 9.

Adjudication techniques are affected by factors that also affect the choice of a "model" for competition laws, such as economic, legal and political views.[48] The phrase "politics of law and economics" signals that adjudicating competition cases considers not only on economics but an intricate puzzle of domestic laws and politics. [49]

For instance, the Canadian Competition Policy has gone through a "pure political accountability" model whereby the authority was part of a Ministry to an "Independent Agency Model" and later to a "Judicialized Tribunal Model".[50] The UNCTAD Model Law on Competition has classified the choices for structuring of competition authorities into three institutional models: the bifurcated judicial model, the bifurcated agency model and the integrated agency model.[51] UNCTAD observations suggest that most of the competition authorities are awarding as much administrative independence as possible so as to avoid political interference in particular in developing countries and countries in transition.[52]

Having different adjudication institutional structures also influences the exchange of information between competition authorities because of the different criteria that adjudicators have in handling the information. For example, within Latin America, while the Costa Rican Competition Commission is composed by commissioners that are not civil servants and whose activities are not precisely regulated by government administrative rules.[53] On the other hand, the members of the Chilean Competition Tribunal, being part of the judicial branch, are bound by the administrative rules of the Supreme Court of Chile.[54]

The different rules governing the conduct of the adjudicators in Chile and Costa Rica yields different responsibilities in handling the agency information and would be a barrier against the free exchange of information between these two adjudicatory bodies. Presumably, the stricter administrative rules of the Supreme Court of Chile will cause its staff to be more careful in sharing information to their counterparts in Costa Rica.

[48] Tyhurst, 'The Adjudication of Competition Law Issues in Theory and Practice : An Assessment of the Reviewable Matters Jurisdiction of the Restrictive Trade Practices Commission', (1983) , available at http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=64728&local_base=GEN01-MCG02 (last visited 28 February 2017] , at P. 9.

[49] See more in: Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window', 61 *New York University Law Review* (1986) 554.

[50] See Chapter II of the Master Thesis: Tyhurst, *supra* note 48.

[51] '*....(i) The bifurcated judicial model – the Authority is empowered to be investigative, and must bring enforcement actions before courts of general jurisdiction, with rights of appeal to general appellate courts. (ii) The bifurcated agency model – the Authority is empowered to be investigative, and must bring enforcement actions before specialized competition adjudicative authorities, with rights of appeal to further specialized appellate bodies or to general appellate courts. (iii) The integrated agency model – the Authority is empowered with both investigative and adjudicative functions, with rights of appeal to general or specialized appellate bodies....*' UNCTAD, *Model Law on Competition (2010) – Chapter IX*, TD/RBP/CONF.7/L.9 (2010), available at http://unctad.org/en/Docs/ciclpL2_en.pdf (last visited 15 March 2017], at P. 2.

[52] See Para. 8 *Ibid.*, at P. 4.

[53] See Article 22 Costa Rica _ Ley 7472 1995.pdf.

[54] See FNE Chile, Chile New Competition Act, vol. Decreto Ley No. 211, 22 December 1973.

2. Lack of Substantive Provisions on Leniency Programs

Leniency programmes have been regarded as the most powerful tool to detect cartels in modern competition law.[55] For instance, within Latin America, Brazil and Peru were one of the first countries to introduce the leniency programme in 2000 and 1996, respectively.[56] Brazil had its first leniency agreement signed in 2003, and by 2016, Brazil saw 54 leniency agreements signed and monitored.[57] Undoubtedly, the leniency system in Brazil has been a success with an effective prosecution of domestic, mixed and CBCs.[58] Even today, the introduction of immunity and leniency programs to fight hard-core cartels remains an important challenge in the region as agencies would need to gain the "*necessary expertise to administer these programs, increasingly join and even cooperate with their international counterparts, and learn the nuances in their legal systems when implementing them and enforcing their competition legislation.*"[59]

3. Exemption of Export Cartels from the Application of Competition Law

Export cartels occurs when the cartel conduct takes place in the exporting country but the adverse effects are felt exclusively or mainly in the importing country.[60] Export cartels or export associations are cartels formed solely to engage in export trade. Exporters may collude explicitly and even supported by their own governments, to enter joint production and/or joint marketing, price fixing and market allocation.[61]

Distinguished from domestic cartels, export cartels usually are adversely only the importing market. Where a collusion parallel conducted by cartel members impedes competition in domestic market, a "mixed" export cartel is referred to. When export cartels promote the formation and stability of CBCs, with the encouragement or tolerance given by exporting states, there could be a link between export and transnational CBCs. However, the distinction remains clear. Transnational cartels would refer to member firms which are based in different states, while undertakings engaged in export cartels are exporters from one exporting state to another country.

---

[55] UNCTAD, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries*, TD/RBP/CONF.7/4 (2010), available at http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf (last visited 17 February 2017].

[56] OECD, *Leniency Programmes in Latin America and the Caribbean: Recent Experiences and Lessons Learned* (2016), available at https://one.oecd.org/document/DAF/COMP/LACF(2016)5/en/pdf (last visited 21 February 2017], at P. 19.

[57] A. Linhares Martins and A. Lin Fidelis, *NEARLY 16 YEARS OF THE LENIENCY PROGRAM IN BRAZIL: BREAKTHROUGHS AND CHALLENGES IN CARTEL PROSECUTION* (2016), available at https://www.competitionpolicyinternational.com/wp-content/uploads/2016/06/Amanda-Andressa.final2_.pdf (last visited 19 February 2017], at P. 2.

[58] By 2016, Brazil reported 70 cartel cases, which represents the highest number of cases in the region. *Leniency: The Future for Cartel Enforcement in Latin America* (2016), at P. 6.

[59] E. Mariscal and C. Mena-Labarthe, *Leniency Programs in Latin America: New Tools for Cartel Enforcement | Competition Policy International*, 2010, available at https://www.competitionpolicyinternational.com/leniency-programs-in-latin-america-new-tools-for-cartel-enforcement/ (last visited 19 February 2017].

[60] Export cartels have been also defined as 'mercantilist trade political tools' which benefit home countries at the expense of others. N. Jensen-Eriksen, *Predators or Patriots? Export Cartels as a Source of Power for the Weak* (2007), available at http://www.gla.ac.uk/media/media_168473_en.pdf (last visited 8 February 2017], at P. 7.

[61] Historically export cartels have been promoted by governments. For instance, in 1944 Mason said that CBCs (refering to export cartels) have been negotiated by governments. See Mason, 'The Future of CBCs', 22 *Foreign Affairs* (1944) 604 , at P. 605.

In theory, there could be different types of export cartels. In fact, in accordance to *Victor*, export cartels can be pure, mixed, national or international depending upon their scope and constituency.[62] As such, whereas *pure export cartels* would be those restraints that are directly targeting foreign markets, *mixed export cartels* show restraints in both, domestic and foreign markets. Another type presented here is *national export cartels* which are exporters from one country alone and international export cartels whereby exporters are coming from different countries.[63] Nonetheless, for the purposes of the present research, the concept of export cartels will only cover *national export cartels* as being the pure export cartel type.

In practice, all cross-border anticompetitive practices that are not pure export cartels should fall within the scope of *transnational cartels* as per the meaning provided *supra*. In addition, there are differences between multinational and export cartels as export conspiracies are often driven essentially by domestic considerations rather than more diverse considerations coming from multinational firms that had incentives to collude in certain markets. Countries may have less incentives to tolerate multinational or transnational cartels in comparison with export or import cartels that may protect specific domestic circumstances and even industrial policy arguments.

Forms of export cartels are diverse as can be seen from the several recent export cartels targeting US markets but under the definition of a pure export cartel with exporters coming from one country alone.[64]

Let us review the case of China promoting export cartels in the industry of vitamins after the collapse of the worldwide cartel dismantled of the Vitamins during 2001. [65] The Chinese vitamin C export cartel targeted US markets[66] and was prosecuted in 2013 by US courts.[67] The Chinese Government supported the export cartel under the grounds of the *state doctrine* principle and participated in the case via *amicus curiae,*[68] the first time where a Chinese institution addressed

[62] Victor, 'Export Cartels: An Idea Whose Time Has Passed', 60 *Antitrust Law Journal* (1991) 571.
[63] *Ibid.*, at P. 571.
[64] M. Matsushita et al., *The World Trade Organization: Law, Practice, and Policy* (2015), at P. 818.
[65] First, 'The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law', 68 *Antitrust Law Journal* (2000) 711.
[66] Chinese exporters were found guilty of manipulating prices and limiting production during a period from December 2001 to June 2006 The jury found that the plaintiffs had sustained damages of $54.1million, which was trebled under U.S. antitrust law for a total award of $162.3 million. In this lawsuit, a group of Chinese firms were sued by the plaintiffs, a class of vitamin C purchasers led by a small distributor. Prior to the jury verdict, three of the original five defendants reached a settlement with the plaintiffs, with two of them reportedly agreeing to pay the plaintiffs $22.5 million. North China and Hebei Welcome Pharmaceutical Co. were remained in the case by the time of the verdict. Hence, this accused collusion was an export cartel operated by exporters from the same state -- China. Under American law, in some circumstances companies may avoid antitrust liability if a court finds that a foreign government compelled the companies to engage in anticompetitive behavior. The defendants filed a motion to dismiss, and argued they were acting under the direction of regulators. See 'China Vitamin C Price-Fixing Verdict Scrutinized by Court', *Bloomberg.com* (2015) , available at https://www.bloomberg.com/news/articles/2015-01-29/china-vitamin-c-dispute-sets-up-clash-over-u-s-antitrust-law (last visited 6 February 2017].
[67] US, US District Court New York, *US Vitamin C Export Cartel*, Case 1:06-md-01738-BMC-JO Document 440, 9 June 2011, available at http://www.lawnet.gr/assets/files/Vitamin%20Cartel%20.pdf (last visited 7 February 2017].
[68] An amicus brief also had been submitted to the court by the Chinese Ministry of Commerce (MOFCOM), informing the court that plaintiffs challenged 'a regulatory pricing regime mandated by the government of China'. Therefore, it seems that this export cartel is compelled or at least encouraged by the exporting state. With exporting states' encouragement and tolerance is a common aspect of some export cartels, which also represents the most challenge for the realization of an optimal regulation on them. , *supra* note 65.

US courts.[69] The US District Court of NY sanctioned the case on the grounds that the export cartels, while encouraged explicitly by the Chinese government, involved the private conduct of the Chinese exporters which violated US antitrust laws.[70] The Chinese government unequivocally criticized the judgment unfair, saying that the judge had refused to respect China's own interpretation of Chinese law. In the US, however, this case was regarded as a significant victory for private antitrust enforcement against an export cartel. However, later in September 2016, the US Second Circuit Court of Appeals overturned the judgement on the ground that the companies were compelled to fix price and output by Chinese law, and therefore, their conduct was outside the antitrust jurisdiction of U.S. federal courts.[71] As *Kovacic* said in an interview:

> "*The fact that they* [the 3 Chinese competition authorities] *were all there, arm's joint, providing a common view was a signal to the court "were are serious about this". We are serious about the arguments we are making and we are in effect giving you a seminar on how our government functions but also if you reject our views it will offend us. At first they had not made their case so clear. But then they did."* [72]

This case shows how the enforcement of competition rules in the US can adversely affect implementation of China's trade policy, to the extent with which other importing countries prohibit export cartels effectively.[73] These cartels affect the trading relations between countries and hence it has been claimed that "*… it is not enough to simply consider them in light of existing competition law regulations but a more nuanced approach encompassing trade law* [would be] *therefore required…"*[74] Consensus on the detriment of export cartels is growing but a potential conflict between exporting and importing countries in this issue remains unavoidable.[75]

3.1. Lack of incentives and willingness to cooperate with the requesting authority suffering the cartelized exports

As explained earlier, export CBCs are pure export cartels wherein export producers within one specific jurisdiction collude to target a precise foreign market. In this type of CBC, the exporting country is the birth place of the collusion and will most probably be the location of the evidence against the cartel. The competition authority in the targeted jurisdiction therefore needs

[69] H. L.-L. M. Breed, J. W. Bernick and A. Emch, *Deferring to Chinese Government, US Court of Appeals Overturns Vitamin C Cartel Judgment | Lexology*, available at http://www.lexology.com/library/detail.aspx?g=02c9bc3e-31f9-4824-adfd-d5c8cd9053d8 (last visited 7 February 2017].

[70] US, *supra* note 66.

[71] Breed et al., *supra* note 69.

[72] Kovacic, William, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Former Chairman of the Federal Trade Commission of the United States of America and Professor of Global Competition Law in GeorgeTown University', (2017).

[73] For a comprehensive assessment of the new antitrust case law emerging in the US involving Chinese export cartels. See Martyniszyn, 'A Comparative Look on Foreign State Compulsion as a Defence in Antitrust Litigation', 8 *The Competition Law Review* (2012) 143.

[74] Kwok, 'Export Cartels: Analysing the Gap in International Competition Law and Trade', 2 *Edinburgh Student L. Rev.* (2013) 140.

[75] See the proposal to advocate for a mandatory notification and transparency of export cartels by the WTO. Sokol, 'What Do We Really Know About Export Cartels and What Is the Appropriate Solution?', 4 *Journal of Competition Law and Economics* (2008) 967 , at P. 980.

information on the location of the relevant cartel evidence. It would also benefit from knowing if the competition authority in the originating jurisdiction is willing to cooperate and provide further information.

As export CBCs are generally exempted from the application of competition rules in the originating jurisdiction due to the lack of effects in their own territories as well as industrial policy considerations,[76] the competition authority in the originating jurisdiction would normally have no incentive to provide evidence to prosecute and punish export in the targeted jurisdiction.

The issue is compounded if the targeted jurisdiction has a young/small competition agency. Access to the evidence on the alleged export CBC is more difficult for young and small competition authorities compared to mature competition agencies. For young competition agencies, access to most basic agency information at the pre-investigatory phase would require the support of the other competition authority and without compelling arguments to convince the peer, it is unlikely that this will happen. Also, a young competition agency in the originating jurisdiction will not have an incentive to share information about export cartels unless the targeted jurisdiction has leverage against the originating jurisdiction. For instance, in the Vitamin C export cartel, the competition authority in the targeted jurisdiction, the US, started its pre-investigation without the previous support of the Chinese competition authorities. Perhaps due to the pressure exerted by US, Chinese authorities later sent an *amicus curiae* to the US courts to plead in favour of the export cartels being formed in accordance to Chinese laws.[77]

3.2. Lack of a compulsory agreement to gather information on behalf of the requesting young competition authority of the other party: the failure of The Hague Convention on taking evidence abroad in civil or commercial matters

Another issue that relates to the legal standing of cartel offences is the lack of compulsory agreements to gather information on behalf of other competition authorities. This issue exists despite the existence of The Hague Convention on Taking Evidence Abroad in Civil or Commercial Matters (Hague Evidence Convention).[78] The Hague Evidence Convention failed to result to compulsory agreements to gather information on behalf of a requesting competition authority due to the following reasons.

The Mandatory or Non-mandatory Character of the Convention: When The Hague Convention was being negotiated, it was unclear if it was mandatory or not. No provision in the Convention expressly addressed this issue. However, the founders of the Convention, particularly those

[76] Consider the Finnish pulp industry where by national export cartels have been crucial for the Finnish industry because most of the individual Finnish companies were so small that they could not have competed independently with much larger foreign competitors. See N. Jensen-Eriksen, *Predators or Patriots? Export Cartels as a Source of Power for the Weak* (2007), available at http://www.gla.ac.uk/media/media_168473_en.pdf (last visited 8 February 2017].
[77] US, *supra* note 66.
[78] Hague Conference on Private International Law, *Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, 18 March 1970, available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=82 (last visited 4 April 2017].

States with common law jurisdictions,[79] were of the belief that the convention was not mandatory. This issue was settled in *Aerospatiale,* wherein the US Supreme Court held that The Hague Convention does not have a mandatory character.[8081] After the US Judgement, comity considerations and common sense would suggest that the Convention deserves initial use. Unfortunately in private antitrust actions in the US, courts favour the use of domestic discovery rules rather than the Convention.[82]

The failure to define "civil and commercial matters" in the Convention: The legal definition and scope of the term "civil and commercial matters" has also caused problems in the implementation of tThe Hague Convention. While common law jurisdictions are of the view that the Convention covers all proceedings except those which are criminal in nature, civil law jurisdictions claim that the Convention cannot apply to tax and administrative matters.[83] As a result, mature competition authorities such as the US and EU never relied on The Hague Convention when enforcing their laws. The limited use of The Hague Convention in countries where cartel laws are criminalized, has made it inadequate for international assistance in the field of antitrust enforcement.[84]

Unfamiliarity Amongst Legal Practitioners and Courts: Probably because of the two reasons above, in the US, few legal practitioners and courts know about the Convention. Those who are unfamiliar with it feel that it is not an effective tool of obtaining foreign-based evidence.[85] Despite this fact, in the EU, efforts to promote private enforcement can lead to the "rediscovery" of the Convention, which ultimately can mean a great contribution to the transnational competition law litigation unless the trend of criminalization of competition rules may undermine the usefulness of this convention.[86]

4. Extraterritoriality vs. State Jurisdiction of Application of Competition Rules

The extraterritorial application of competition laws has been regarded as the classical solution to mitigate the effects of Export CBCs as the importing country has limited jurisdiction to prosecute cartelists abroad.[87] This principle involves two types of jurisdictions, legislative and enforcement. Legislative jurisdiction pertains to the establishment and application of laws while enforcement jurisdiction refers to implementation as condition of extraterritorial application of competition laws.[88] Since the classical landmark case *Aluminium Co. Of America (Alcoa)* of 1945, US antitrust

[79] In turn, States with civil law traditions were convinced that the Convention had a mandatory character.
[80] *US SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and Societe de Construction d'Avions de Tourisme, Petitioners v. UNITED STATES DISTRICT COURT FOR the SOUTHERN DISTRICT OF IOWA, Etc.*, LII / Legal Information Institute, available at https://www.law.cornell.edu/supremecourt/text/482/522 (last visited 11 April 2017].
[81] Martyniszyn, *supra* note 35, at P. 13.
[82] *Ibid.*, at P. 15.
[83] *Ibid.*, at P. 16.
[84] B. Zanettin, *Cooperation Between Antitrust Agencies at the International Level* (2002), at P. 148.
[85] Martyniszyn, *supra* note 35, at P. 17.
[86] *Ibid.*, at P. 18.
[87] The principle is not applicable for Import CBCs as the cartel activity harms exporters' interest in an exporting country not having a direct impact in domestic markets.
[88] A. Ezrachi, *EU Competition Law: An Analytical Guide to the Leading Cases* (2016), at P. 627.

laws have reached foreign companies and individuals fixing prices abroad but with effects in US commerce and markets.[89]

The "Effects Doctrine" emerged as a guiding principle to punish foreign cartelists even in cases where the territory in which the price fixing took place cartels were lawful.[90] The Effects Doctrine basically means that "… *competition laws can be applied extraterritorially only in cases where actions taken outside a country have a direct and substantial impact on competition in the domestic markets…*"[91] It may be said that there is now an international recognition of the Effects Doctrine as it has been adopted by two important international legal bodies: the International Law Association and *L'Institut de Droit International*.[92]

Arguably, the Effects Doctrine is a matter of judicial forensics whereby the so-called "jurisdictional rule of reason" is applied to avoid having to select a jurisdiction that could become the global forum of choice for cartel victims. In this connection, the *Empagran* case shows that the US courts cannot become the global jurisdiction for all cartel cases affecting globally as it held that the effects doctrine is not the only test to establish jurisdiction but "…*to develop a more subtle analysis that admits foreign plaintiffs where US interests are directly advanced, but turns away those claims where we should leave to regulation to others*…."[93] By contrast, the European Court of Justice has refrained from a direct and clear adoption of the Effects Doctrine.

In this vein, two important cases in Europe and US merit to be mentioned. [94] The European *Wood Pulp* cartel Case of 1988[95] (that established the "Implementation Principle") and the American *Hartford Fire Ins. Co. v. California* of 1993[96] (that established a more expansive approach of the Effects Doctrine).

[89] '*....In 1982, the U.S. Congress established a law on extraterritorial application (legislative jurisdiction) called the Foreign Trade Antitrust Improvements Act (FTAIA). However, the Department of Justice 1988 Antitrust Guidelines for International Operations focused only on anti-competitive actions that could be presumed to harm the competition in the U.S. market. The Guidelines did not address the subject of anti-competitive conduct that restricted U.S. exports to enforcement actions. In April 1992, however, the Department of Justice announced that it would begin enforcement of the U.S. antitrust laws extraterritorially with respect to foreign conduct restricting U.S. exports, regardless of whether the conduct harmed competition in the U.S. market. The new policy applies to anti-competitive conduct that could reasonably be expected to directly and substantially impact U.S. exports. ..*' Japanese Ministry of Economy, Trade and Industry, *'Excessive' Extraterritorial Application of Competition Laws* (2008), available at http://www.meti.go.jp/english/report/downloadfiles/2008WTO/2-14-2ExcessiveExtraterritorial.pdf (last visited 6 April 2017], at P. 480.

[90] E. M. Fox and E. M. Fox, *Cases and Materials on U.S. Antitrust in Global Context* (3rd ed, 2012), at P. 177-178.

[91] Japanese Ministry of Economy, Trade and Industry, *supra* note 88, at P. 479.

[92] *Ibid.*, at P. 478.

[93] Sprigman, 'Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over CBCs', 72 *The University of Chicago Law Review* (2005) 265 , at P. 279.

[94] For a comprehensive study of this principle , See: Griffin, 'EXTRATERRITORIALITY IN U.S. AND EU ANTITRUST ENFORCEMENT', 67 *Antitrust Law Journal* (1999) 159.

[95] ECJ, European Court of Justice, *EU Case Ahlstrom v. Commission*, 89/85, 27 September 1988, available at http://eur-lex.europa.eu/resource.html?uri=cellar:5ed612ae-790c-4091-bf05-0a6d7cbd9142.0002.06/DOC_1&format=PDF (last visited 6 April 2017].

[96] US, US Court of Appeals for the Ninth Circuit, *Hartford Fire Ins. Co. v. California 509 U.S. 764 (1993)*, 28 June 1993, available at https://supreme.justia.com/cases/federal/us/509/764/case.html (last visited 6 April 2017].

The *Wood Pulp* case held that jurisdictions under EU Competition Law[97] "…*exists over firms outside the Union if they implement a price-fixing agreement reached outside the EU by selling to purchasers within it…"*[98] This Implementation Principle was later complemented by EU Decision in *Gencor judgement* by incorporating the "immediate, foreseeable and substantial effects in the Union" requirement to the principle so as to fully incorporate the so-called "effects doctrine".[99]

The *Hartford Fire case,* on the other hand*,* provided a rather aggressive stance on the extraterritorial application of US Antitrust Laws by stating that a US Court "…*should not consider the interests of a foreign sovereign unless there is a true conflict between US Law and the Law of the foreign state…"*[100] This judgment, which was considered a disturbance of the established trend of comity, made the extraterritoriality rule highly controversial as it swept away the notion of comity, which "…*holds that a nation with lesser interests at stake should normally defer to a nation with greater interests at stake of conflict…"*[101] As a result, many countries issued diplomatic protests and some even enacted blocking legislations as it was considered an excessive application of US antitrust laws.[102]

Thanks to the *Empagran* case, the negative trend has been gradually softened by the doctrine of "comity."[103] US lower Courts can adopt an approach based on both *Hartford* & *Empagran,* and introduce comity analysis in global cartel cases by developing their own comity-based limitations on jurisdiction. This could eventually lead to expend significant resources in determining whether there is a policy conflict[104] regarding the difference in the legal standing of cartel offenses.

These frictions between jurisdictional and substantive law and policy caused by the US' unilateral extraterritorial application of its antitrust legislation without regard to the interests of foreign countries, resulted to international conflicts. Thus, in CBC investigations whereby interactions with young or small competition regimes occur, they would have little to say between conflicts amongst mature competition agencies on how the effects doctrine should be transposed to a lesser and objective approach of "comity".

In relation to the collection of foreign evidence, the extraterritorial application of domestic rules on access to evidence or "extraterritorial discovery" might be a solution to the failure of The Hague Convention. The extraterritorial discovery would consist of the "…*use of state power to coerce (compel under the threat of sanctions) conduct within foreign territory for the sake of securing evidence…"*[105] This instrument has been exercised mainly by the US in the application of antitrust

[97] For a complete assessment of the reach of EC Competition Law in the area of cartels, see Chapter 4 in: C. Ryngaert, *Jurisdiction over Antitrust Violations in International Law* (2008).
[98] Ezrachi, *supra* note 88, at P. 628.
[99] CFI, Court of First Intance, *EU Case Gencor v. Commission*, 25 March 1999, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61996TJ0102&from=EN (last visited 6 April 2017].
[100] US, *supra* note 95, at P. 2919.
[101] Burr, 'The Application of US Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?', 15 *University of Pennsylvania Journal of International Law* (1994) , available at http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tlr70&section=59 (last visited 6 April 2017] , at P. 223.
[102] Kojima, 'International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy', *Weatherhead Center for International Affairs* (2002) 2001 , at P. 4.
[103] Fox and Fox, *supra* note 90, at P. 178.
[104] Sprigman, *supra* note 93, at P. 280-281.
[105] Martyniszyn, *supra* note 35, at P. 18.

laws in criminal and civil cases and was met with a massive negative response from foreign jurisdictions that have repeatedly enacted statutes hindering or blocking collection of and access to evidence located in the forum for the purposes of foreign antitrust litigation. [106] In the EU, international law provisions limit the exercise of EU Commission's competence within the EU jurisdiction as it would impinge upon the national sovereignty of the non-member country in whose territory it was purporting to act. Therefore, in case of non-compliance of foreign parties to cooperate, the EU has no power to effectively sanction the foreign-based evidence request.[107] As a result of both jurisdictions' acts, there is no specific "binding" and appropriate solution where the extraterritorial discovery can be applicable across jurisdictions and therefore access to foreign evidence would still be an issue in particular when two competition authorities are engaged in formal investigations (the investigation phase itself).

5. Lack of national implementation of competition-related provisions in regional trade agreements

According to the database of the World Trade Organization (WTO), there are 287 regional trade agreements (RTAs) that have been officially notified. The last RTA notified was in November 2016.[108] By 2012, almost 100 RTAs contained competition provisions.[109]

RTAs that have created a supranational competition authority are mainly the EU, the Common Market for Eastern and Southern Africa (COMESA), the West Africa Economic and Monetary Union (WAEMU), the Caribbean Community (CARICOM) and the Andean Community of Nations. Other RTAs such as the Association of Southeast Asian Nations (ASEAN), the North American Free Trade Agreement (NAFTA) and the "*Mercado Comun del Sur"* (MERCOSUR) have some competition provisions in force but do not create a supranational authority that can deal with competition matters at the regional level.

The implementation of competition provisions in RTAs has been already assessed in 2005 and 2007 and the evidence at that time was that there was a weak implementation record which *was partly explained by the fact that RTAs with Competition Related Provisions (CRPs) are a relatively new phenomenon* [and] *the history of regional integration has shown that 'deep integration' rules, such as competition provisions, need time to fully materialize, particularly in RTAs involving developing countries*.[110]

[106] Countries such as Australia, Canada, France, New Zealand, the Netherlands, the UK, Philippines, South Africa, among others have introduced legislations in reaction to the US jurisdiciton although they were always framed in abstract terms. See J.-G. Castel, *The extraterritorial effects of antitrust laws* (1984).

[107] Martyniszyn, *supra* note 35, at P. 18 and 28.

[108] WTO official database, *WTO | Regional Trade Agreements*, December 2016, available at http://rtais.wto.org/UI/PublicAllRTAList.aspx (last visited 25 February 2017].

[109] OECD, *Improving International Co-Operation in Cartel Investigations*, available at http://www.fne.gob.cl/wp-content/uploads/2014/03/OECD_-2012-Improving-international-cooperation-in-cartel-investigations1.pdf (last visited 26 January 2017], at P. 31.

[110] Cernat, 'Eager to Ink, but Ready to Act?', in P. Brusick, A. M. Alvarez and L. Cernat (eds.), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 1 , at P. 34.

From 2005 to 2016, the number of RTAs have continued to increase but the competition provisions in these RTAs lacked details on the implementation. The factors identified in 2007 remain valid: "*…cooperation is too costly to be pursued, as the agreements* [were] *ill-designed in a way that the burdens for cooperation tend to be higher that the perceived benefits arising from it …* [and] *there* [was] *no real interest in spending the resources required to push such cooperation.."*[111] The latter was exacerbated by the lack of national coordination between competition authorities on the one hand and trade negotiators on the other.[112]

However, progress in this particular regard has been taken place which has also been accompanied by the strengthening of the capacity in developing and transition RTA members that has been achieved in part by the reinforced commitment from developed countries to effectively address the main competition-policy concerns of their trading partners.[113]

5.1. Informal cooperation: unleashing its full potential

Whether it is a mature or young competition authority, informal cooperation has proven to be a tool that can shed tangible results.[114] With its two types of informal arrangements (general[115] or case-specific[116]), there is a wider consensus that informal cooperation is an integral part of the work of competition authorities when they interact internationally.[117]

However, to unleash the full potential of informal cooperation in the case specific context and at all the three stages of investigations, competition authorities would need to appreciate the usefulness of sharing non-confidential information such as public and agency information under

[111] Rosenberg, 'National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements', in *Implementing Competition-Related Provisions in Regional Trade Agreements: Is It Possible to Obtain Development Gains?* (2007) 5 , at P. 7.

[112] Horna and Kayali, 'National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements', in *Implementing Competition-Related Provisions in Regional Trade Agreements: Is It Possible to Obtain Development Gains?* (2007) 21 , at P. 55.

[113]

[114] For a further analysis of the exchange of information and evidence between competition authorities, particularly the case of the Polish Competition Authority, see M. Błachucki and S. Jóźwiak, *Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights*, SSRN Scholarly Paper, ID 2130849 (2012), available at https://papers.ssrn.com/abstract=2130849 (last visited 26 January 2017].

[115] "*General informal cooperation can take place in conferences, bilateral meetings and other forms of exchange of knowledge and information that can be shared between competition experts in the course of their deliberations. Also, capacity-building and technical assistance cooperation may provide the platform where beneficiary countries can get together and promote common objectives. In this regard, UNCTAD, OECD and ICN are engaged in this type of informal cooperation through their contributions to multilateral, regional and bilateral meetings*". UNCTAD, *Informal Cooperation among Competition Authorities in Specific Cases*, TD/B/C.I/CLP/29 (2014), at P. 6.

[116] "*Case-specific informal cooperation could include discussion of investigation strategies, market information and witness evaluations. It would also entail sharing leads and comparing authority approaches to common cases. This form of cooperation can help young competition authorities in particular to streamline an investigative strategy and focus an investigation*". *Ibid.*

[117] Informal information sharing is an important tool that many competition Authorities utilize as an enforcement strategy ICN, *supra* note 214, at P. 9.

the meaning provided earlier.[118] On case specific informal cooperation, the usual interaction is when various competition authorities engage in CBC investigations[119]

Section 2: Procedural legal issues

1. Problems arising in implementing cooperation agreements

1.1. Complexity and duration of certain cooperation procedures

> *"Generally speaking, when competition agencies wish to exchange more sensitive information, or wish to use information formally in their proceedings, they must exchange such information through formal avenues."*[120]

When the incentives to cooperate are met, formal cooperation schemes have been precisely designed to exchange information that would not normally be shared in informal settings.[121] The quotation above presupposes the idea of having the willingness to enter into formal arrangements.[122] Yet, reality can be surprising in some occasions when formal cooperation agreements have been used to "break-the-ice strategies" where two competition agencies do not necessarily want to cooperate but they are obliged to do so, due to specific circumstances.[123]

---

[118] Mature Authorities currently exchange information on a variety of issues such as background information of the industry, sharing of case theories or the disclosure of investigative or analytical findings. Bilateral meetings at the management level generally involve high-level discussions of common cases, including the status of the investigation and other case-related information. In addition, bilateral meetings are also a good forum to discuss policy issues, or to seek guidance from another competition agency on a specific issue or concern. All these informal cooperation settings can take a number of forms including in-person meetings, e-mail exchanges, and telephone calls between individuals or case teams. ICN (ed.), *supra* note 212, at P. 9.

[119] '...cas'.... This form of contact normally occurs when multiple competition agencies are investigating the same or similar conduct in their respective jurisdictions. The contact can occur through in-person meetings, by e-mail, or by telephone. However, in-person meetings are rare due to logistical difficulties with arranging these meetings between several competition agencies. Multilateral contacts tyCBCally include discussions of investigative and analytical findings, the sharing of case theories and the coordination of formal powers..." ICN, *supra* note 221, at P. 9.

[120] *Ibid.*

[121] See for example the international cooperation agreement signed between the US and EU in 1991 whereby both authorities agree for a more formalized approach of 'rapid' consultations procedures and dispute avoidance mechanism in Competition matters. See Ham, 'International Cooperation in the Anti-Trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities', 30 *Common Market Law Review* (1993) 571 , at P. 571.

[122] International cooperation in cartel enforcement presents specific features different from other anticompetitive practices such as mergers or unilateral conducts at the international level. There is sufficient evidence of the harmful effects of hard-core cross-border cartels to developing countries and countries in transition since the detection and sanctioning of CBCs in 1990s. Due to the intrinsic international nature of cartels, key domestic tools provided by domestic laws such as dawn raids and leniency programmes become insufficient to target cross-border cartels. Classic international instruments such as formal cooperation agreements have proven to be underused due to the diverse legal standing of anti-cartel laws (administrative vs. criminal offences) and the inability of legal treaties to overcome these difficulties. See Cowen and Sutter, 'The Costs of Cooperation', 12 *The Review of Austrian Economics* (1999) 161.

[123] Consider the case of China's Competition Law. The Antimonopoly Law (AML) is a product of compromise based on existing political and economic realities and 'pragmatism'. The Law was drafted as short and abstract so its future implementation will

Due to the increasing number of competition laws and authorities worldwide, different types of formal arrangements have proliferated over the last decade. The State-to-State cooperation agreements ("Agreements"), Agency-to-Agency cooperation arrangements ("Arrangements"), Mutual Legal Assistance Treaties ("MLATs"), Free Trade Agreements ("FTAs"), Economic Partnership Agreements ("EPAs"), Regional Trade Agreements ("RTAs"), and Memoranda of Understanding ("MOUs") and domestic provisions. Each of these formal tools provides competition agencies with unique ways to share information with their foreign counterparts.[124]

Out of all these forms of formal cooperation, the following sections review the two most common forms of bilateral cooperation: Memorandum of Understanding vs. Agreements; and Competition Chapters being part of Regional Trade Agreements. In many different ways, these formal tools have provided alternative approaches to informal cooperation being the following: (1) Effective cooperation on the basis of publicly available or non-confidential information; (2) Waivers of confidentiality; (3) Building cooperative relationships; and (4) Deferral to partners in appropriate cases.[125]

a. Memoranda of Understandings vs. Agreements: the legal principle of "Comity"

Following the long-standing tradition of application of the Comity-legal-principle of international public law[126] for over 100 years,[127] the principle has been employed in a number of areas where competition law is not the exception. In this regard, international co-operation in the competition field would present two types of comity: negative [128]and positive.[129] The latter type appeared to be the best strategy to ensure reciprocal understanding of laws and procedures and hence the exponential number of cooperation agreements and memoranda of understanding signed the recent decade, as in 2011 when major jurisdictions (US and EU) signed agreements and memoranda of understanding with emerging jurisdictions such as China and Russia.[130]

---

prove to be a trial-and-error process. See Huang, 'Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law', 75 *Antitrust Law Journal* (2008) 117 , at P. 131.

[124] ICN, *supra* note 116, at P. 10.

[125] Damtoft, 'Mechanisms for Cooperation: Informal Cooperation', (2014) , available at http://unctad.org/meetings/en/Presentation/CCPB_IGE2014_RTPRESInfCoop_USFTC_en.pdf (last visited 23 February 2017] , at Slide 11.

[126] For a complete overview of the Comity in International Law see: Paul, 'Comity in International Law', 32 *Harvard International Law Journal* (1991) 1.

[127] '*Comity is the legal principle whereby a country should take other countries' important interests into account while conducting its law enforcement activities, in return for their doing the same… Comity is therefore a horizontal, sovereign state –to-sovereign state concept, as laid down by the United States Supreme Court in Hilton v Guyot in 1895.2 It is not the abdication of jurisdiction; instead, it is the exercise of jurisdiction with an accompanying understanding of the impact that the exercise of jurisdiction may have on the law enforcement activities of other countries*." OECD, *supra* note 293, at P. 20.

[128] "*Negative or traditional comity involves a country's consideration of how to prevent its laws and law enforcement actions from harming another country's important interests…*" *Ibid*, at P. 20.

[129] "*…Positive comity involves a request by one country that another country undertake enforcement activities in order to remedy allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the referring country…*" *Ibid.*, at P. 21.

[130] EU & Russian Governments, *MoU on Cooperation between the Directorate-General for Competition of the EU Commission and the Russian Federal Antimonopoly Service*, 10 March 2011, available at http://ec.europa.eu/competition/international/bilateral/mou_russia_en.pdf (last visited 22 February 2017]US & Chinese

In the area of mergers, more cooperation has been achieved with China such as the cooperation agreement signed between DG Competition and the Ministry of Commerce of the People's Republic of China (MOFCOM) in 2015. [131]

The positive comity provisions would aim at enabling the country which was adversely affected by an anticompetitive practice that was originated in the other signatory country, to act on behalf of the originating and affected country and enforce competition rules accordingly.[132] Unfortunately, despite the potential benefits of positive comity, the instrument has been infrequently. This is because the principle is not a principle of national law, has no legal force, and remains a discretionary prerogative, the scope of which may be limited substantially by competition authorities with scarce resources.[133]

Ideally, if these agreements would have been used more often, there would have been real and meaningful cooperation, through which exchange of "non-confidential" information and synchronization of investigations, notably in relation to CBCs, and coordination of enforcement activities can take place.[134] That was the case of the bilateral agreement signed between the US and EU in 1991[135] and renewed in 1998[136] which also embedded a notification alert whereby each party would notify its partner when a case was likely to affect important interests of the other party.

1.2. The issue of handling confidential information in join-investigation cases hampers the accountability and effectiveness of already established networks (formal or informal) of competition agencies. Absence of waivers of confidentiality. Barriers related to "confidential information"

In an OECD/ICN survey of 2013, the OECD and non-OECD member countries claimed that "…*there is no commonly agreed definition at the international level concerning what information is "confidential" in competition matters. Some responses also indicate that there may be different*

Governments, *MoU on Antitrust and Antimonopoly Cooperation between US Department of Justice/US Federal Trade Commission; and the People's Republic of China National Development and Reform Commission (NDRC) , Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC)*, 27 July 2011, available at https://www.justice.gov/sites/default/files/atr/legacy/2011/08/03/273310a.pdf (last visited 18 February 2017)*Ibid.*

[131] See Slaughter and May, 'EU Competition & Regulatory. Legal and Policy Developments at the EU Level', (2015) , available at https://www.slaughterandmay.com/media/2534641/eu-competition-and-regulatory-newsletter-16-oct-22-oct-2015.pdf (last visited 10 April 2017].

[132] Although these provisions have rarely been formally activated but they are an inspiration for daily cooperation. An important exception to this observation is the so-called Nordic Cooperation when positive comity provisions are often activated. See Nordic Cartel Network, *Joint Contribution by Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden - IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS: THE NORDIC CARTEL NETWORK: A REGIONAL MODEL FOR COOPERATION BETWEEN CARTEL UNITS OF COMPETITION AUTHORITIES*, DAF/COMP/GF/WD(2012)34 (2012).

[133] OECD, *supra* note 108, at P. 23.

[134] Djelic and Kleiner, 'The International Competition Network: Moving towards Transnational Governance', *Transnational Governance: Institutional Dynamics of Regulation* (2006) 287 , at P. 10.

[135] US & EU Governments, *Agreement between US and EU on the Application of Their Competition Laws*, 23 September 1991, available at http://www.jstor.org/stable/20693634 (last visited 22 February 2017].

[136] Y. US & EU Governments, *Agreement between US and EU on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws*, 4 June 1998, available at http://www.jstor.org/stable/20698829 (last visited 22 February 2017].

definitions within the same jurisdiction (…) These definitions of "confidential information" are not necessarily included in legal statutes, but may instead be developed by practices of the enforcement agencies and of the courts."[137]

An international standard approach to determine what is confidential has been difficult to achieve as the standards and methods for such determination differs across countries and legal systems. [138] Indeed, the said OECD/ICN survey mentioned that jurisdictions would have one or more of the following criteria to define confidential information:

(1) **By the nature and type of the information**: would mean that if the information provided is disclosed, it would harm the commercial interests of the source that trusted the authority. In the OECD/ICN survey, the majority of respondents would consider business secrets to be confidential but others authorities would differ from that particular benchmark.[139]

For instance, under US Law, a definition of "confidential information" can be extracted from Article 1905 of the US Code which prescribes that confidential information should be regarded as "*information [that] concerns or relates to the trade secrets, processes, operations, style of work, or apparatus, or to the identity, confidential statistical data, amount or source of any income, profits, losses, or expenditures of any person, firm, partnership, corporation, or association; or permits any income return or copy thereof or any book containing any abstract or particulars thereof…"*[140]

In EU laws and regulations, confidential information is linked to the term "professional secrecy" that every EU official must observe and covers all kinds of information related to companies (undertakings), their business relations or their cost components.[141] In this definition the term "business secrets" arises as information such as technical or financial information relating to an *"… undertaking's know-how, methods of assessing methods of assessing costs, production secrets and processes, supply sources, quantities produced and sold, market shares, customer and distributor lists, marketing plans, cost and price structure and sales strategy..."*[142] The notion of confidential information under EU laws includes other types of confidential information such as "…*information that would enable the parties to identify complainants or other third parties where those have a justified wish to remain anonymous. The category of other confidential information also includes military secrets…"*[143]

[137] OECD & ICN, *Secretariat Report on the OECD/ICN Survey on International Enforcement Co-Operation*, International Enforcement Co-operation (2013), available at http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf (last visited 25 February 2017], at P. 127.
[138] H. Shan, *Protection of Trade Secrets in China* (2008), at P. 58.
[139] Other survey respondents considered confidential any information which is prejudicial to the commercial position of the subject matter. OECD & ICN, *supra* note 443, at P. 128.
[140] *18 U.S. Code § 1905 - Disclosure of Confidential Information Generally*, LII / Legal Information Institute, available at https://www.law.cornell.edu/uscode/text/18/1905 (last visited 24 March 2017].
[141] *Contribution from the European Union - Discussion on How to Define Confidential Information*, DAF/COMP/WP3/WD(2013)57 (2013), available at http://ec.europa.eu/competition/international/multilateral/2013_oct_confidential%20information_en.pdf (last visited 24 March 2017], at P. 2-3.
[142] *Ibid.*, at P. 3.
[143] *Ibid.*, at P. 3.

Finally, in China, confidential information is associated with the term trade secret and is often referred as information "*unknown to the public* [which means] *that the information is unknown to, and is difficult to be obtained by, the relevant personnel in the relevant field…*"[144] Interestingly, according to China's Supreme People Court, there are exceptions to the definition of trade secrets which are enumerated expressly in the jurisprudence.[145]

As can be seen above, similarities and differences between the definitions of confidential information in EU, US and China can be provided in order. While there are some similarities between the definitions of trade secret as part of the definition of confidential information between US and EU,[146] differences remain as for the scope of the term *confidential information* amongst Chinese, US and EU laws. For instance, China's definition of "trade secret" is blurry as its real meaning is left to be determined by the jurisprudence of courts. Another difference between China and EU relies on the level of protection of trade secrets: while trade secrets need to be protected in accordance with Unfair Competition Laws in China, in EU, trade secret protection is protected differently in every EU member State. [147] In the US, trade secret is mainly protected from misappropriation by State laws and the Uniform Trade Secrets Act (UTSA), which codifies the basic principles of common law trade secret protection, adopted by the majority of the States in the US.[148]

(2) **By the way in which the information is collected:** the majority of OECD/ICN respondents said that they would "….*consider confidential any information obtained by the competition authority in the course of performance of its official duties and functions*…" [149] The latter has been endorsed recently at the latest ICN Annual Conference whereby a few interviewees coming from young competition jurisdictions highlighting that any information that is gathered by the authority should be deemed as confidential, particularly

[144] Foley et al., *Trade Secret Protection in China: A Perspective from China and Hong Kong | Lexology*, available at http://www.lexology.com/library/detail.aspx?g=bee3d833-06b9-4c01-861b-e49c3dadda6c (last visited 24 March 2017].

[145] These exceptions are: "…(*1) The information is common sense or common industrial practice for the personnel in the relevant technical or economic field; (2) The information only involves a simple combination of dimensions, structures, materials, and parts of products, and can be directly obtained through the observation of products by the relevant public after the products enter into the market. (3) The information has been publicly disclosed in any publication or any other mass medium. (4) The information has been publicized through reports or exhibits. (5) The information can be obtained through other public channels. (6) The information can be easily obtained at little or no cost…*" *Ibid.*

[146] . The similarities are: "*(1) The owner or person lawfully in control of the information must have taken reasonable steps to maintain its secrecy; 2. The information must be secret in the sense that it is neither generally known to nor readily ascertainable by another person; and 3. The information must derive economic or commercial value from its secrecy….*" B. Ankenbrandt and T. Vormann, *Comparing U.S. and EU Trade Secret Laws* (2016), available at http://www.transatlanticbusiness.org/wp-content/uploads/2016/07/US-EU-Trade-Secret-Comparison-30-June-2016.pdf (last visited 24 March 2017], at P. 5.

[147] For example, in Italy, trade secrets are protected under the intellectual property law. In France and Germany, they are protected under unfair competition laws, in the Netherlands under tort law, and in the UK and Ireland under breach of confidence rules. See China IPR SME Helpdesk, *Intellectual Property Systems: China/Europe Comparison* (2015), available at http://www.china-iprhelpdesk.eu/sites/all/docs/publications/Intellectual_Property_Systems_China_Europe_Comparison.pdf (last visited 28 March 2017], at P. 5.

[148] B. T. Yeh, *Protection of Trade Secrets: Overview of Current Law and Legislation*, CRS Report prepared for Members and Committees of Congress (2016), available at https://fas.org/sgp/crs/secrecy/R43714.pdf (last visited 28 March 2017], at P. 6.

[149] OECD & ICN, *supra* note 136, at P. 128.

that information that has been provided by the parties in an open investigation, regardless of the nature, type, or purpose.[150]

(3) **By the purpose for which the information was collected or submitted:** if the information is submitted for a pre-merger notification, it would need to be considered confidential and not to cross-fertilize other proceedings that the authority is undertaking such as a cartel investigation.[151] This definition of confidential information is restricted and reflects the level of caution and excessive care of the information provided in a course of an investigation. In some cases, this level of high-level of protection can be considered to be excessive and can reflect the inexperience that some young competition authorities could have when they consider that everything that the parties said needs to be treated as confidential otherwise they would not provide that information. [152]

(4) **By the way the parties define it:** in a course of an open investigation, the parties can and probably will consider that all information provided needs to be treated as confidential. In other words, "*… any information that the source has defined as such is considered confidential"*[153]. That consideration would need to be automatically endorsed by the authority. Fortunately, only 8 respondents of 55 authorities surveyed in the OECD/ICN report said that option. [154]

For the reasons provided above, there are important differences amongst jurisdictions as per the definition of confidential information. Indeed, these differences and the lack of a workable international definition of confidential information hampers the exchange information between competition authorities because of the failure to draw a line between confidential information that cannot be shared with other authorities in the absence of waivers, and information that can be indeed shared with others. This limitation is more pronounced in cartel investigations whereby the use of waivers of confidentiality is less used in cartel investigations than it is in the case of merger cases. [155]

OECD countries have failed to agree on an international benchmark on the definition of confidential information in order to differentiate it from the areas where "sharable" information can be exchanged in the three stages of a cartel investigation. As such, ICN defined four types of information (public, agency, party information and information obtained from the parties at the

[150] Irrarazabal, 'International Cooperation in Cartel Enforcement: the Chilean experience', (2017) and Lozano, *supra* note 549.
[151] OECD & ICN, *supra* note 136, at P. 128.
[152] As Nicaragua is considered a young competition authority, the lack of a robust competition culture in the business sector is still a problem. This is also reflected when the authority investigates cartels: If they do not consider the information provided by the parties as 'confidential', the parties would simply reject to cooperate and provide the information. Interview at the ICN Annual Conference in Porto with Luis Guzman, 'International Cooperation in Cartel Enforcement: the Nicaraguan experience', (2017).
[153] OECD & ICN, *supra* note 136, at P. 128.
[154] *Ibid.*
[155] OECD, *NATIONAL AND INTERNATIONAL PROVISIONS FOR THE EXCHANGE OF CONFIDENTIAL INFORMATION BETWEEN COMPETITION AGENCIES WITHOUT WAIVERS*, DAF/COMP/WP3(2013)4 (2013), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2013)4&doclanguage=en (last visited 17 February 2017], at P. 2.

request of other parties) there is no common agreement as to what information should be protected under confidentiality domestic rules and which other types of information should not as each competition jurisdiction has its own rules regarding confidentiality, in particular those rules related to the rights of the investigation parties and the public to access information in the agencies' files.[156]

As a result, in many instances requesting competition authorities would need to "…*engage in a time-consuming coordination process to avoid possible accusations form the firms or individuals that provided the information to the authority receiving the request*…" [157] And the latter would take place provided the mature competition authorities have the necessary incentives to cooperate and share information with a young one. Incentives to cooperate are always a constraint and would only be possible if there are common enforcement interests between a mature and a young competition authority.

In sum, the lack of an international definition of confidential information is a problem for exchange information in an international cooperation scheme. As seen above, different views, approaches and interpretations at the domestic legislations have created a number of differences amongst the legal definitions of confidential information provided by the example of US, EU, Chinese laws. The latter is exacerbated by the fact that the confidentiality test that competition authorities undertake when the information received at the investigatory phase differs from jurisdiction to jurisdiction. Part III of the research deals with this particular problem and provides solutions to further consolidate an international benchmark of what is "sharable" information as oppose to defining the term "confidential".

2. Problems arising in implementing leniency and immunity programmes

Based on the interviews carried out for this research[158], the most recurrent issue for Transnational CBCs is leniency, specifically how leniency programmes are being implemented in younger jurisdictions when an international leniency applicant wishes to incorporate these jurisdictions in the transnational case.

Mature competition authorities have devised a practice of executing waivers when sharing with each other confidential information in cross-border leniency applications. This practice works in

[156] For example, Turkey's Competition Authority recently published a communiqué on the right to access the file and the protection of trade secrets; the agency is required to balance the need to use evidence to prove its case against legitimate confidentiality claims. Chile's Transparency Act allows any person to request any specific document or more general information from the FNE, but provides justifications for FNE to deny such requests in order to protect the confidentiality of business secrets OECD, *Procedural Fairness and Transparency. Key Points* (2012), available at http://www.oecd.org/competition/mergers/50235955.pdf (last visited 23 March 2017], at P. 17.

[157] UNCTAD, *Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures*, TD/B/C.I/CLP/44 (2017), available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf (last visited 16 May 2017], at P. 5.

[158] See the list of all interviews in annex of the present report.

instances because among these mature or large authorities and the international leniency applicants' trust in these mature competition authorities. This may not be the case when it comes to the leniency practices of young competition authorities. Hence, it is important to discuss the issues which must be resolved by younger authorities that wish to take advantage of this international machinery for cooperation.

2.1. Differences in leniency regimes between mature and young competition authorities' jurisdictions

For many young and small competition authorities getting the types of information at the investigatory phase can be considered as a dead-end in itself due to a structural problem of ill-designed leniency programmes that led to lack of implementation at the domestic level or in other jurisdictions, non-existence of these leniency programmes. Therefore, adding to the complexity of moving forward cross-border cooperation with mature competition authorities as they would expect that leniency programmes are in place in younger jurisdictions so they can ask for waivers to the leniency applicants in order to share information with its younger peers.

Indeed, transnational CBC investigations create additional hurdles as the evidence can be found in multijurisdictional places where cooperation is selective between a handful of competition agencies (the usual suspects) and information exchange between new comers (young competition agencies) might lead to failures in getting the evidence needed in this particular phase because of the lack of leniency programmes or the lack of trust of leniency applicants to grant waivers to mature competition authorities to share information with younger jurisdictions.[159]

2.2. Lack of effective implementation of leniency programmes in young competition authorities

The main problem in many younger jurisdictions and even in mature ones is the lack of a successful implementation of leniency programmes at the domestic level due to a number of factors such as "*…State dominance of the economy at least until the 1980s and continued State monopolies, higher variability in development among sectors, and different socio-economic and political factors..*" [160]. These factors have conceivably influenced the effectiveness of a leniency programme in a jurisdiction that is actively fighting cartels.

For instance, in Latin America, leniency programmes remains a critical challenge, with the exceptions of Brazil, Chile and Mexico. By 2016, while Argentina, Bolivia, Costa Rica, Paraguay and

[159] In accordance to an interview conducted with the Head of the Competition Commission of Singapore, leniency is critical for the development of good trust relations between mature and young competition authorities. If Leniency is not well developed in younger jurisdictions, there is little chance for a successful cooperation between these authorities. See HAN LI, 'International Cooperation in Cartel Enforcement: The Singaporean Experience', (2017).
[160] UNCTAD, *supra* note 54, at P. 15.

Venezuela do not have a formal leniency programme established by law, Ecuador, Panama, Peru and Uruguay do have formal leniency programmes but no leniency cases so far.[161]

In a recent interview with the head of the Authority of Panama claimed that the main reason as to why Panama has no leniency cases after 10 years of implementation is attributed to the fact that the majority of cases that the Panamanian Competition Authority (ACODECO) has been investigating are related to bid-rigging activity in public procurement bids whereby there is a criminal dimension and ACODECO cannot guarantee the criminal immunity to the whistle blower.[162] Another problem associated to the lack of implementation is that any leniency application will not pre-empt private damage actions triggered by cartel victims[163]. In both cases, legal reform should follow to reinforce the leniency programmes.

2.3. Lack of trust by the leniency applicants in providing a confidentiality waiver to young competition authorities

As a consequence of the lack of effective leniency programmes or in the absence of those in younger jurisdictions, leniency applicants cannot provide confidentiality waivers to these authorities dealing with mature ones.[164] In addition, even if the leniency programme is in place in younger jurisdiction, there is always the question of trust by the leniency applicants as to how much the confidential information shared by the mature competition authorities can actually be kept in confidentiality in the younger jurisdiction. [165] In other words, the whole system would not work if leniency applicants do not have confidence in the confidentiality practice of younger competition authorities. [166]

Another problem as to why leniency applicants do not trust younger jurisdictions' leniency programmes is related to the lack of clear formulation as to what exactly the terms of the waiver should be (whether a full or procedural waiver should be disclosed[167]) . In fact, despite efforts carried out by ICN in the formulation of template waivers in cross-border leniency applications,[168] many young competition authorities do not have a clear view as to how a waiver should be limit the consent of a leniency applicant in accordance to domestic confidentiality rules.[169] In a

[161] Young Council Latin American Regional Forum, *supra* note 57, at P. 5-6.
[162] Interview at the ICN Annual Conference in Porto, Portugal on 11 May 2017. Cardoze, 'International Cooperation in Cartel Enforcement: the Panama experience', (2017).
[163] Although in Panama, civil damage actions have not been successful at all in civil courts. See *Ibid.*
[164] Bezzi, Marcus, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the General Manager of the Australian Competition and Consumer Protection Commission', (2017).
[165] Indeed, it has occurred in practice that when the confidential information is being exchanged between a mature and younger competition authority, the information has been leaked to public domain the very next day of the information exchanged. See Interview at the ICN Annual Conference in Porto. Han Li, Toh, *supra* note 158.
[166] UNCTAD, *supra* note 156, at P. 5.
[167] Whereas the purpose of the procedural waiver is the coordination of key investigative steps between competition authorities; a full waiver would contain beside the procedural aspects, the exchange of information between authorities on the substance of the leniency applicant's submission. See ICN, *Waivers of Confidentiality in Cartel Investigations - Explanatory Note*, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1012.pdf (last visited 17 February 2017].
[168] See ICN, *supra* note 166.
[169] In the ASEAN region, younger competition authorities would need to always interact with mature ones (Australia) in order to get the best international practice as to how a waiver should be prepared. Australia can always refer to the ICN template and that has been effective to avoid different levels of confidentiality being disclosed. See Bezzi, Marcus, *supra* note 163.

transnational CBC, a waiver of confidentiality provided by the parties would provide a variety of confidential information submitted in the context of CBC investigation with another competition authority (younger) dealing with the same CBC but the decision of a leniency applicant to waive the right to confidentiality protection is voluntary and therefore it would rely entirely on trust that unfortunately is not yet there in many younger jurisdictions.[170]

Indeed a young competition authority wishing to request information from their mature ones, a two-way trust needs to be in place in order to smooth cooperation between the two authorities. For instance, when the Colombian Competition Authority opened an investigation in the transnational Auto Parts cartel, it had little or no trust in its counterparts in Japan and US. As such, although the Colombian Competition Authority recognized that the US-Department of Justice (DOJ) involvement's at the initial stage of investigation could help establish the case by providing information on which firms had already pleaded guilty, it had difficulty doing so as there was no previous close cooperative relationship between the Colombian Competition Authority and the US-DOJ.[171]

2.4. Lack of specific cooperation arrangements of mutual recognition in leniency and immunity issues

As discussed earlier, leniency programs are increasingly being used by young and small competition authorities to gain access to information about cartels. The implementation of these leniency programs, however, is negatively impacted by the lack of an agreement between jurisdictions regarding the access to foreign evidence coming from a leniency application as well as the lack of coordination between civil, administrative and criminal proceedings in the affected jurisdictions.[172]

In the stage where competition authorities are urging for pieces of information, evidence, public but not immediate accessible information to open their formal cartel investigations, the fact of not having coordination mechanisms as per the evidence gathered from leniency applications harms considerably the way the information can be transmitted to the requesting authority.

[170] A clear distinction can be found among mature competition authorities whereby parties and leniency applicants would trust that the information provided can actually be treated with cautious and no leak of information would occur. For instance at the Transnational CBC of the Bearing automotive cartel discussed in Chapter 2, the international leniency application submitted to US, Canada and Europe, incorporated in a later stage the Australian Competition Commission. The ACCC received a notification of the bearing automotive cartel thanks to a waiver submitted to US and Canada whereby it allowed having discussions on the case. This actually led to a different outcome of the case in Australia as the Australian based conduct was different to the allegations made in counterpart jurisdictions that there was no need to follow-up with a document exchanged request. See Bezzi, *supra* note 202, at Slide 9.

[171] SIC, Superintendencia de Industria y Comercio, *Colombia Autoparts Cartel - Closing the Investigation*, Resolution No. 37523, 24 July 2015.

[172] See more in: Hansen, Crocco and Kennedy, 'Challenges to International Cartel Enforcement and Multi-Jurisdictional Leniency Applications–Disclosure of Leniency Applicant Statements and Materials', in *ABA International Cartel Workshop, Vancouver* (2012) 1.

Failure to agree on a definition of confidential information hampers the way information from leniency can flow between competition authorities. It is well settled that "*…the protection of the confidentiality of leniency applicant statements against disclosure in Court is commonly seen as a cornerstone of leniency regimes…"*[173] The name of the leniency applicant and its unlawful practices in a given jurisdiction has been considered as confidential information and kept as such by major jurisdictions such as the US whereby US' DOJ Antitrust Division had to deal with this problem by plea agreements in open courts.[174]

Another key issue is the young competition authorities' lack of trust in sharing the leniency information with competition authorities in other jurisdictions, even if such information resulted from its knowledge of the market and the intelligence that it gathers red during the pre-investigatory cartel investigation phase. This problem illustrated in the countries neighbouring South Africa.

There, even if the legal standing of cartels are the same (i.e., criminal in nature), cartel leniency confessions and settlements in South Africa have not resulted in similar confessions in the Southern African Custom Union (SACU) and the Southern African Development Community (SADC) countries (Botswana, Namibia, Swaziland, Zambia and Zimbabwe), even if there are functional competition authorities. The asymmetry between South Africa and the rest of the SACU/SADC young competition agencies have led to uncover and punish regional CBCs in key sectors such as fertiliser, petroleum, and cement that are of relevance primarily to South African domestic markets.[175]

In sum, developing countries' competition regimes are struggling to implement effective leniency programmes. The issues of trust are based on the perception of a number of procedural issues that each jurisdiction presents in cases where the leniency programme works. As a result, the issues connected to this problem are as follows:

[173] *Ibid.*, at P. 2.

[174] "*…Since 1993, with the adoption of the DOJ Antitrust Division's Corporate Leniency Policy, a bedrock principle of the leniency program in the United States has been the ironclad assurance of confidentiality for all leniency applicants. In 2008, the DOJ reiterated this principle and stated that: '[t]he Division holds the identity of leniency applicants and the information they provide in strict confidence, much like the treatment afforded to confidential informants. Therefore, the Division does not publicly disclose the identity of a leniency applicant or information provided by the applicant, absent prior disclosure by, or agreement with, the applicant, unless required to do so by court order in connection with litigation.'The Division also adopted a 'policy of not disclosing to foreign antitrust agencies information obtained from a leniency applicant unless the leniency applicant agrees first to the disclosure.' The Division has been able to dutifully abide by these confidentiality guarantees in most cases and most, if not all, of the information supplied by a leniency applicant has been kept confidential and out of the public domain…*" *Ibid.*, at P. 13.

[175] See more Kaira, 'A Cartel in South Africa Is a Cartel in a Neighbouring Country: Why Has the Successful Cartel Leniency Policy in South Africa Not Resulted into Automatic Cartel Confessions in Economically Interdependent Neighbouring Countries?', *Competition Authority of Botswana* (2015) , available at http://www.competition.org.za/s/Thula-Kaira_Regional-cartels.pdf (last visited 8 February 2017].

- Different timing of investigative steps
- Different tests for marker/immunity/leniency
- Different scope of proceedings, hence of immunity/leniency
- “Leaks” from leniency to non-leniency jurisdiction
- Risk of evidence “leaking” to third parties, such as plaintiffs
- Conflicting demands on applicant’s internal investigation
- Difficulty of reconciling demands on witnesses
- Inability to comply with strict confidentiality requirements in leniency regimes (such as the EU regime)

Section 3: Solutions and novel proposals

1. Proposed solutions

1.1. To address different legal standing of cartel offenses: appointment of one or more lead jurisdiction(s) in cross-border cases

The "lead jurisdiction" concept involves assigning one jurisdiction to investigate an international case under its own laws and procedures. The lead jurisdiction , with the assistance of the other affected jurisdictions, decide the case, taking into account all the views and interests of the different jurisdictions. As a result of having a lead jurisdiction, the legal standing problem may be addressed by selecting the most appropriate safeguards when it comes to due process, handle of evidence and the standard of proof in competition cases.

This model drew inspiration from the patent dispute resolution system developed by the Hague Conference on Private International Law, taking into account the asymmetric countries' development and the relationship of private parties involved in a multijurisdictional litigation.[176]

There are indeed advantages to this model as it would avoid multiple and parallel proceedings and therefore a community of interests among jurisdictions need to be achieved so as to allocate all individual interests of jurisdictions in one single case. As such, "…*the lead jurisdiction model incentivizes relevant jurisdictions to consider not only their own country interests, but the interests of all affected interests…"*[177]

Problems, may however, arise when two or more jurisdictions consider themselves "better placed" to investigate a particular CBC and to decide "on behalf" of all affected jurisdictions. Hence, an objective and least-discretionary criteria must be adopted to avoid these shortcomings of the system.[178] Intrusiveness may be at stake here in particular when the lead jurisdiction model is a mandatory one. Another challenge is when the lead jurisdiction cannot reconcile the interests of all affected jurisdictions because of distinctive rules and procedures as well as business cultural values. In this connection, let us compare two different sub-regions of the word: the Nordic and Central American one. In the former one (Nordic Cartel Network), competition rules are well harmonized and cultural business values are well aligned as well as trust between the competition

[176] See more in Municoy, 'Allocation of Jurisdiction on Patent Disputes in the Models Developed by the Hague Conference in Private International Law: Asymmetric Countries and the Relationship of Private Parties', 4 *Chicago-Kent Journal of Intellectual Property* (2004) 342.
[177] Capobianco and Nagy, 'Survey: Developments in International Enforcement Co-Operation in the Competition Field', 7 *Journal of European Competition Law & Practice* (2016) 566 , at P. 15.
[178] *Ibid.*

authorities have been well developed over time.[179] The latter (Central American) has been trying to harmonize practices through the Network of Competition Authorities (RECAC) and even proposed a regional institutional framework based on the commonality of cultural business values within the Central American countries. However, trust between the competition authorities may need to be more developed in order to achieve what the Nordic authorities have achieved in terms of agreeing who could the "lead" jurisdiction in certain regional CBCs.

Furthermore, the lead jurisdiction model, however, could pose serious sovereignty problems to the different jurisdictions, as it did when Costa Rica decided not to recognize the jurisdiction of the Central American Court of Justice when the other Central American peers agreed that this regional court might have jurisdiction to deal with regional CBCs in Central America.[180]

1.2. To address the differences in leniency applications: Alignment of Leniency Requirements Across Mature and Young jurisdictions through "One-Stop Shop" Models

Due to the growing number of countries having leniency programmes and the divergences between leniency and markers across jurisdictions, the Business and Industry Advisory Committee (BIAC), in 2013, proposed to the OECD member countries to set up a "one-stop shop" marker policy that can be able to provide uniformity application on how markers are carried out in different jurisdictions.[181] To improve cooperation in multiple jurisdictions when it comes to leniency applications and markers, the experience of the International Patent System established by the Patent Convention Treaty (PCT)[182] administered by the World Intellectual Property Organization (WIPO) can serve as inspiration.[183] The PCT allows one single application made at any of the WIPO member countries to have cross-border effects in the other member countries, that is to say, an automatic recognition in foreign jurisdictions, provided local conditions of the granting patent local authority are met.[184]

One-stop shop models for leniency applications could increase administrative efficacy by avoiding duplication of efforts and fragmentation of administrative costs and ensure that relevant and timely information is provided to the relevant competition authorities.[185]

---

[179] "*…The Nordic Competition Authorities established in 2000 a model for cooperation between respective units for cartel investigation, the Nordic Cartel Network (NCN). The purpose of the cooperation was solely practical: Discussing cases and case collaboration, investigating techniques and other cartel and investigation issues of mutual interest...*" Nordic Cartel Network, *supra* note 284, at P. 2.

[180] E. E. País, *Costa Rica ignora una orden de la Corte Centroamericana de Justicia*, 18 January 2012, EL PAÍS, available at http://internacional.elpais.com/internacional/2012/01/18/actualidad/1326926845_688633.html (last visited 4 April 2017].

[181] Business and Industry Advisory Committee to the OECD (BIAC), *supra* note 42, at P. 3-4.

[182] The PCT is an international treaty with more than 145 Contracting States. The PCT makes it possible to seek patent protection for an invention simultaneously in a large number of countries by filing a single 'international' patent application instead of filing several separate national or regional patent applications. See Patent Cooperation Treaty, 19 June 1970.

[183] Capobianco and Nagy, *supra* note 177, at P. 12.

[184] *PCT FAQs*, available at /pct/en/faqs/faqs.html (last visited 28 March 2017].

[185] Capobianco and Nagy, *supra* note 177, at P. 12.

Calls for a "One-Stop European Leniency Shop" gained ground after the modernization of European Competition Law in 2003.[186] This eventually led to the launch of a Model Leniency Programme by the European Competition Network (ECN) to improve the handling of parallel leniency applications in the ECN.[187]

The solution proposed here may be problematic for young competition authorities since the actual enforcement of this option would mean first that domestic leniency programmes are effective and that, for a number of reasons in younger competition regimes, are not the case. There are heavy burdens related to sharing information between competition authorities in order to implement an effective one-stop shop and take full advantage of its benefits.[188] Indeed, this information would be crucial for the success of the investigation as competition authorities would obtain the necessary information to decide whether or not to open a formal investigation, and this would be jeopardized by the divergence of procedures and requirements to open investigations among competition authorities, even within the EU competition law, where procedural laws still have some differences among the 27 member States.

Another problem is that a one-stop shop solution does not necessarily ensure coherent outcomes as the single location reception authority only receives all leniency applications but does not harmonize the substantive rules under different time schedules after the initial stage of notification/filings.[189] Of course, from the perspective of businesses, this option of harmonizing the substantive rules of leniency programmes would be an ideal one but requires serious harmonizing efforts from the part of the competition authorities and to that extent, the efforts made by the ICN in sharing the leniency materials and programmes of each of its members prove to be a valuable point of departure.[190]

1.3. A Solution proposed for Export CBC proceedings: Foreign States' Amicus Curiae to Domestic Competition Cases

In 2007, *Sweeney* proposed a possible arrangement to curb out export cartels while suggesting the alignment of incentives for both, exporting and importing countries.[191] The discussion could also be more critical when many developing countries are suffering from export cartels coming from

[186] See C. Gauer and M. Jaspers, *Designing a European Solution for A 'one-Stop Leniency Shop'*, 2006, available at https://www.biicl.org/files/2498_designing_a_european_solution_for_one_stop_leniency.pdf (last visited 28 March 2017].

[187] The Model Programme responds to the call for a one stop leniency shop and offers a set of rules on which all ECN programmes can align. It is therefore a first step towards a harmonised leniency policy throughout the EU. It sets out the main procedural and substantive rules which the ECN members believe should be common in all programmes *European Commission - PRESS RELEASES - Press Release - Competition: The European Competition Network Launches a Model Leniency Programme – Frequently Asked Questions*, available at http://europa.eu/rapid/press-release_MEMO-06-356_en.htm (last visited 28 March 2017].

[188] Capobianco and Nagy, *supra* note 177, at P. 14.

[189] *Ibid.*

[190] See more ICN, *Leniency Materials. Country/Organization + Link(s) to Leniency Program Materials*, available at http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx (last visited 17 February 2017].

[191] Sweeney, 'Export Cartels: Is There a Need for Global Rules?', 10 *Journal of International Economic Law* (2007) 87.

developed nations[192] such as in the case of the *American Soda Ash* cases in India[193] and South Africa whereby completely different outcomes were reached by the local jurisdictions attempting to apply the extraterritorially principle.[194]

Export cartels are often as a result of political motivated reasons where national governments would be supporting their exporters' efforts to hit specific foreign markets. In the current times of political uncertainty and the rise of populism,[195] one could expect that international export cartels would emerge as well as the imposition of tariffs on imports from imperfectly competitive foreign firms.[196]

For the reasons above, export CBCs could be effectively addressed when the submission of Amicus Curiae[197] by foreign competition authorities or governments in domestic competition cases due to the political dimension of this CBC and the specific trade and competition considerations that could be addressed jointly by a Ministry of foreign affairs action representing the interests of both: the competition authority and the trade authority of the importing country. As a result, speaking on "one voice" might help the frictions between the different implications of trade and competition authorities' actions.

According to *Martyniszyn,* foreign *amicus curiae* serve a number of useful functions in international competition cases. First, the appreciation of foreign laws, procedures and policies by the foreign jurisdiction itself can be instrumental in understanding the full nature of the international case being heard by a domestic jurisdiction. Second, it provides an opportunity to reach out to foreign jurisdictions and ease unnecessary frictions and misunderstandings from the international relation viewpoint. Third, from a collaborative perspective, it allows concerns to be voiced and considered on an ad-hoc basis (i.e., good neighbourliness).[198]

Evidence shows that foreign *amicus curiae* submissions are situated between the intersection of competition and international law.[199] This intersection is explained when a mature or large competition authority tries to accommodate the interests of these briefs where notably participation of foreign ministries through diplomatic channels and competition authorities is

[192] The author claims that while importing countries should evaluate foreign export cartels under a 'rule of reason', most of them will be constrained by a lack of technical expertise and limited enforcement capacity. A novel approach, based on parallels with anti-dumping procedures, would strengthen developing countries' efforts in dealing with export cartels. See more A. Bhattacharjea, *EXPORT CARTELS : A Developing Country Perspective*, Working paper, 120 (2004), available at https://ideas.repec.org/p/cde/cdewps/120.html (last visited 8 February 2017].

[193] Indeed, India was the first competition authority that investigate and prosecute an International Cartel which was the Soda Ash Export Cartel in 2006 Connor, 'The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America', (2016) , available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711972 (last visited 26 January 2017] , at P.6.

[194] Martyniszyn, 'Export Cartels: Is It Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15 *Journal of International Economic Law* (2012) 181 , at P. 17-26.

[195] See R. Inglehart and P. Norris, *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, SSRN Scholarly Paper, ID 2818659 (2016), available at https://papers.ssrn.com/abstract=2818659 (last visited 14 February 2017].

[196] See Brander and Spencer, 'Trade Warfare: Tariffs and Cartels', 16 *Journal of International Economics* (1984) 227.

[197] '*...An amicus brief is a submission of a person who is not a party to a lawsuit but who petitions the court or is requested by the court to file a brief in action because that person has a strong interest in the subject matter...*' Martyniszyn, 'Foreign States Amicus Curiae Participation in U.S. Antitrust Cases', 61 *The Antitrust Bulletin* (2016) 611 , at P. 612.

[198] *Ibid.*, at P. 640.

[199] See Martyniszyn, *supra* note 197.

taking place. For example, the US government has taken part in eleven foreign private actions representing public interests[200] in line with US interests, and with a clear deference between the courts and executive branch, speaking with "one voice" suggesting that the inter-governmental communication is critical.

The latter might be controversial and difficult to achieve in a young competition regime's setting as the adjudication in many new jurisdictions remains part of the executive branch through independent commissions ruling on competition cases at the administrative level and where courts and competition authorities may have different views on how the principle of deference should be triggered.

Moreover, while *amicus curiae* remain a "….*versatile instrument, potentially serving varios legal and political functions* [as] *they have the capacity to facilitate adjudication, influence development of international law (…) and serve domestic political ends without hampering foreign legal processes…"*[201] it seems that it has been only used between mature competition regimes and there is still a long way to go in terms of passing that experience to the vast majority of competition regimes in the world. In the last few decades, cases such as *Matushita, Hartford Fire* and *Empagran* have received *amicus curiae* submissions but it is unclear how these submissions were treated by the Courts and whether they were relevant to the subject matter before the court.[202]

1.4. To address the lack of an international definition of confidential information: information gateways & appropriate safeguards

The OECD has recommended that its member States promote "… *the adoption of legal provisions allowing for the exchange of confidential information between competition authorities without the need to obtain prior consent from the source of the information*." [203] "Information gateways" refer to domestic legal provisions or international agreements that explicitly empower the enforcement agency to exchange confidential information with other competition authorities in other jurisdictions under certain conditions.[204]

In 2013, the OECD reported that only 4 jurisdictions (UK, Australia, Canada and Germany) had provisions in their domestic legislation enabling them to exchange confidential information with

[200] These cases were: Pzifer v. Gov. of India (1978), Matsushita v. Zenith (1986), Hartfor Fire v. California (1994), US v. Nippon Paper (1997), F. Hoffmann La Roche v. Empagran (2004), Intel Copr v. Advanced Micro Devices (2004), US v. Gosselin World (2005), Stolt Nielsen v. US (2006), Spectrum Stores v. Citgo Petroleum (2011), In re Flat Glass II Antitrust Litigation (2012), Motorola v. Au Optronics (2015) *Ibid.*, at P. 638.
[201] *Ibid.*, at P. 642.
[202] *Ibid.*, at P. 612.
[203] OECD, *Recommendation of the OECD Council Concerning International Co-Operation on Competition Investigations and Proceedings* (2014), available at http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf (last visited 17 February 2017], at P. 7.
[204] OECD, *Contribution by OECD to the Roundtable on: 'Modalities and Procedures for International Cooperation in Competition Cases Involving More than One Country'* (2013), available at http://unctad.org/meetings/en/Contribution/IGE2013_RT1_OECD_en.pdf (last visited 16 May 2017], at P. 6.

other competition authorities without the consent of the parties.[205] In Latin America, only two competition authorities (Brazil in 2012[206] and Peru[207] in 2015) have adopted domestic legislations on the exchange of confidential information. At the regional level, provisions to exchange confidential information at the European Competition Network (ECN) exist.[208] These provisions are meant to facilitate considerably the exchange of "confidential" information amongst mature competition authorities. Of course, there are some costs that need to be borne by the adherent in terms of establishing sufficient safeguards to protect the confidential information exchanged.

The lack of information gateways between OECD members may be due to the fear that this will affect the businesses' confidence in the treatment of confidential information. This concern may be more pronounced when it comes to young competition regimes which have yet to prove to international companies that they can protect confidential information by robust legislation[209] or by technical capacity. As a result, information gateways may not be the best solution to foster trust by international leniency applicants.

If, however, competition authorities' legislations enable that possibility, this research proposes a modified version the existing information gateway options which can be used, subject to specific conditions being triggered. In this regard, in some cases that can avoid having counterfactual consequences of having information gateways in place for younger jurisdictions, at least, not at the beginning of the trust development process.

1.5. To address the diverse criteria in adjudication techniques: Recognition of Decisions made by Agencies or Courts in other Jurisdictions

A less complicated solution-based approach than the one provided by the private international law solution is the recognition of administrative decisions made by foreign competition authorities, notably mature ones, in multinational and transnational CBCs.[210] The idea behind this solution is to reduce duplication and the overall costs associated with parallel international investigations of the same CBC as well as saving the additional transaction costs of defining markets, establishing the duration of the cartel, detect the companies involved, among others.[211]

Clearly, this solution may be applicable at the adjudication phase after the two previous phases of the investigation are carried out (the pre-investigatory phase and the investigatory phase) and local elements of the cartel law in a given jurisdiction is incorporated in the adjudication process such

[205] See for instance the Part 9 of the UK Enterprise Act 2002. OECD & ICN, *supra* note 136, at P. 132.
[206] See Brazilian Decree No. 7.738/12 and CADE's resolution No. 1/12 Burnier da Silveira and Tardelli Tollini, 'CBCs in Brazil : An Overview and a Look Forward', in V. M. de Carvalho, C. E. J. Ragazzo and P. Burnier da Silveira (eds.), *International Cooperation and Competition Enforcement: Brazilian and European Experiences from the Enforcers' Perspective* (2014) , at P. 178-179.
[207] See Diario Oficial El Peruano, Peru Amendment of some Competition Act provisions, Decreto Legislativo 1205, 22 September 2015.
[208] OECD, *supra* note 203, at P. 6.
[209] Martyniszyn, 'Inter-Agency Evidence Sharing in Competition Law Enforcement', 19 *The International Journal of Evidence & Proof* (2015) 11 , at P. 26.
[210] Capobianco and Nagy, *supra* note 177, at P. 11.
[211] *Ibid.*, at P. 12.

as "*…identification of local costumers, calculating the local turnover in the jurisdiction for fining purposes…"*[212]

Although this solution has never been triggered as such, one could say that the Mexican and Brazilian prosecutions of the Lysine and Vitamin multinational CBCs in 1998 and 2007, may be a *de-facto* demonstration that competition authorities may rely their findings on other jurisdictions' administrative rulings to support their decisions to impose locally a cartel fine to international cartelists. Unfortunately, as has been discussed earlier, not all attempts to rely on foreign judging have been successful.[213] The solution proposed has the following limitations for young and small competition regimes:

(1) To have an enforceable and mandatory mutual recognition of judgements requires the entry into force of a treaty between nations. As such, the experience provided by the Australia-New Zealand cooperation which allows the mutual recognition and enforcement of each other's jurisdiction judgements is an exception to the general rule of the lack of international treaties that support this solution.[214]

(2) Even in the absence of international treaties, young competition authorities may rely *de facto* as in the case of Brazil or Mexico in foreign jurisdictions' rulings; the differences in legal systems may hamper the extent of recognition of foreign court decisions and evidence admissibility. Once again the discussion between legal standing of cartel offense may arise, in particular the dichotomy between civil vs criminal sanctions in multijurisdictional cartel investigations.

2. Novel proposals

The dynamics for trust development between mature and young competition authorities differ from that between young competition authorities particularly when we are dealing with transnational CBCs. In fact, in a transnational CBC, mature and young competition authorities would normally interact as the diversity of jurisdictions that the CBC affects.[215] Yet, there is a need to develop a special type of trust in this type of transnational CBCs where the mature competition authority is willing to cooperate with a younger one despite the costs of cooperation and the distributional costs. In addition, there should be an incentive to share certain type of information at the investigatory phase despite the fact that the type of information might be protected under confidentiality rules. And how the sharing of that information should be conducted under which

[212] *Ibid.*

[213] Cf. the case of Colombia with the Auto Parts Cartel Investigation in 2012. See at SIC, *supra* note 170.

[214] See *Agreement between the Government of Australia and the Government of New Zealand on Trans Tasman Court Proceedings and Regulatory Enforcement (Christchurch 24 July 2008) - [2013] ATS 32*, 11 October 2013, available at http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2013/32.html (last visited 27 March 2017].

[215] Conversely, if a regional CBC is at stake, normally, it may include a handful of young competition authorities' jurisdictions that are part of the regional grouping with a regional trade agreement that could also have competition provisions. As a result, the dynamics for trust development may depend on how the intra-trade relations between the member countries are shaped and whether trade and competition authorities of that particular regional grouping have a workable level of cooperation. See Chapter 9 *infra.*

platform, that is also another important building block that would need to be developed under this transnational scheme.

This Section proposes a three-prong approach. First it introduces a type of "experimental" trust between mature and young competition authorities. Second, it develops a concept of sharable information whether the mature competition authority is at the pre-investigatory or investigatory phase. Third, it builds on the platform in which the cooperation should take place, whether at the ICN registration framework or with a complementary feature provided by the UN platform.

2.1. Introducing calculus-based trust activities between mature and young competition authorities

This sub-section attempts to deal with a solution based on an inter-disciplinary approach to improve the dynamics of trust development between institutions based on the literature that has developed over the years on this subject matter. As competition authorities are public institutions organized in a certain structure and bound by certain public servant rules, there is a given role that trust can play in explaining the "business behaviour" in the way these competition authorities as organizations interact.

For these reasons, the structure of the present sub-section is as follows: First, the conceptual framework of Trust development to be used from other disciplines such as management and organization studies and other related ones. Second, how these concepts can apply to the world of authorities dealing with competition issues. Third, specific examples of how trust has been developed in certain regional groupings in the world, in particular within mature competition authorities and young competition ones.

2.1.1. The conceptual framework in trust development

The purpose of this sub-section is to deepen the theoretical framework about the definitions, approaches, types of trust in professional relationships as well as ways to develop trust in organizations or institutions.

Trust has been ordinarily regarded as *"….the glue that holds a relationship together…"*[216] but indeed the term "trust" has received different attention in several branches of social science literature such as psychology, sociology, political science, economics, anthropology, history and socio-biology and each social science branch would approach the problem of trust with its own disciplinary lens and filters. [217] Different definitions of trust could emerge from the above, for instance, trust can be regarded as a manifestation of calculation and self-interest, or as a combination of relations dependent on the underlying social reality. Recent literature has included three approaches to trust: (1) trust as accumulated capital where trust is seen as individualist interests to uphold one's reputation; (2) trust as risk as all transactions boil down to a calculation of the costs/benefits to be derived from a relationship; and (3) trust as a relationship of delegation that will depend on the

[216] Lewicki, 'Trust, Trust Development, and Trust Repair', in M. Deutsch, P. Coleman and E. Marcus (eds.), *The Handbook of Conflict Resolution: Theory and Practice* 2. ed (2006) , at P. 92.
[217] *Ibid.*, at P. 93.

broader social network than the relationship itself. [218] As a result, trust can be developed in different ways if one is to reach institutional-based trust and interaction-based trust. As such, trusting someone builds on a decision which is based on an assessment of the other party's competence, integrity, benevolence, including a rough and quick semi-conscious assessment of the unrecoverable costs that would occur if the other party turned out to be untrustworthy.

For these reasons, while there are several definitions and conceptualizations of trust between business relationships, a definition provided by sociologists and economists that focus trust as an institutional phenomenon whereby there is a "*…belief that future interactions will continue, based on explicit or implicit rules and norms…"* [219] As such, trust in organizational contexts has become critically important. See below the following quotation:

> *"Trust has become a central concept in explaining business behaviour in organizational contexts. The ability to create trust has been widely recognized as hugely valuable because it can significantly reduce transaction costs and lead to the creation of new ideas, for example when knowledge is pooled in inter-organizational relationships."*[220]

Organizational scholars have introduced the concept of "institutional-based" trust as a contrast to the concept of "interaction-based" trust. While the latter would develop "*…on the basis of personal face-to-face experience between two (or more) individuals without references made or being necessary to make institutional…*"[221]; the former "*… is a form of individual or collective action that is constitutively embedded in the institutional environment in which a relationship is placed …*[222]" From the economic point of view, trust is related to confidence under the principal-agent relationship whereby the relations between them need to be "*…sufficiently strong so that the agent will not cheat even though it may be rational economic behaviour to do so..*."[223]

Within the institutional-based trust, Shapiro et al. suggested three types of trust in professional relationships: **deterrence-based trust, knowledge-based trust and identification-based trust.**[224] In what follows, let us examine each of these types.

2.1.2. Deterrence-based or calculus-based trust (CBT)

CBT is sustained by the threat of punishment if consistency is not maintained whereby individuals would do what they promise because they fear the consequences of not doing what they say. Therefore, the significant motivator of this type of trust is the "threat of punishment" rather than the promise of the reward. In economic terms, this type of trust is "*…an ongoing, market-oriented,*

[218] Reynaud, 'Forms of Trust and Conditions for Their Stability', 41 *Cambridge Journal of Economics* (2017) 127 , at P. 128.
[219] Citing Rousseau, Sitkin, Burt, and Camerer, Lewicki conceptualized trust as a phenomenon within and among institutions. See Lewicki, *supra* note 216, at P. 93.
[220] Bachmann and Inkpen, 'Understanding Institutional-Based Trust Building Processes in Inter-Organizational Relationships', 32 *Organization Studies* (2011) 281 , at P. 281.
[221] *Ibid.*, at P. 284.
[222] *Ibid.*
[223] Reynaud, *supra* note 218, at P. 128.
[224] See Shapiro, Sheppard and Cheraskin, 'Business on a Handshake', 8 *Negotiation Journal* (1992) 365.

a mere economic calculation whose value is determined by the outcomes resulting from creating and sustaining the relationship relative to the costs of maintaining or severing it..." [225]

An example of this type of trust can be seen in the MOU signed between a mature authority (US) and a young authority (China) in 2011[226]. Both authorities engaged in a number of institutional activities that yielded the costs and benefits in entering into an MOU based on interdependence factors marked by geopolitical global dynamics. Being the two most powerful economies in the world, there are associated costs if one of the parties enter into cheating arrangements so as to destroy CBT and therefore the deterrence element is a more dominant motivator than the benefit-seeking elements. Thus, punishment for non-consistency was more likely to produce CBT than rewards or incentives derived from maintaining trust. After 6 years (2011-2017) of the signature of the MOU, there is little likelihood to sign a more comprehensive or full-fledge cooperation agreement between these two nations as CBT is the only trust that can be maintained giving the changing geopolitical dynamics. [227]

2.1.3. Knowledge-based trust (KBT)

With the difference with CBT, KBT relies on information rather than deterrence. KBT is grounded in behavioural predictability as one would have enough information about others to understand them and to accurately predict their likely behaviour.[228] KBT is based on reciprocal information of the counterpart: *"…the better we know the other individual, the more accurately we can predict that he or she will do…"* In this regard, KBT will remain as long as the other remain predictable, that is confirming our knowledge and acting consistently with that knowledge. There are three dimensions of KBT: information, predictability and accurate prediction. [229]

An example of this KBT can be found in the signing of the *Lima Declaration* informal cooperation agreement in Latin America. KBT was critical in the negotiation of the agreement between Colombia, Chile and Peru as peer and young competition authorities in order to work together against CBCs and other type of CAPs. UNCTAD was instrumental to facilitate the prior negotiations as well as the Peruvian Competition Authority when they organised a session with all South American counterparts months prior the signing of the agreement in September 2013. Repeated interactions and regular communications between the three heads of the authorities enhanced the ability to understand the way the other approaches the enforcement of competition rules at the domestic level are in connection to the trustor of the trilateral business relationship. In addition, a database of key competition cases was incorporated in the informal cooperation arrangement which led to the detailed awareness of each other's competition cases and enforcement challenges. KBT allowed the three Latin American competition authorities to move forward with a commissioned report to UNCTAD on how the claim of confidentiality is assessed by each jurisdictions and measures to harmonize these practices in the future. Finally, KBT took place in

[225] Lewicki and Bunker, 'Trust in Relationships. A Model of Development and Decline', in B. Bunker and J. Z. Rubin (eds.), *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch.* (1995) , at P.145.
[226] US & Chinese Governments, *supra* note 129.
[227] For a more detailed geopolitical analysis of the relations between US and China, see A. Lee, *What the U.S. Can Learn from China: An Open-Minded Guide to Treating Our Greatest Competitor as Our Greatest Teacher* (1st ed, 2012).
[228] Lewicki and Bunker, *supra* note 225, at P. 142.
[229] Shapiro et al., *supra* note 224.

two formats: institution-based and interaction-based. That means that a combination of the two forms of building trust took place to reach a workable level of KBT that allowed the signature of the *Lima Declaration* in September 2013 at the OECD Latin American Competition Forum. [230]

2.1.4. Identification-based trust (IBT)

IBT involves the full internalization of the other's desires and intentions take place as a result of a complete and mutual understanding of both parties or institutions to the extent that each can effectively act for the other without surveillance or monitoring of the trusted activities.[231] In fact, the "acting for each other" in IBT relations would mean that the parties may come to know each other better and identify with the other in such a way that the parties would understand what they should do in order to sustain the others' trust in the long run.

A classic example of IBT in the competition world is the Nordic Competition Network (NCN). Well before the regional model for cooperation between the cartel units of the Nordic competition authorities formed in 2000, the Nordic countries (Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden) are high trust countries which are characterized by ethnic homogeneity, protestant religious traditions, good government, wealth and income equality.[232] NCN has developed as a result of these critical contextual factors that have shaped the work of cartel investigations at the regional or local levels. [233] Based on IBT, members of the NCN would meet to discuss common enforcement interests prior to making investigation in a business with possible links to other Nordic countries.

2.1.5. How the framework is applicable to competition authorities' business model

As discussed above, CBT, KB,T and IBT are types of trust that can be found in the cross-border consultations that are being held between competition authorities. Indeed, if one looks closely at these types of trusts, CBT would govern the relations between mature and young competition authorities based on the rationale that a scarce level of knowledge of each other is a constant variable between these institutions and the level of deterrence that can take place between the asymmetric relationships. In accordance to the head of a relatively advanced but still young competition authority (Chile), the best way to interact with mature competition authorities is to show them how the case-interaction cooperation can be mutually benefit between the two competition authorities, as such the mature competition authority would slowly understand the importance of engaging with younger authorities that can actually contribute to their own investigation at the domestic level. [234] In some situations, a younger competition authority wishing to enter cooperation with a mature one would like to first incorporate a third party (convener) in

[230] Tassano, 'La Declaración de Lima: Una acción concreta para el fortalecimiento de la cooperación entre agencias en la fiscalización de actividades anticompetitivas transfronterizas', 2 *Revista de Defesa da Concorrência* (2014) 4.
[231] Lewicki, *supra* note 216, at P. 96.
[232] For a detailed analysis on how national level of social trust can be achieved in different settings worlwide as opposed to the nordic model, see Delhey and Newton, 'Predicting Cross-National Levels of Social Trust: Global Pattern or Nordic Exceptionalism?', 21 *European Sociological Review* (2005) 311.
[233] Critical factors such as cultural similarities, harmonized competition legislations, among others. Nordic Cartel Network, *supra* note 131, at P. 222-223.
[234] Interview at the ICN Annual Conference in Porto with Irrarazabal, Felipe, *supra* note 149.

the cooperation scheme so as to provide the credentials needed between the first-time encounters. [235]

Conversely, KBT can govern the relations within young competition authorities given the incentives to come forward with the information needed to trust each other as the example of the Lima Declaration. Perhaps in some instances, IBT can easily developed between mature competition authorities only due to a number of critical factors that embedded the *institutional economics* of these countries because of the way laws and institutions are being set up.

In any case, as competition authorities are public institutions composed by civil servants, institutional based trust would be the governing feature with some critical insights on how personal interaction can also be developed. With the caveat that in young competition authorities where a high turnover of staff is common, one cannot rely on personal trust dynamics and therefore the reputation of the young competition authority would be the critical asset in the relations with mature authorities.

2.1.6. The role of technical assistance and capacity building in creating trust between mature and young competition authorities

At worldwide conferences such as the International Competition Network (ICN)[236] or the intergovernmental group of experts on competition law and policy of the United Nations Conference on Trade and Development (UNCTAD),[237] mature and young competition authorities can meet and interact. For some young authorities, this interaction can be the first one where two heads of authorities can introduce themselves.[238] That sort of interaction could be reflected in a later stage in capacity building and technical assistance activities which could eventually lead to form the necessary basis for future case-based cooperation. As a result, technical assistance and capacity building do have a role in fostering trust, in particular CBT as the younger competition authority would be interested in receiving assistance and support from the mature authority and in return, the mature authority can get specific information regarding an investigation whereby the younger competition authority may contribute to provide leads and evidence.[239]

In some instances, it would be more important to develop CBT activities between two competition authorities rather than trying to implement competition provisions already signed within regional trade agreements. An example of this was the relationship between the competition authorities of Panama and Taiwan. In fact, trade relations between Taiwan and Panama were established in 2003

[235] Kovacic, William, *supra* note 71.
[236] See Chapter 3 *supra.*
[237] See Chapter 3 *supra*
[238] For instance, thanks to this preliminary interaction, competition authorities such as Panama and Taiwan can interact and that would be the basis for further interactions and exchange of experiences between these two authorities as indeed happened when they met at the OECD Global Competition Forum and later ACODECO (Panama) sent its officers to participate in study tours to the Taiwan Competition Authority. Interview at the ICN Annual Conference in Porto with Cardoze, Oscar, *supra* note 161.
[239] Indeed the latter has happened in different instances. For instance, when the US open an investigation to the Vitamins Multinational CBC 12 years ago, they openly request a number of younger competition authorities worlwide to ascertain what would be the effects of this multinational cartel in their own markets. As such, Panama received an open and very specific request from US antitrust authorities on this particular case. *Ibid.*

when they signed a free trade agreement which included a chapter on competition whereby cooperation was included as a provision.[240] It was until the two heads of the authority met in an international conference and exchanged staffs that real cooperation took place years after the signature of the trade agreement. The latter proves that more important for specific cooperation between competition authorities that having competition provisions in free trade agreements is to have the initial interaction whereby the officers from both competition authorities interact and that can form the basis for further work together. As such, this would be an example whereby CBT and KBT can complement each other as both competition authorities have similar levels of development. Therefore, in a possible transnational CBC investigation, Panama and Taiwan would be ready to cooperate and share agency information based on the CBT activities that they undertook prior to the case-based cooperation.

For competition authorities younger than Panama, a revealing testimony from a Central American competition authority established only in 2006 said that the source of information to gather information outside their region in a hypothetical transnational CBC investigation would be the sensitive information that international organizations might access such as the World Bank or the Inter-American Development Bank.[241] Others would say that in a transnational CBC investigation, one of the first actions to undertake is to ask a third and possible mature competition authority to "introduce" and provide the "credentials" to an unknown competition authority that is seeking information or need to provide information.[242] In all these cases, there is a component of technical assistance and capacity building that either mature authorities or international organizations would do to engage with newer and younger authorities wishing to internationally cooperate with more advanced authorities. The first-time interaction between these authorities could be regarded as CBT activities not only from the part of the mature authority wishing to engage with a younger one, but also the younger authority wishing to receive assistance that they need in order to create the necessary capacity to deal with complex competition cases affecting their domestic markets.

2.2. Setting up an international benchmark for the definition of "sharable information"

For private practitioners and mature competition authorities, having an international benchmark of the definition of confidential information would be a desirable solution to smooth information exchange flows with young competition authorities.[243]

[240] Indeed the wording of Article 15.02 regarding cooperation said : " *The Parties recognize the importance of the cooperation and coordination in the application of their enforcement mechanisms, including notification, consultations and mutual exchange of information regarding the enforcement of the competition laws and policies in the area of free trade as long as they do not contravene legal obligations regarding confidentiality*". Panama & Taiwan Governments, *Panama - Taiwan Free Trade Agreement*, 21 August 2003, available at http://www.sice.oas.org/Trade/PanRC/PANRC_e.ASP (last visited 18 May 2017].

[241] Interview at the ICN Annual Conference in Porto with Lozano, Alberto, *supra* note 149.

[242] In an interview with the head of the Chilean Competition Authority, if Chile would need to interact with an ASEAN younger competition authority such as the Philippines or Brunei Darussalam, he would ask the US authorities to make the proper introduction as they handle worldwide technical assistance cooperation with all these authorities. The latter would facilitate the first-time interaction with a head of agency or officers in charge of cartel investigations. See Irrarazabal, *supra* note 772.

[243] Interview at the ICN Annual Conference, Porto from 10-12 May 2017 Anderson, David, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with a Brussels-Based Private Competition Practitioner', (2017).

This remains to be a challenging task as there is little agreement on what confidential information in the competition realm are. In international conventions and domestic legislations, confidential information typically refers to information that is "not generally known" or "not made publicly available."[244] In this sense, if the information is legally accessible then it is no longer confidential. Hence, there is a common understanding among countries that it would be "*…difficult for anyone but the holder of confidential information to obtain legally and only through exerting certain effort such as by investing a certain amount of time, material and human resource can a non-owner of the information find and access it….*"[245]

The types of information that competition authorities normally handled when investigating cartels. In this regard, reference was mentioned to the term "agency information" that reflects the level of expertise and aprioristic knowledge of a certain industry and the possible theory of harms that any competition authority would have when someone asks about a certain product or market. At the particular situation where a transnational CBC investigation is taking place and where often mature competition authorities would have already started their formal investigation and have enough information to share to their younger counterparts, the question would be what exactly would mean to share information overseas if technically there is no a common ground for the concept of confidential information so as to say that the information exchanged would be only taking place with non-confidential information.

This section dissects the type of information that can be exchanged in the three different stages of any cartel investigation at the international level: the pre-investigatory, investigatory and post-investigatory phases. Normally, the term *"…information exchanged is determined by a procedural definition of confidential information, namely "information obtained by investigative process…"* [246] In this regard, if one could differentiate that this type of information can only be gathered when a formal investigation is opened, then public and agency information types will not be essentially protected under confidentiality restrictions and therefore that would be the "sharable" information that competition authorities may exchange only within the pre-investigatory phase. As a result of that, without having second generation agreements such as the one signed between EU and Switzerland[247], competition authorities can only share information at the pre-investigatory phase when they have not opened formally an investigation.

Even at the pre-investigatory phase, when information handled by the authority does not strictly fall under the prism of confidentiality rules, there are strategic reasons as to why many competition authorities would not feel comfortable to share information overseas due to possible leaks to the companies operating in both jurisdictions and destruction of evidence prior to search warrants or

[244] Shan, *supra* note 138, at 58.
[245] *Ibid.*, at P. 59.
[246] V. Demedts, *Confidential Information Exchange in Competition Cases: Perception versus Reality in the EU and US* (2014), available at http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Demedts_Confidentional.pdf (last visited 23 March 2017], at P. 9.
[247] See EU & Swiss Governments, *Agreement between the EU and the Swiss Confederation concerning Cooperation on the Application of their Competition Laws*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A1203(01)&from=EN (last visited 22 February 2017].

dawn raids.[248] And unfortunately, it has happened in the past where a mature competition authority shared information to a younger one and the next day there was a press release in that country about that sensitive information.[249] The latter can undoubtedly hamper the trust between the authorities in such a manner that cooperation would not take place in the future.

Having said the foregoing, the proposal is to disaggregate the types of information needed to take transnational CBCs and to implement specific measures as to how information gateways could specially designed in the absence of effective leniency programmes in younger jurisdictions. Let us examine in detail the proposal.

2.2.1. Disaggregating the types of (confidential or not) information needed to tackle transnational CBCs

The present section briefly reviews the assessment of confidentiality by three Latin American competition authorities: Colombia, Chile and Peru and how the assessment might differ amongst these three young competition authorities. In what follows, an examination of what are the types of specific information that normally competition authorities receive in the course of the investigation and what should be deemed to be confidential and what not.

(1) **Criteria set by young competition authorities**: some relatively advanced[250] but young competition authorities[251] have been establishing its own guidelines for transparency purposes as to what would be the most objective criteria to assess what is confidential and what is not within the great amount of information gathered in the course of an investigation and often is claimed by the parties as confidential per se.[252] Often, younger competition authorities extend confidential treatment to information that is relevant to the case but for a number of reasons connected to the harmfulness of the disclosure of such information to commercial interests or competitive advantage of the owner of the information; interests of a private individual to whom the information pertains; public interest; or even to the nature of investigations conducted for the enforcement of the competition law. Therefore, defining the term "confidential business information" as "*…information which concerns or relates to the operations, production, sales, shipments, purchases, transfers, identification of customers, inventories, or amount or source of any*

[248] Several interviewees heads of agencies stated that a more possible scenario of sharing information with its foreign counterparts would be once they open an investigation and not before. See Cardoze, *supra* note 552; Irrarazabal, *supra* note 775; and Ratshisusu, 'International Cooperation in Cartel Enforcement: The South African Experience', (2017).

[249] Interview at the ICN Annual Conference in Porto with Han Li, Toh, *supra* note 158.

[250] See the case of Chile in: FNE Chile, *Instructivo Interno Para El Desarrollo de Investigationes de La Fiscalia Nacional Económica*, May 2013, available at http://www.fne.gob.cl/wp-content/uploads/2013/05/Instr._investigaciones_2013.pdf (last visited 18 May 2017].

[251] Notably is the case of the Peruvian Competition Authority issuing its guidelines for confidentiality based on its own practice and enforcement experience since 1992. See more in: INDECOPI, Peru Lineamiento sobre Confidencialidad de la Comision de Defensa de la Libre Competencia, vol. Resolution 027-2013/CLC-INDECOPI, 2013.

[252] Based on the author's observation and experience, some younger competition authorities such as the Philippines Competition Commission that was established in January 2016, are currently working on confidentiality rules that should be the basis for granting confidentiality to party's claims based on specific and objective grounds for confidential treatment. By April 2017, a set of rules on confidentiality are being prepared by the authority in an effort to objectively incorporate transparency on how information provided by the parties can be proclaimed "confidential" or not.

income, profits, losses, or expenditures…"[253] should not be enough to declare it as confidential. In fact, in some mature jurisdictions that information is not considered confidential as long as it is concerning the past and not current or future information.[254] In the case of Peru, the administrative jurisprudence considered six criteria under which the information should be considered confidential or not. The six criteria are: (i) that the information should be relevant to the case; (ii) that the company should precise what type of information needs to be considered confidential; (iii) that the company needs to justify the grounds as to which the information should be considered confidential; (iv) that the company should also present a summary of the information non-confidential; (v) that the information is not known to the public; and (vi) that the information is a commercial secret whose disclosure would be harmful to the company itself. [255]

(2) Criteria used to assess the confidential information by young competition authorities in Latin America: Colombia, Chile and Peru

As there is no an international definition of confidential information, competition authorities would need to examine on a case-by-case basis whether the information received by the parties is confidential or not. The following section takes three Latin American competition authorities as an example of this confidentiality test.

Three Latin American competition authorities signed in 2013 the so-called "*Lima declaration,"*[256] as an informal cooperation agreement on information sharing between its members in relation to enforcement competition activities. Two rights are involved when competition agencies assess the confidentiality of the information received: the right to access to public information (democratic accountability)[257] and the right to protect sensitive information of the companies. This is critical for young competition agencies that wish to get domestic legitimacy from their constituencies, and at the same time, protect constitutional rights and principles such as the right to information by any citizen. Young competition authorities in Latin America encounter difficulty getting information from companies as the latter claim that the information is "private" or "confidential" and, therefore, should not be disclosed to a public authority that will not protect adequately its content.

[253] Philippine Government, Rules and Regulations to Implement the Provisions of Republic Act No. 10667 (Philippine Competition Act), p. P. 2.
[254] Interview at the ICN Annual Conference in Porto with Bezzi, Marcus, *supra* note 163.
[255] According to Peruvian practice, all these six criteria needs to be fulfilled. Failure to do so, the whole confidentiality claim would be denied by the Authority. See INDECOPI, *supra* note 593.
[256] See Chile/Colombia/Peru Governments, *Lima Declaration*, September 2013, available at http://www.fne.gob.cl/wp-content/uploads/2013/09/dec_lima_2013.pdf (last visited 22 February 2017].
[257] '...The public's right to government-held information has been recognized by international human rights courts and implemented in national 'sunshine' and freedom of information (FOI) laws.." Natural Resource Governance Institute, *Chapter 3 : Commercially Sensitive Information and the Public Interest*, Contracts Confidential: ending secret deals in the extractive industries, available at http://www.resourcegovernance.org/sites/default/files/RWI_Contracts_Confidential_Chapter_3.pdf (last visited 7 April 2017], at 3.

In Chile[258] and Colombia,[259] the principle is to have full access to all public information handled by government institutions unless exceptions are made in certain cases.[260] Peru, on the other hand, follows the starting principle of "reserving" the public information for all administrative proceedings handled by public institutions[261] albeit the overall principle of "publicity" of government information.[262]

There is a difference between "reserve" and "confidential" information. In the above description, all administrative proceedings in Peru are "reserved," and may not be accessed by the public until the proceedings are finalized, unless the competition authority decides to grant that access to legitimate third parties or authorized competition handlers. "Confidential" information, on the other hand, needs to be previously declared as such by the competition authority when the parties submit and request that the information should be deemed as "confidential" in an open formal cartel investigations. The legal effect of that declaration would mean that only the competition authority will have access to that information and not the other parties' part of the proceedings.[263]

As for the test of confidentiality practiced by the competition authorities, in accordance to article 39 bis of the Chilean Competition Act, information that contains formulas, strategies or commercial secrets or any other element whose disclosure may impact the competitive situation of the company should be declared as "confidential"[264] unless that information is necessary to be transmitted to the other party so as to exercise its right to defence. In Peru, information provided by the party in a formal investigation can be declared "confidential" if that information is related to banking, tax, commercial, industrial, technological and stock exchange secrets as well as family and personal intimacy.[265] Indeed, out of the three countries under assessment, by 2017, only the Peruvian Competition Authority has issued specific guidelines regarding how to assess confidential information in competition cases,[266] including an annex whereby "*criteria to interpret the confidentiality requests*" is provided for transparency purposes.[267] This effort can be capitalized by the other peer competition authorities to harmonize their day-to-day practices. Unfortunately, the majority of young competition authorities do not have the level of advancement of the three competition authorities under review which are relatively more advanced that other young or small

[258] Biblioteca del Congreso Nacional, Chile - Transparencia de La Funcion Publica Y de Accesso a La Informacion de La Administracion Del Estado, Law 20.285, 20 August 2008.
[259] National Congress, Colombia Código de Procedimiento Administrativo Y de Lo Contencioso Administrativo., vol. Ley 1437, de enero de 2011.
[260] See Article 21 of the Transparency Law in Chile whereby exceptions are made to the overall principle of access to information. See Biblioteca del Congreso Nacional, *supra* note 590.
[261] Diario Oficial El Peruano, Peru Competition Act, Decreto Legislativo Nº 1044, 2008.
[262] National Congress, Peru Ley de Transparencia Y Accesso a La Informacion Publica, vol. Ley N° 27806, 13 July 2002.
[263] For example in Peru, the competition authority can negate the declaration of confidentiality if they believe that the other party needs that information to exercise its right for defence. (Due process considerations). See Diario Oficial El Peruano, *supra* note 101.
[264] See Article 39 FNE Chile, *supra* note 53.
[265] INDECOPI, *supra* note 250, at P. 6.
[266] Chile has some information but not as detailed as the Guidelines provided by the Peruvian Authority INDECOPI. See TDLC, Chile- Tribunal de Defensa de La Libre Competencia - Auto Acordado Sobre Reservan O Confidencialidad de La Informacion En Los Procesos, vol. Auto Acordado No. 15/2012, 2012.
[267] See Annex 1 INDECOPI, *supra* note 250.

competition authorities. Thus, there is still a great diversity of how competition authorities treat confidentiality in their administrative proceedings. This uncertainty harms any attempt to move forward in cooperating against the harmful effects of CBCs. Part III of the research proposes a solution to this problem.

In addition, within the framework of the sub-regional Andean competition law, article 24 of Decision 608 sets forth the criteria for the confidentiality treatment under Andean community competition law. There are 4 criteria that arises from this legal provision[268]: (1) Publicity of the information; (2) requested by the entity that provides the information; (3) the information needs to be justified such as industrial secrets on prices, and the like; (4) summary of the non-confidential information provided. [269]

(3) **Types of information handled by the authority:** Following the common practice of young competition authorities, there are different types of information that could be gathered in a course of an investigation: information about the company, prices, sales, commercial or contractual, financial or accounting, output or production, and other information such as the identity of the sources. In all these cases, as long as the information is already public but not easily accessible such as public registry of companies, known by the suppliers or clients of the company and so forth, that information should considered non-confidential. For instance, within the overall information of the company, the information that relates to the legal representatives of the company as well as their prerogatives are normally found in the public registry of commercial entities in a given jurisdiction and therefore should not be deemed as confidential. [270] Similarly, when it comes to information on prices, only the information about the price listing that has been already disclosed elsewhere should not be declared confidential.

(4) **Setting the benchmark for "sharable" information:**

Given that confidentiality is an essential element of trade secrets and has become the fundamental premise for their legal protection across jurisdictions because of the importance of having certain type of information "… *hidden from competitors because of the information's commercial value and the likelihood that competitors would copy it*….[271] In this regard, the first benchmark that should be incorporated in the framework should be "*whatever is not confidential or declared as such, is potentially sharable*". There are four types of information that a competition authority would handle: public information, agency information, information from the parties already in possession of one agency, information obtained from the parties at the request of another agency. Within these four types of information, there is always a possibility to share information with your foreign counterpart if the information has not been claimed as confidential.

[268] Interview at the ICN Annual Conference with Jean Paul Van Brackel Barbosa, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with a Staff Member of the Andean Community of Nations.', (2017).
[269] Gaceta Oficial del Acuerdo de Cartagena, CAN Regional Competition Law, Decision 608, Año XXII, vol. 1180, 4 April 2005, p. P. 6.
[270] INDECOPI, *supra* note 250.
[271] Hill, 'Trade Secrets, Unjust Enrichment, and the Classification of Obligations', *VIRGINIA JOURNAL of LAW and TECHNOLOGY* (1999) , available at http://www.vjolt.net/vol4/issue/home_art2.html (last visited 7 April 2017].

A second benchmark should be the incorporation of an overall definition of "sharable" information taking place in all stages of any cartel investigation. As such, already mature competition authorities such as the US have claimed that categories of "sharable" information should be (1) existence of a formal and open investigation; (2) theories of harm, markets or remedies; and (3) industry background.[272] A fourth category was proposed by a young enforcer in Central America: (4) the formation of the cartel. [273]

The problem with this second benchmark is that in some jurisdictions such as South Africa, the existence of a formal and open investigation can be a privilege information as be deemed as confidential because the information can be gathered from merger procedures cases whereby the information was gathered and declared "confidential".[274] In other jurisdictions such as Singapore, if the authority has not opened an investigation and is being requested by a foreign counterpart to disclose information about the industry, there is little that can be shared because the authority would not have any information about the industry.[275] In addition, younger but relatively advanced competition authorities such as Chile would claim that sharable information can only be exchanged when the authority opened and notified officially the parties or whether within a leniency application the information gathered is not declared confidential.[276] As a result, the first item regarding as "existence of a formal and open investigation" can only be disclosed once the parties have been notified, that is to say, at the beginning of the investigatory phase. [277] On the second and third item provided by the US (theories of harm and industry background), that would not be an issue to be shared with foreign counterparts in any stage of the investigation.

A third benchmark should be the information that is available in the internet but it is not easily reachable by foreign counterparts due to a number of reasons such as language barriers, public information handled and disseminated in selected networks, among other types of information that is not secret or has been already published by any entity worldwide.

2.3. . Strengthening the ICN Framework for promotion of sharing non-confidential information for cartel enforcement[278]

[272] Damtoft, *supra* note 343, at Slide 11.
[273] Odio-Rohrmoser, Edgar, 'Interview with the ex-Commissioner of the Costa Rican Competition Authority (COPROCOM)', (2017).
[274] See Interview at the ICN Annual Conference in Porto with Harin Ratshisusu, Mulalo Hardin, *supra* note 247.
[275] See Interview at the ICN Annual Conference in Porto with Han Li, Toh, *supra* note 158.
[276] See Interview at the ICN Annual Conference with Felipe Irrarazabal, Felipe, *supra* note 149.
[277] For example in Panama, the Competition Authority (ACODECO) would communicate the Ministry of Industry the ocurrence of the dawn raid only one hour before the scheduled time. See Interview at the ICN Annual Conference Porto with Oscar Cardoze, Oscar, *supra* note 161.
[278] This section is fully based on : Horna, 'David & Goliath: How Young Competition Agencies Can Succeed in Fighting Cross-Border Cartels', *The University of Oxford Centre for Competition Law and Policy* (2017) , available at

This sub-section does not aim to reinvent the wheel. Rather, it proposes to "start moving the wagon" with instruments that have already been adopted and proposed by young competition agencies as well as international networks such as the ICN and UN. The objective is to facilitate flow of "sharable information" at the pre-investigatory phase.

The ICN framework was proposed by Japan in 2014 and has been operational since January 2016. However, as of April 2017, only 33 ICN member agencies have registered for it.[279] This suggests an underlying need to advocate the importance of this framework by raising awareness of the benefits for young competition authorities in particular when dealing with Multinational CBCs as well as Transnational CBCs. According to the primary sources consulted, some cooperation cases among younger and smaller agencies have taken place but not made public under the ICN Framework.[280] Some other competition agencies have claimed to have little information about the ICN Framework.[281] The underutilization of the ICN Framework could be attributed to a host of issues, such as the differences between common and civil law jurisdictions when it comes to what public servants are permitted to do or disclose under the principles of administrative law, which could be as an important legal barrier against cooperation.[282] In addition, there are also difficulties associated with inter-agency evidence sharing in international competition cases[283], an issue that has been successfully addressed by the European Competition Network[284] under Regulation 1/ 2003.[285] Finally, factors such as lack of inter-organizational trust and incentives to cooperate might also be considered in the issue at stake. Other surrounding factors determine whether the ICN framework would be a success or not. [286]

Another limitation of the ICN Framework is that it limits cooperation between agencies that are members of the ICN and have been able to register onto the said framework. Notably, one important economy of the several emerging and large competition agencies, representing economies that greatly influence the world economic and trading order, and which are nowadays shaping important developments in international competition law instruments[287], is not a member

https://www.law.ox.ac.uk/sites/files/oxlaw/david_goliath_-_how_young_competition_agencies_can_succeed_in_fighting_cross-border_cartels_-_cclp_l_45.pdf (last visited 6 February 2017].

[279] Kasahara, 'International Coordination to Increase the Efficiency of Cartel Investigations', (2017) , at Slide 20.

[280] Interview with anonymous referees carried out in January 2017.

[281] Interview with the President of PROCOMPETENCIA Nicaragua, Dr. Luis Humberto Guzman, carried out in January 2017.

[282] Dyzenhaus, Hunt and Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation', 1 *Oxford University Commonwealth Law Journal* (2001) 5.

[283] See Martyniszyn, *supra* note 209.

[284] See Capobianco, 'Information Exchange under EC Competition Law', 41 *Common Market Law Review* (2004) 1247.

[285] Official Journal of the European Communities, *supra* note 37.

[286] Information-sharing research relate to 3 main levels: (1) interpersonal, (2) intra-organizational; and (3) inter-organizational levels. For a review of the literature on information-sharing Yang and Maxwell, 'Information-Sharing in Public Organizations: A Literature Review of Interpersonal, Intra-Organizational and Inter-Organizational Success Factors', 28 *Government Information Quarterly* (2011) 164.

[287] See the latest competition agreement in the BRICS countries at: BRICS Competition Authorities, *MoU between the BRICS Competition Authorities on Cooperation in the Field of Competition Law and Policy*, 19 May 2016, available at http://en.fas.gov.ru/upload/other/Memorandum%20of%20understanding%20between%20the%20BRICS%20competition%20authorities%20on%20cooperation%20in%20the%20field%20of%20competition%20law%20and%20policy.pdf.

of the ICN: China.[288] These agencies have shown the intention to cooperate in investigation efforts. For instance, the Russian Federation, being one of the biggest competition authorities in the world (in terms of number of employees)[289], has recently proposed to the UN the possibility of strengthening international cooperation in the investigation of cases.[290]

The future work of the ICN Cartel Working Group is to improve the anti-cartel enforcement across the whole membership of the ICN[291] . The challenge is to go beyond the usual cooperation among friends and colleagues from the major competition regulators which founded the ICN back in 2002,[292] and expand the cooperation to all members of the network and beyond. In sum, it appears that the ICN framework could be an effective mechanism that can be expanded towards other younger and smaller jurisdictions seeking to cooperate and share non-confidential information when investigating cross-border cartels. However, to unleash the full potential of, and improve the trust and confidence in, the ICN Framework, further enhancement and dissemination in multilateral meetings and enhanced transparency between the members are essential.

2.3.1. Weaving the UN mechanism into the ICN

ICN's efforts in providing mechanisms for younger and smaller agencies are instrumental but need further reinforcements and incentives for the members to rely on this system. There are three main reasons why a UN mechanism could strengthen the work of the ICN with the particularities and effectiveness of this framework.

(1) Young and small agencies' trust and confidence in UNCTAD's work on Competition law and Policy: Taking into account "*UNCTAD's long tradition of representing the interests of developing countries, its legitimacy as part of the U.N. system, and its continued focus on the linkage between competition and development…*"[293] younger and small competition agencies have appreciated the work of the UN in assisting them (through the government) in the enactment of their competition laws and capacity building efforts in strengthening their capacities and institutions to deal with competition law and policy implementation at large. UNCTAD has largely supported the development efforts of countries for a number of historical and political economy considerations.[294] Therefore, there is an underlying trust that countries,

[288] Hollman and Kovacic, 'The International Competition Network: Its Past, Current and Future Role', in P. Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (2011) 51 , at P. 275.
[289] In 2004, it was reported to have 1827 employees through the country with 75 regional offices. Presentation of the Federal Antimonopoly Service at the APEC Training Course in August 2005. See FAS, 'Federal Antimonopoly Service of the Russian Federation (FAS Russia)', (2005) , available at https://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2005/Group2/Efimov_fas.pdf (last visited 22 February 2017].
[290] R. F. W. FAS, *FAS Russia's Draft Toolkit on International Cooperation Is Now Available for Public Discussion | Федеральная Антимонопольная Служба - ФАС России*, 5 May 2017, available at http://en.fas.gov.ru/press-center/news/detail.html?id=49965 (last visited 8 May 2017].
[291] ICN, *Cartel Working Group 2015-2018 Work Plan*, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1041.pdf (last visited 8 May 2017].
[292] For a complete survey on how international networks respond to international cooperation problems worldwide see Marsden, 'Jaw-Jaw Not Law-Law - from Treaties to Meetings: The Increasing Informality and Effectiveness of International Cooperation', in A. Ezrachi (ed.), *Research Handbook on International Competition Law* (2012) 110.
[293] I. Lianos, *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, SSRN Scholarly Paper, ID 1398918 (2009), available at https://papers.ssrn.com/abstract=1398918 (last visited 31 January 2017], at P. 42.
[294] M. Williams, *Third World Cooperation: The Group of 77 in UNCTAD* (1991).

and the young and small agencies representing them, would have with UNCTAD and UN even before the creation of these agencies. Notably, UN instruments related to competition, such as the establishment of Committee III on Restrictive Business Practices (RBPs) at the first session of the preparatory committee of the United Nations Conference on Trade and Employment (UNCTAE) in Church House, Dean's Yard, London in February 1946[295] have long involved several jurisdictions.

(2) Wider membership in the UN: ICN wide membership is an asset but not all major economies are part of this network.[296] To maximize the opportunities for cooperation, it would be important to look at UN's expanded network under the auspices of UNCTAD, which covers all of the ICN members as well as all major economies which are not affiliated with ICN.[297] UNCTAD's experience in addressing broad interest across regions with different development and priority needs might be an asset in the growing membership of the ICN so as to avoid fissures throughout the choice of ICN topics to be addressed in its regular meetings.[298]

(3) Additional advocacy activities in the multilateral arena: The ICN Advocacy & Implementation Network Support Program (AISUP) does valuable work in encouraging ICN member agencies to greater implement ICN work products and promoting more efficient and effective antitrust enforcement worldwide by enhancing convergence and cooperation[299]. AISUP's efforts can be further enhanced by promoting ICN work products in wider audiences such as the UNCTAD's annual sessions of the UNCTAD Intergovernmental Group of Experts on Competition Law and Policy where competition agencies from the developing world are often present.

In what follows, Section F.4 of the UN Set will be reviewed accordingly.

There has been extensive scholarship on the emergence of the UN Set, which was adopted by the United Nations General Assembly in 1980.[300]Among the different matters covered by the

[295] Horna, 'Seventy Years of Work on Competition Law and Policy in the United Nations (1946-2016)', *Sofia Competition Forum Newsletter* (2016) 23.

[296] 'The most notable jurisdiction with a competition law and no representation in the ICN is China, which has three national competition agencies (MOFCOM, NDRC, and SAIC). China participates in the work of the OECD Competition Committee as an observer and is a member of UNCTAD. The Chinese agencies have not discussed their intentions concerning ICN membership'. Hollman and Kovacic, *supra* note 288, at P. 275 Note 3.

[297] At the latest UNCTAD meeting of October 2016, 22 delegates from China attended the meeting. See UNCTAD, *List of Participants of the Intergovernmental Group of Experts on Competition Law and Policy Fifteenth Session Geneva, 19–21 October 2016*, TD/B/C.I/CLP/INF.6 (2016), available at http://unctad.org/meetings/en/SessionalDocuments/ciclpinf6_en.pdf (last visited 17 February 2017].

[298] 'Assembling a portfolio of projects that suits a network's members arises from expansions of membership. As a competition policy network grows, it may be difficult to pick topics that command broad interest across the network. Fissures may emerge on the basis of regional differences (e.g., competition agencies in the island economies of the Caribbean may have needs that are alien to the landlocked nations of Central Asia) or wide gaps in experience. In addition to, or as a substitute for their participation in the large, multinational networks, some countries might choose to focus resources competition initiatives undertaken in the context of regional networks such as ASEAN, CARICOM, and COMESA… "Hollman and Kovacic, *supra* note 288.

[299] See ICN, *Activity Report on ICN Advocacy and Implementation Network Support Program (AISUP) 2011-2012* (2012), available at http://www.internationalcompetitionnetwork.org/uploads/library/doc814.pdf (last visited 8 May 2017].

[300] DAVIDOW, 'The UNCTAD Restrictive Business Practices Code', 13 *The International Lawyer* (1979) 587Davidow and Chiles, 'The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices', 72 *The American Journal of International Law* (1978) 247Fikentscher, 'United Nations Codes of Conduct: New Paths in

UN Set, Section F of the UN Set, related to international measures and voluntary consultations, has been the least explored and discussed.[301] Interestingly, recent expressions call for Section F's potential to be unleashed for the benefit of the vast majority of young and small competition regimes worldwide,[302] particularly by an important UN member State.[303] Section F of the UN Set on Competition was originally conceived to address the harmful effects of a cross-border cartel impacting a company seeking to get enforcement actions with the competition agency in its own jurisdiction.[304] Section F.4 describes a voluntary consultation scheme, which bear similarities to the ones contained by the 1976 OECD Guidelines and the voluntary consultations in the old General Agreement on Tariffs and Trade (GATT).[305]

"…4. Consultations:
(a) Where a State, particularly of a developing country, believes that a consultation with another State or States is appropriate in regard to an issue concerning control of restrictive business practices, it may request a consultation with those States with a view to finding a mutually acceptable solution. When a consultation is to be held, the States involved may request the Secretary-General of UNCTAD to provide mutually agreed conference facilities for such a consultation;
(b) States should accord full consideration to requests for consultations and, upon agreement as to the subject of and the procedures for such a consultation, the consultation should take place at an appropriate time;
(c) If the States involved so agree, a joint report on the consultations and their results should be prepared by the States involved and, if they so wish, with the assistance of the UNCTAD secretariat, and be made available to the Secretary-General of UNCTAD for inclusion in the annual report on restrictive business practices…"[306]

According to the above, there are the four key elements for the implementation of this provision: [307]

International Law', 30 *The American Journal of Comparative Law* (1982) 577Snell, 'Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity', 33 *Stan. J. Int'l L.* (1997) 215Timberg, 'Restrictive Business Practices as an Appropriate Subject for United Nations Action', 1 *Antitrust Bulletin* (1955) 409.

[301] Initially, UNCTAD was supposed to play a role in dispute settlement but after lively discussions during the December 1979, delegations did not agree to have a binding resolution but a set of principles whereby affected countries would go on consultations with no prior commitment to binding arbitration or conciliation. Benson, 'UN Conference on Restrictive Business Practices', 74 *The American Journal of International Law* (1980) 451 , at P. 452.

[302] In October 2016 at the 15th session of the IGE on Competition Law and Policy, the Russian Delegation to the United Nations submitted a key note speech delivered by the Head of the Federal Antimonopoly Service *FAS* whereby it was mentioned the need to further enhance the usefulness of Section F of the UN Set when it comes to investigation of cross-border competition cases. UNCTAD, *Report of the Intergovernmental Group of Experts on Competition Law and Policy on Its Fifteenth Session*, TD/B/C.I/CLP/40 (2016), available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd40_en.pdf (last visited 17 February 2017], at P. 4.

[303] As a result of consultations, in May 2017, the Russian Federation proposed a toolkit to operationalize section F of the UN Set. See FAS, *supra* note 767.

[304] UN, THE UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION, TD/RBP/CONF/10/Rev.2.

[305] Oesterle, 'United Nations Conference on Restrictive Business Practices', 14 *Cornell International Law Journal* (1981) 1 , at P. 44.

[306] UN, *supra* note 303.

[307] See Costa Rica's submission to the Sixth Review Conference of 2010 whereby it was proposed specific modalities for the implementation of the voluntary consultations provided for in Section F (4) of the Set. The proposed modalities included a number of requirements for the application, the envisaged elements to be included in the response of the request and the possible

1. An Issue Concerning the Control of "Restrictive Business Practices": The content of the term restrictive business practice used in Section F4(a) can be found in Section B(i)1 of the UN Set. Restrictive business practices are deemed to include, inter alia, "acts or behavior of enterprises which, through an abuse or acquisition and abuse of a dominant position of market power, limit access to markets or otherwise unduly restrain competition, having or being likely to have adverse effects on international trade". Section D of the UN Set also elaborates on the meaning of "restrictive business practices", particularly Sections D3 and D4, concerning horizontal coordinated conduct between enterprises and conduct abusive of market power, respectively. The list contained in Sections D3 and D4 are non-exhaustive, allowing for the addition of further anti-competitive practices.

2. The Nature of Consultations: Two points can be made with regard to the nature of the consultations. First, it should be emphasized that Consultations under the UN Set are voluntary and States entering negotiations strive to find mutually agreed solutions. [308] Second, while Sections B and D address the actions of private enterprises, the Consultations are on a "State-to-State" level. This is in line with the idea that Consultations are cooperative in nature and do not directly seek the resolution of a case by a third party. [309]

3. Full Consideration to Consultations: Requests and Agreement upon the Proceeding and Substance: While Consultations are voluntary in nature, member States are required to give full consideration to the request and should be encouraged to enter into the proceeding to explore, and if possible reach, mutually agreeable solutions. If a State declines to participate in the Consultations it would be expected that a reasoned response would be filed to explain its decision. Responses so filed will help to improve future requests and make Consultations more meaningful. Participation of the corresponding States in the proceedings will strengthen consultation as a valid and effective mechanism to address cross-border competition issues. If the States agree to enter into Consultation, they have to agree on the subject and on the procedures of the Consultation.[310] This makes the procedure more complex as it is one more

extension of the UNCTAD secretariat's participation. See UNCTAD, *Report of the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, TD/RBP/CONF.7/11 (2011), available at http://unctad.org/en/Docs/tdrbpconf7d11_en.pdf (last visited 17 February 2017].

[308] Oesterle, *supra* note 305, at P. 43.

[309] See Brusick, 'UN Control of Restrictive Business Practices - A Decisive First Step', 17 *Journal of World Trade Law* (1983) 337.

[310] Proceedings should be optional to the States entering into consultations. In other words, the States may agree on different procedures. If the States decide to do so, they should still be able to get assistance from UNCTAD. Secondly, the proceeding should be as simple as possible with basic signals to light the path for the States to explore and reach mutually agreeable solutions. The proceeding must be respectful of local laws. States entering into consultations will try to find mutually agreeable solutions that are also consistent with their own local law. Thus, the proceeding should also be respectful of local laws. At the Sixth Review Conference of Nov 2010, UNCTAD member States of the 6th Review Conference in 2010 believed that there were benefits of having a 'default' set of procedural rules to implement the consultations pursuant to section F.4. The reasons referred to included (a) the consultations would offer the State another mechanism for cooperation, in addition to formal and informal networks and technical assistance; (b) having such rules would provide predictability for the State members; and (c) UNCTAD could have a role in providing conference facilities, technical assistance and monitoring the agreements, if requested by the parties. Several delegates said that the participation of UNCTAD as an impartial third party would add value to the mechanism and help to legitimize the participation of the States in the consultations before the stakeholders in their own country. While some States may be able to share confidential information, the proceedings must also guarantee such confidentiality. UNCTAD may assist the States in the definition of what information should or should not be shared or in ways to present information while preserving the confidential component, if the States request such assistance. Finally, the proceedings should be to implement Consultations

thing the States have to discuss and agree on. This would also force the States to "reinvent the wheel" for every consultation. Unfortunately, the Sixth UN Conference of 2010 did not specifically instruct UNCTAD to design a procedure for the implementation of the Consultation despite the presentation of the modalities by a member State. [311]

4. Joint report to be prepared by the States with the assistance of UNCTAD: Once the requesting State and the corresponding State(s) agree to enter into voluntary consultations, they may agree on specific mutually reciprocal solutions and this process could be crystallized in a "joint report". Given the UNCTAD`s expertise and knowledge, the States may also request UNCTAD's assistance in seeking possible agreeable solutions and drafting the report. The conference may want to instruct UNCTAD to bring such assistance when requested by the States.

2.3.2. Inserting key features of the voluntary consultation mechanism provided under Section F.4 of the UN set of competition

As discussed earlier, section F.4 of the UN Set provides key elements that could facilitate the singing-up of new members to this ICN Framework beyond the 33 and thereby the consecutive sharing of non-confidential information. If the ICN framework is to have the key features of section F.4 of the UN Set on board, younger or smaller agencies would be willing to enter into voluntary consultations, which will have the following stages of cooperation:

Stage 1: In accordance with the ICN framework, participating agencies can register a liaison officer who would lead the communications with the other. The incentive for the mature agency's liaison officer to cooperate would be the possibility of having common enforcement interests with the small or young agency, which is seeking "sharable" information. To abbreviate bureaucracy and to avoid having so many people in the process, it is advisable that the liaison officer and the case team leader be one and the same person. Case team leaders who are fully involved in the case should also be at the forefront of communications with his/her foreign counterpart to prevent delays and errors in communication critical information. This change is important to ensure the effectiveness and trust for the tool, as it has been said that: "co-operation is more likely when the organizations involved are few in number and uncertainty can thereby be reduced" . This would be prevent having several officers in the agency knowing sensitive information, addressing concerns that intra-trust agency would be an issue between international officers and case officers protecting their "turfs."

Stage 2: Applying Section F of the UN Set presented supra, participating agencies would need to voluntarily agree on the subject and the specific procedures for each consultation. Since the subject

as a cooperation procedure, not as a conflict resolution forum. It also follows that UNCTAD may provide conference facilities and assistance if the States request so, but UNCTAD shall not act as a judge, nor as an arbitrator. See UNCTAD, *supra* note 306.

[311] See UNCTAD, *Contribution from Costa Rica - COMPILATION OF THE CONTRIBUTIONS SUBMITTED FOR THE CONFERENCE* 32, available at http://unctad.org/en/Docs/tdrbpconf7contributions_en.pdf (last visited 17 February 2017].

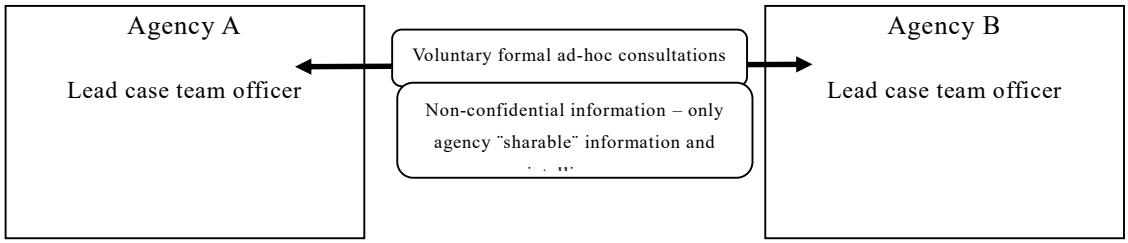
matter and the procedures for the consultation is mutually arrived at, the participating competition agencies will have assurance of control over the mechanism. The previous agreement on the subject matter/s and the procedures would also prevent outright refusal to respond or provide information, as, absent any overwhelming concern, it would be unreasonable for an agency to suddenly change its mind as to what it wants to share or discuss. This is a critical stage as ICN framework might need this feature in order to reassure trust on the system based on reciprocity principles between the participating agencies.

While some participating agencies may be able to provide the agency with sharable information, the proceedings must also guarantee such confidentiality. In the absence of an international definition of confidential information, it is important to set up the specific procedures for such consultation and eventually provide a definition of what information should or should not be shared or in ways to present information while preserving the confidential component, in accordance to their domestic laws. The proceedings should be to implement Consultations as a cooperation procedure, not as a conflict resolution forum as indicated supra.

Stage 3: Once the subject matter and the procedures are established ad-hoc, the lead case team officers can provide information to each other on the following categories of agency sharable information: (1) existence of investigation; (2) theories about harm, markets, or remedies; and (3) industry background. These three categories do not constitute confidential information, as these were not provided by parties and are not protected by domestic laws. The ICN framework provides a detailed workflow that could be established.

Stage 4: If the participating agencies agree, the process could be crystallised in a joint report that would track and record the consultations and the outcome of these communications. Even if the consultations do not result to a successful sharing of non-confidential sharable information, the fact that attempts to carry out communications were tracked and recorded could indicate to the ICN members that the system is progressing, and that it could eventually yield concrete results. In addition, the joint report could fuel more discussions about how international cooperation could be approved, by being presented at the annual conferences of the ICN whereby head of agencies meet in closed doors. After a certain period of time, the joint report could also be submitted as an item to be discussed at the annual meetings of the UNCTAD Intergovernmental Group of Experts on Competition Law and policy. Sharing the experience of the participating agencies could build trust and confidence in the system as the universal UN membership can appreciate these results. Illustration 1 below suggests the workflow of the 4 stages presented and the key features of this tool.

Illustration 1: Reinforcing the ICN Framework to foster international cooperation in case investigations



Source: Own elaboration based on the Japan proposal of 2015

Illustration 1 brings the term "voluntary formal ad-hoc consultations" as a result of the insertion of the key features of Section F.4 of the UN Set. This system will build trust and confidence as explained supra in Section II.

In sum, the application of the Consultations contemplated in Section F.4. of the UN Set into the ICN Framework could help to achieve the cooperation required between competition agencies in different countries to fight anticompetitive conducts with international effects . Indeed, the mechanisms provided by the UN could provide additional ways and means to strengthen the ICN existing framework. In particular, they could be helpful in fostering the ICN Framework.

The two systems can nourish each other and the use of provisions from one should not result in friction. One should view it as an effort to use the best from both organs to create a greater and more efficient whole. Beyond the foregoing, there are some caveats that need to be considered as well in the use of this tool:

(1) Entering into consultations with another State would eventually mean that the issue would move from "…a mere legal problem to a more political realm in which the outcome would depend on the relative bargaining power of the two states and the degree to which the two states wish to protect the respective interest of private companies doing business within their borders…" However, the world has changed since the adoption of the UN Set in 1980 and what we refer to in this essay are key specific elements of Section F.4 that will eventually bring additional positive results of the ICN Framework, as it was proposed by Japan in 2015.

(2) Responses at the regional level to foster competition laws in different regional groupings also try to address common old problems that the UN Set wished to solve back in1980, but they have been ineffective due to national factors in their implementations. As many young and small competition regimes are located in developing countries and economies in transition, conventional wisdom suggests that any international cartel regulation would interfere with their domestic economic policies, among other things, including industrial policy. Hence, there has been a historic resistance from the developing world to implement Section F of the UN Set. This has undermined the UN's efforts to have effective international cartel regulation which could eventually mean an increase of the probability of success.

(3) Not having a pre-existent commitment for authorities in the respective jurisdictions to cooperate with each other or to jointly carry on the investigation of alleged anti-competitive conducts exacerbates the problem and leaves a large majority of small and young competition

regimes with few options to address their problems. Worse, it may lead to using mature competition laws to supplant their own laws in regulate their own markets .

(4) For the analysis of the consultations provided for in Section F.4, the fact that the UN Set constitutes a body of soft law is irrelevant because such consultations are clearly voluntary obviously for the filing participating agency, but also for the requested Agency.

Conclusions and recommendations

If one was to write this research in 2003, one would have proposed the adoption of a "Multilateral Agreement on Competition Policy" within the framework of the World Trade Organization (WTO).[312] This binding document from the members of the WTO would have meant that CBCs were to be covered by the rule-based multilateral trade system and one single institution would deal with multinational cartels affecting world trade.[313]

Notably, some have said that it was a "false hope" to conceive the idea of having competition policy under the auspices of WTO.[314] This is because even if WTO had the authority to tackle competition issues worldwide, the WTO dispute settlement regime would not have a well-developed capacity to undertake economic analysis, despite the ample opportunities that members of the panels and appellate body can exploit economic evidence in their own rulings. [315]

The reasons behind the non-adoption of the WTO solution are beyond the research because the main arguments discussed in the WTO Cancun Ministerial Conference in 2003 are no longer valid at present. The world has changed and international cooperation has been identified as the main solution to fight CBCs across jurisdictions.

With the failure of WTO as the single solution to the problem of CBCs, international cooperation mechanisms would be the vehicle through which the additional legal instruments and solutions proposed or being used by major competition jurisdictions can counteract the harmful effects of CBCs in domestic and international markets. Conversely, in the absence of international cooperation and coordination between competition authorities, uncertainty would occur as there is no global agreement as to the purpose of anti-cartel laws.

In this regard, the research critically assessed the solutions which have been proposed in the past to address the issues described above The assessment aims to identify the challenges in the

[312] See more in: M. D. Taylor, *International Competition Law: A New Dimension for the WTO?* (2006).
[313] Cf. the assessment provided by Lee when referring to the fact of incorporating binding strategies to regulate multinational cartels. J. S. Lee, *Strategies to Achieve a Binding International Agreement on Regulating Cartels: Overcoming Doha Standstill* (2016), available at http://public.eblib.com/choice/publicfullrecord.aspx?p=4748055 (last visited 19 March 2017].
[314] See more in Bradford, 'International Antitrust Negotiations and the False Hope of the WTO', 48 *Harvard International Law Journal* (2007) 383.
[315] Mavroidis and Neven, 'Land Rich and Cash Poor? The Reluctance of the WTO Dispute Settlement System to Entertain Economics Expertise: An Institutional Analysis', in T. M. Carpenter, J. Marion and J. Pauwelyn (eds.), *The Use of Economics in International Trade and Investment Disputes* (2016) 192 , at P. 202.

implementation, the inherent limitations of, and the reasons why such proposed solutions have not been effective to help younger competition agencies address the foregoing issues.

According to *Stephan,* problems in antitrust coordination have three possible solutions, *viz*:

> *"Antitrust coordination problems have three possible solutions. First, states might adhere to a common standard of competition law. Second, states might accept a body of rules for allocating regulatory jurisdiction that ensures that one, and only one, state imposes its competition standards on any given transaction. Third, states might decline to cooperate*."[316]

As a result, the "competition of competition laws" and "forum-shopping" might be a first problem that young competition authorities face. The so-called "choice of law" and "jurisdiction"[317] can trigger difficulties for young competition regimes being unfamiliar to these solutions.

Other jurisdictions such as the mature ones would find unilateral enforcement of competition rules to activities outside the territory of the affected jurisdiction (the extraterritorial application of competition rules) as the only solution to address CBCs.

In any event, the research attempts to solve the puzzle of trust and the possible legal constraint surrounding confidentiality together with an international mechanism that could serve the basis of a facilitator to materialize cooperation.

If countries at stake do not have a legal standing problem at the forefront of their legal concerns, then building trust should be at the top of the factors whereby mature and young competition authorities are willing to cooperate but there are costs to be borne. International cooperation involves benefits and costs in it. See below the self-explanatory quotation:

> *"International co-operation involves resource (opportunity) costs. This can be seen at two levels. First, providing co-operation in a specific matter can be time and resource intensive. Second, at a more general level, co-operation is more likely where respective authorities have a relationship of trust and a good understanding of each other's legislation. Relationships of trust are important for both formal and informal co-operation. Achieving this trust is time consuming and resource intensive, particularly for smaller agencies. However, incurring these costs also brings benefits, both in terms of the specific enforcement activity and in building an ongoing relationship of trust with other agencies in which enforcers can assist each other over time and across multiple matters."*[318]

[316] Stephan, 'Against International Cooperation', in M. S. Greve and R. A. Epstein (eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (2004) 66 , at P. 66.

[317] The conflicts of laws or international private law considerations pinpoints to three foreign elements when dealing with multinational aspects of a cartel investigation: jurisdiction, choice of law and recognition and enforcement of foreign judgements. C. M. V. Clarkson, A. J. E. Jaffey and J. Hill, *The Conflict of Laws* (3rd ed, 2006), at P. 1-2.

[318] OECD, *International Cooperation in Competition Law Enforcement*, C/MIN (2014) 17 (2014), available at https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf (last visited 10 April 2017], at 37.

A mature competition authority (EU) once said that in deciding whether or not to cooperate, two factors must be taken into account: first, the perceived usefulness of that cooperation for both agencies; and second, the relationship between the agencies and the knowledge of each other's procedures.[319]

The three building blocks proposed in the research for **transnational CBCs** intend to solve the problem of incentives and costs of cooperation by incorporating "Calculus-Based-Trust" activities as well as addressing the problem of sharing information at all stages of investigation by incorporating the term "sharable" information into the literature of international cooperation of competition authorities. The last building block would answer the question as to "where" to cooperate in a transnational setting and that could be a joining force between the ICN and UN, to better address the concerns of a wider membership and trust by developing countries to UN agencies such as UNCTAD.

At the time of drafting this research, Peru launched a transnational CBC investigation whereby mature and Latin American young competition authorities have already investigated and in some cases sanctioned the transnational CBC.[320] It remains to be seen how the transnational CBC investigation will conclude and how much cooperation the Peruvian authority can get from its counterparts and the parties involved.[321]

* * * * * * * * *

Annex: Interviews carried out for the Research

1. Anderson, David, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with a Brussels-Based Private Competition Practitioner', (2017).
2. Bacca, Germán, 'Interview with the Former Superintendent Delegate for Competition of the Colombian Competition Authority', (2017).
3. Bezzi, Marcus, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the General Manager of the Australian Competition and Consumer Protection Commission', (2017).
4. Capobianco, Antonio, 'Interview with a Senior Competition Officer of the Competition Division of the Organization for Economic Development and Cooperation (OECD)', (2017).
5. Cardoze, Oscar, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Administrator of the Competition Authority of Panama (ACODECO)', (2017).

[319] OECD, *supra* note 109, at P. 313.
[320] *Indecopi Inicia Procedimiento Contra Seis Líneas Navieras Por Presuntas Prácticas Colusorias En El Servicio de Transporte Marítimo Internacional de Carga Rodante - Inicio - Indecopi*, available at https://www.indecopi.gob.pe/inicio/-/asset_publisher/ZxXrtRdgbv1r/content/indecopi-inicia-procedimiento-contra-seis-lineas-navieras-por-presuntas-practicas-colusorias-en-el-servicio-de-transporte-maritimo-internacional-de-ca?inheritRedirect=false (last visited 23 May 2017].
[321] In an interview with the Head of the Peruvian Authority, the main issue that could be a restrained of cooperation with foreign authorities is not trust but rather legal specific issues surrounding confidentiality. See Gagliuffi, 'International Cooperation in Cartel Enforcement: the Peruvian experience', (2017).

6. Coloma, Germán, 'Interview with the Director of Economic Studies of the Argentinean Competition Commission', (2017).
7. Damtoft, Russell W., 'Interview with the Associate Director of International Affairs, Federal Trade Commission of the United States of America', (2017).
8. Gagliuffi, Ivo, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the President of the Competition Authority of Peru (INDECOPI)', (2017).
9. Guzman, Luis Humberto, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the President of the Competition Auhtority of Nicaragua (PROCOMPETENCIA)', (2017).
10. Han Li, Toh, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Chief Executive of the Singapore Competition Commission', (2017).
11. Haraksin, Kusha, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Chairman of the CARICOM Competition Commission', (2017).
12. Harsdorf, Natalie, 'Interview with the Deputy Managing Director of the Austrian Competition Authority', (2017).
13. Irrarazabal, Felipe, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the National Economic Prosecutor of Chile (FNE)', (2017).
14. Kovacic, William, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Former Chairman of the Federal Trade Commission of the United States of America and Professor of Global Competition Law in GeorgeTown University', (2017).
15. Lozano, Alberto, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the President of the Honduras Competition Commission', (2017).
16. Lozano, Alberto, 'Interview with the President of the Honduras Competition Commission and President Pro-tempore of RECAC 2017', (2017).
17. Mehta, Kirtikumar, 'Interview with the Former Director of the Cartel Directorate, DG Competition of the EU Commission.', (2017).
18. Odio-Rohrmoser, Edgar, 'Interview with the ex-Commissioner of the Costa Rican Competition Authority (COPROCOM)', (2017).
19. Qaqaya, Hassan, 'Interview with the Former Head of the Competition and Consumer Policies Branch of the United Nations Conference on Trade and Development (UNCTAD)', (2017).
20. Ragazzo, Carlos Emmanuel Joppert, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Former Superintendent of Investigation of the Brazilian Competition Authority (CADE) and Professor of Competition Law in Getulio Vargas Foundation, Sao Paulo (Brazil)', (2017).
21. Ratshisusu, Mulalo Hardin, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Deputy Commissioner of the South African Competition Commission', (2017).
22. Van Brackel Barbosa, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with a Staff Member of the Andean Community of Nations.', (2017).

References:

Anderson, David, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with a Brussels-Based Private Competition Practitioner', (2017).

Ankenbrandt B. and Vormann T., *Comparing U.S. and EU Trade Secret Laws* (2016), available at http://www.transatlanticbusiness.org/wp-content/uploads/2016/07/US-EU-Trade-Secret-Comparison-30-June-2016.pdf (last visited 24 March 2017].

Bachmann and Inkpen, 'Understanding Institutional-Based Trust Building Processes in Inter-Organizational Relationships', 32 *Organization Studies* (2011] 281.

'Criminal Sanctions for Cartels-the Jury Is Still out', in C. Beaton-Wells and A. Ezrachi (eds.), *Research Handbook on International Competition Law* (2012) 266.

Benson, 'UN Conference on Restrictive Business Practices', 74 *The American Journal of International Law* (1980] 451.

Bezzi, 'International Cooperation: Bearing Cartel Case Study', (2014] , available at http://www.ftc.gov.tw/icncartel2014/pdf/2014.10.02.%20Plenary%20II%20%20%20Marcus%20Bezzi%20slides.pdf (last visited 26 January 2017).

Bezzi, Marcus, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the General Manager of the Australian Competition and Consumer Protection Commission', (2017).

Bhattacharjea A., *EXPORT CARTELS : A Developing Country Perspective*, Working paper, 120 (2004), available at https://ideas.repec.org/p/cde/cdewps/120.html (last visited 8 February 2017].

Biblioteca del Congreso Nacional, Chile - Transparencia de La Funcion Publica Y de Accesso a La Informacion de La Administracion Del Estado, Law 20.285, 20 August 2008.

Błachucki M. and Jóźwiak S., *Exchange of Information and Evidence between Competition Authorities and Entrepreneurs' Rights*, SSRN Scholarly Paper, ID 2130849 (2012], available at https://papers.ssrn.com/abstract=2130849 (last visited 26 January 2017).

Bradford, 'International Antitrust Negotiations and the False Hope of the WTO', 48 *Harvard International Law Journal* (2007) 383.

Branch L.S., Canadian Competition Act, 1985.

Brander and Spencer, 'Trade Warfare: Tariffs and Cartels', 16 *Journal of International Economics* (1984) 227.

Breed H.L.-L.M., Bernick J.W. and Emch A., *Deferring to Chinese Government, US Court of Appeals Overturns Vitamin C Cartel Judgment | Lexology*, available at http://www.lexology.com/library/detail.aspx?g=02c9bc3e-31f9-4824-adfd-d5c8cd9053d8 (last visited 7 February 2017].

BRICS Competition Authorities, *MoU between the BRICS Competition Authorities on Cooperation in the Field of Competition Law and Policy*, 19 May 2016, available at http://en.fas.gov.ru/upload/other/Memorandum%20of%20understanding%20between%20the%20BRICS%20competition%20authorities%20on%20cooperation%20in%20the%20field%20of%20competition%20law%20and%20policy.pdf.

Brusick, 'UN Control of Restrictive Business Practices - A Decisive First Step', 17 *Journal of World Trade Law* (1983] 337.

BUREAU OF INTERNATIONAL NARCOTICS AND LAW ENFORCEMENT AFFAIRS, *Treaties and Agreements*, U.S. Department of State, available at http://www.state.gov/j/inl/rls/nrcrpt/2012/vol2/184110.htm (last visited 28 March 2017).

Burnier da Silveira, , Tardelli Tollini, 'International Cartels in Brazil : An Overview and a Look Forward', in V. M. de Carvalho, C. E. J. Ragazzo and P. Burnier da Silveira (eds.), *International Cooperation and*

Competition Enforcement: Brazilian and European Experiences from the Enforcers' Perspective (2014).

Burr, 'The Application of US Antitrust Law to Foreign Conduct: Has Hartford Fire Extinguished Considerations of Comity?', 15 *University of Pennsylvania Journal of International Law* (1994) , available at http://heinonline.org/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/tlr70&section=59 (last visited 6 April 2017].

Business and Industry Advisory Committee to the OECD (BIAC), *Discussion on International Co-Operation and the 1995 Recommendation: Next Steps* (2013], available at http://biac.org/wp-content/uploads/2014/05/11-120613_BIAC_Note_to_WP3_on_International_Cooperation.pdf (last visited 28 March 2017).

Capobianco, 'Information Exchange under EC Competition Law', 41 *Common Market Law Review* (2004) 1247.

Capobianco and Nagy, 'Survey: Developments in International Enforcement Co-Operation in the Competition Field', 7 *Journal of European Competition Law & Practice* (2016) 566.

Cardoze, Oscar, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Administrator of the Competition Authority of Panama (ACODECO)', (2017).

Castel J.-G., *The extraterritorial effects of antitrust laws* (1984).

Cernat, 'Eager to Ink, but Ready to Act?', in P. Brusick, A. M. Alvarez and L. Cernat (eds.), *Competition Provisions in Regional Trade Agreements: How to Assure Development Gains* (2005) 1.

Court of First Instance, CFI, *EU Case Gencor v. Commission*, 25 March 1999, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:61996TJ0102&from=EN (last visited 6 April 2017].

Chile/Colombia/Peru Governments, *Lima Declaration*, September 2013, available at http://www.fne.gob.cl/wp-content/uploads/2013/09/dec_lima_2013.pdf (last visited 22 February 2017).

China IPR SME Helpdesk, *Intellectual Property Systems: China/Europe Comparison* (2015), available at http://www.china-iprhelpdesk.eu/sites/all/docs/publications/Intellectual_Property_Systems_China_Europe_Comparison.pdf (last visited 28 March 2017].

Clarkson C.M.V., Jaffey A.J.E. and Hill J., *The Conflict of Laws* (3rd ed, 2006].

Connor, 'International Cartel Stats: A Look at the Last 26 Years', *Browser Download This Paper* (2016] , available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2862135 (last visited 26 January 2017).

Connor, 'The Rise of Anti-Cartel Enforcement in Africa, Asia, and Latin America', (2016) , available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2711972 (last visited 26 January 2017].

Cowen and Sutter, 'The Costs of Cooperation', 12 *The Review of Austrian Economics* (1999] 161.

Cseres K.J. et al., *Criminalization of Competition Law Enforcement: Economic and Legal Implications for the EU Member States* (2006].

Dabbah M.M., *International and Comparative Competition Law* (2010].

Damtoft, 'Mechanisms for Cooperation: Informal Cooperation', (2014] , available at http://unctad.org/meetings/en/Presentation/CCPB_IGE2014_RTPRESInfCoop_USFTC_en.pdf (last visited 23 February 2017).

DAVIDOW, 'The UNCTAD Restrictive Business Practices Code', 13 *The International Lawyer* (1979) 587.

Davidow and Chiles, 'The United States and the Issue of the Binding or Voluntary Nature of International Codes of Conduct Regarding Restrictive Business Practices', 72 *The American Journal of International Law* (1978) 247.

Delhey and Newton, 'Predicting Cross-National Levels of Social Trust: Global Pattern or Nordic Exceptionalism?', 21 *European Sociological Review* (2005) 311.

Demedts V., *Confidential Information Exchange in Competition Cases: Perception versus Reality in the EU and US* (2014), available at http://www.ascola-conference-2014.wz.uw.edu.pl/conference_papers/Demedts_Confidentional.pdf (last visited 23 March 2017].

Diario Oficial El Peruano, Peru Amendment of some Competition Act provisions, Decreto Legislativo 1205, 22 September 2015.

Diario Oficial El Peruano, Peru Competition Act, Decreto Legislativo N° 1044, 2008.

Djelic and Kleiner, 'The International Competition Network: Moving towards Transnational Governance', *Transnational Governance: Institutional Dynamics of Regulation* (2006] 287.

Dyzenhaus, Hunt, and Taggart, 'The Principle of Legality in Administrative Law: Internationalisation as Constitutionalisation', 1 *Oxford University Commonwealth Law Journal* (2001] 5.

Edwards, 'International Cartels as Obstacles to International Trade', 34 *The American Economic Review* (1944] 330.

EU & Russian Governments, *MoU on Cooperation between the Directorate-General for Competition of the EU Commission and the Russian Federal Antimonopoly Service*, 10 March 2011, available at http://ec.europa.eu/competition/international/bilateral/mou_russia_en.pdf (last visited 22 February 2017).

EU & Swiss Governments, *Agreement between the EU and the Swiss Confederation concerning Cooperation on the Application of their Competition Laws*, available at http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:22014A1203(01)&from=EN (last visited 22 February 2017].

Evenett, Levenstein, and Suslow, 'International Cartel Enforcement: Lessons from the 1990s', *World Economy* (2001].

Ezrachi A., *EU Competition Law: An Analytical Guide to the Leading Cases* (2016].

Ezrachi, 'Sponge', 5 *Journal of Antitrust Enforcement* (2017] 49.

Ezrachi and Kindl, 'Cartels as Criminal? The Long Road from Unilateral Enforcement to International Consensus', *Criminalising Cartels: Critical Studies of an International Regulatory Movement* (2011] 419.

FAS, 'Federal Antimonopoly Service of the Russian Federation (FAS Russia)', (2005] , available at https://www.jftc.go.jp/eacpf/05/APECTrainingCourseAugust2005/Group2/Efimov_fas.pdf (last visited 22 February 2017).

FAS R.F.W., *FAS Russia's Draft Toolkit on International Cooperation Is Now Available for Public Discussion | Федеральная Антимонопольная Служба - ФАС России*, 5 May 2017, available at http://en.fas.gov.ru/press-center/news/detail.html?id=49965 (last visited 8 May 2017].

Fifty-first Congress of the United States of America, At the First Session, US Sherman Antitrust Act, 2 July 1890.

Fikentscher, 'United Nations Codes of Conduct: New Paths in International Law', 30 *The American Journal of Comparative Law* (1982] 577.

First, 'The Vitamins Case: Cartel Prosecutions and the Coming of International Competition Law', 68 *Antitrust Law Journal* (2000] 711.

FNE Chile, Chile New Competition Act, vol. Decreto Ley No. 211, 22 December 1973.

FNE Chile, *Instructivo Interno Para El Desarrollo de Investigationes de La Fiscalia Nacional Económica*, May 2013, available at http://www.fne.gob.cl/wp-content/uploads/2013/05/Instr._investigaciones_2013.pdf (last visited 18 May 2017).

Foley et al., *Trade Secret Protection in China: A Perspective from China and Hong Kong | Lexology*, available at http://www.lexology.com/library/detail.aspx?g=bee3d833-06b9-4c01-861b-e49c3dadda6c (last visited 24 March 2017].

Fox, 'Competition Policy: The Comparative Advantage of Developing Countries', 79 *Law and Contemporary Problems* (2016] 69.

Fox, 'The Politics of Law and Economics in Judicial Decision Making: Antitrust as a Window', 61 *New York University Law Review* (1986] 554.

Fox E.M. and Fox E.M., *Cases and Materials on U.S. Antitrust in Global Context* (3rd ed, 2012].

Gaceta Oficial del Acuerdo de Cartagena, CAN Regional Competition Law, Decision 608, Año XXII, vol. 1180, 4 April 2005.

Gagliuffi, Ivo, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the President of the Competition Authority of Peru (INDECOPI)', (2017].

Gauer C. and Jaspers M., *Designing a European Solution for A 'one-Stop Leniency Shop'*, 2006, available at https://www.biicl.org/files/2498_designing_a_european_solution_for_one_stop_leniency.pdf (last visited 28 March 2017).

Griffin, 'EXTRATERRITORIALITY IN U.S. AND EU ANTITRUST ENFORCEMENT', 67 *Antitrust Law Journal* (1999) 159.

Guzman, Luis Humberto, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the President of the Competition Auhtority of Nicaragua (PROCOMPETENCIA)', (2017).

Hafen, 'International Extradition: Issues Arising Under the Dual Criminality Requirement', *BYU L. Rev.* (1992) 191.

Hague Conference on Private International Law, *Hague Convention on Taking of Evidence Abroad in Civil or Commercial Matters*, 18 March 1970, available at https://www.hcch.net/en/instruments/conventions/full-text/?cid=82 (last visited 4 April 2017].

Ham, 'International Cooperation in the Anti-Trust Field and in Particular the Agreement between the United States of America and the Commission of the European Communities', 30 *Common Market Law Review* (1993] 571.

Han Li, Toh, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Chief Executive of the Singapore Competition Commission', (2017].

Hansen, , Crocco, , Kennedy, 'Challenges to International Cartel Enforcement and Multi-Jurisdictional Leniency Applications–Disclosure of Leniency Applicant Statements and Materials', in *ABA International Cartel Workshop, Vancouver* (2012) 1.

Hawk B.E., *International Antitrust Law & Policy: Fordham Corporate Law 2004* (2005].

Hill, 'Trade Secrets, Unjust Enrichment, and the Classification of Obligations', *VIRGINIA JOURNAL of LAW and TECHNOLOGY* (1999] , available at http://www.vjolt.net/vol4/issue/home_art2.html (last visited 7 April 2017).

Hollman, , Kovacic, 'The International Competition Network: Its Past, Current and Future Role', in P. Lugard (ed.), *The International Competition Network at Ten: Origins, Accomplishments and Aspirations* (2011) 51.

Horna, 'David & Goliath: How Young Competition Agencies Can Succeed in Fighting Cross-Border Cartels', *The University of Oxford Centre for Competition Law and Policy* (2017) , available at https://www.law.ox.ac.uk/sites/files/oxlaw/david_goliath_-_how_young_competition_agencies_can_succeed_in_fighting_cross-border_cartels_-_cclp_l_45.pdf (last visited 6 February 2017].

Horna, 'Seventy Years of Work on Competition Law and Policy in the United Nations (1946-2016)', *Sofia Competition Forum Newsletter* (2016] 23.

Horna, , Kayali, 'National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements', in *Implementing Competition-Related Provisions in Regional Trade Agreements: Is It Possible to Obtain Development Gains?* (2007) 21.

Huang, 'Pursuing the Second Best: The History, Momentum, and Remaining Issues of China's Anti-Monopoly Law', 75 *Antitrust Law Journal* (2008] 117.

ICN, *Activity Report on ICN Advocacy and Implementation Network Support Program (AISUP) 2011-2012* (2012], available at http://www.internationalcompetitionnetwork.org/uploads/library/doc814.pdf (last visited 8 May 2017).

ICN, *Anti-Cartel Enforcement Manual Chapter 9: International Cooperation and Information Sharing* (2013), available at http://www.internationalcompetitionnetwork.org/uploads/cartel%20wg/icn_chapter_on_international_cooperation_and_information_sharing.pdf (last visited 17 February 2017].

ICN, *Cartel Working Group 2015-2018 Work Plan*, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1041.pdf (last visited 8 May 2017).

ICN, *Co-Operation between Competition Agencies in Cartel Investigations* (2006), available at http://ec.europa.eu/competition/international/multilateral/2006.pdf (last visited 28 March 2017].

ICN (ed.), *Co-Operation between Competition Agencies in Cartel Investigations: Report to the ICN Annual Conference, Moscow, May 2007* (2007].

ICN, *Investigative Tools Report* (2013], available at http://www.internationalcompetitionnetwork.org/uploads/library/doc893.pdf (last visited 5 April 2017).

ICN, *Leniency Materials. Country/Organization + Link(s) to Leniency Program Materials*, available at http://www.internationalcompetitionnetwork.org/working-groups/current/cartel/awareness/leniency.aspx (last visited 17 February 2017].

ICN, *Waivers of Confidentiality in Cartel Investigations - Explanatory Note*, available at http://www.internationalcompetitionnetwork.org/uploads/library/doc1012.pdf (last visited 17 February 2017).

INDECOPI, Peru Lineamiento sobre Confidencialidad de la Comision de Defensa de la Libre Competencia, vol. Resolution 027-2013/CLC-INDECOPI, 2013.

Inglehart R. and Norris P., *Trump, Brexit, and the Rise of Populism: Economic Have-Nots and Cultural Backlash*, SSRN Scholarly Paper, ID 2818659 (2016), available at https://papers.ssrn.com/abstract=2818659 (last visited 14 February 2017].

Irrarazabal, Felipe, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the National Economic Prosecutor of Chile (FNE)', (2017].

Japanese Ministry of Economy, Trade and Industry, *'Excessive' Extraterritorial Application of Competition Laws* (2008], available at http://www.meti.go.jp/english/report/downloadfiles/2008WTO/2-14-2ExcessiveExtraterritorial.pdf (last visited 6 April 2017).

Jensen-Eriksen N., *Predators or Patriots? Export Cartels as a Source of Power for the Weak* (2007), available at http://www.gla.ac.uk/media/media_168473_en.pdf (last visited 8 February 2017].

Kaira, 'A Cartel in South Africa Is a Cartel in a Neighbouring Country: Why Has the Successful Cartel Leniency Policy in South Africa Not Resulted into Automatic Cartel Confessions in Economically Interdependent Neighbouring Countries?', *Competition Authority of Botswana* (2015] , available at http://www.competition.org.za/s/Thula-Kaira_Regional-cartels.pdf (last visited 8 February 2017).

Kasahara, 'International Coordination to Increase the Efficiency of Cartel Investigations', (2017).

Kojima, 'International Conflicts over the Extraterritorial Application of Competition Law in a Borderless Economy', *Weatherhead Center for International Affairs* (2002) 2001.

Kovacic, William, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Former Chairman of the Federal Trade Commission of the United States of America and Professor of Global Competition Law in GeorgeTown University', (2017).

Kwok, 'Export Cartels: Analysing the Gap in International Competition Law and Trade', 2 *Edinburgh Student L. Rev.* (2013) 140.

LeClair M.S., *Cartelization, Antitrust and Globalization in the US and Europe* (2011).

Lee A., *What the U.S. Can Learn from China: An Open-Minded Guide to Treating Our Greatest Competitor as Our Greatest Teacher* (1st ed, 2012).

Lee J.S., *Strategies to Achieve a Binding International Agreement on Regulating Cartels: Overcoming Doha Standstill* (2016), available at http://public.eblib.com/choice/publicfullrecord.aspx?p=4748055 (last visited 19 March 2017].

Lewicki, 'Trust, Trust Development, and Trust Repair', in M. Deutsch, P. Coleman and E. Marcus (eds.), *The Handbook of Conflict Resolution: Theory and Practice* 2. ed (2006).

Lewicki, , Bunker, 'Trust in Relationships. A Model of Development and Decline', in B. Bunker and J. Z. Rubin (eds.), *Conflict, Cooperation, and Justice: Essays Inspired by the Work of Morton Deutsch.* (1995).

Lianos I., *The Contribution of the United Nations to the Emergence of Global Antitrust Law*, SSRN Scholarly Paper, ID 1398918 (2009], available at https://papers.ssrn.com/abstract=1398918 (last visited 31 January 2017).

Linhares Martins A. and Lin Fidelis A., *NEARLY 16 YEARS OF THE LENIENCY PROGRAM IN BRAZIL: BREAKTHROUGHS AND CHALLENGES IN CARTEL PROSECUTION* (2016), available at https://www.competitionpolicyinternational.com/wp-content/uploads/2016/06/Amanda-Andressa.final2_.pdf (last visited 19 February 2017].

Lozano, Alberto, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the President of the Honduras Competition Commission', (2017].

Mariscal E. and Mena-Labarthe C., *Leniency Programs in Latin America: New Tools for Cartel Enforcement | Competition Policy International*, 2010, available at https://www.competitionpolicyinternational.com/leniency-programs-in-latin-america-new-tools-for-cartel-enforcement/ (last visited 19 February 2017).

Marsden, 'Jaw-Jaw Not Law-Law - from Treaties to Meetings: The Increasing Informality and Effectiveness of International Cooperation', in A. Ezrachi (ed.), *Research Handbook on International Competition Law* (2012) 110.

Martyniszyn, 'A Comparative Look on Foreign State Compulsion as a Defence in Antitrust Litigation', 8 *The Competition Law Review* (2012) 143.

Martyniszyn M., *Discovery and Evidence in Transnational Antitrust Cases: Current Framework and the Way Forward*, SSRN Scholarly Paper, ID 2142978 (2012), available at https://papers.ssrn.com/abstract=2142978 (last visited 23 February 2017].

Martyniszyn, 'Export Cartels: Is It Legal to Target Your Neighbour? Analysis in Light of Recent Case Law', 15 *Journal of International Economic Law* (2012] 181.

Martyniszyn, 'Foreign States Amicus Curiae Participation in U.S. Antitrust Cases', 61 *The Antitrust Bulletin* (2016] 611.

Martyniszyn, 'Inter-Agency Evidence Sharing in Competition Law Enforcement', 19 *The International Journal of Evidence & Proof* (2015] 11.

Mason, 'The Future of International Cartels', 22 *Foreign Affairs* (1944] 604.

Matsushita M. et al., *The World Trade Organization: Law, Practice, and Policy* (2015].

Mavroidis, , Neven, 'Land Rich and Cash Poor? The Reluctance of the WTO Dispute Settlement System to Entertain Economics Expertise: An Institutional Analysis', in T. M. Carpenter, J. Marion and J. Pauwelyn (eds.), *The Use of Economics in International Trade and Investment Disputes* (2016) 192.

Mehta, Kirtikumar , 'Interview with the Former Director of the Cartel Directorate, DG Competition of the EU Commission.', (2017].

Michaels, 'Supplanting Foreign Antitrust', 79 *Law and Contemporary Problems* (2016] 223.

Municoy, 'Allocation of Jurisdiction on Patent Disputes in the Models Developed by the Hague Conference in Private International Law: Asymmetric Countries and the Relationship of Private Parties', 4 *Chicago-Kent Journal of Intellectual Property* (2004] 342.

National Congress, Colombia Código de Procedimiento Administrativo Y de Lo Contencioso Administrativo., vol. Ley 1437, de enero de 2011.

National Congress, Peru Ley de Transparencia Y Accesso a La Informacion Publica, vol. Ley N° 27806, 13 July 2002.

Natural Resource Governance Institute, *Chapter 3 : Commercially Sensitive Information and the Public Interest*, Contracts Confidential: ending secret deals in the extractive industries, available at http://www.resourcegovernance.org/sites/default/files/RWI_Contracts_Confidential_Chapter_3.pdf (last visited 7 April 2017).

Noonan C., *The Emerging Principles of International Competition Law* (2008).

Nordic Cartel Network, *Joint Contribution by Denmark, the Faroe Islands, Finland, Greenland, Iceland, Norway and Sweden - IMPROVING INTERNATIONAL CO-OPERATION IN CARTEL INVESTIGATIONS: THE NORDIC CARTEL NETWORK: A REGIONAL MODEL FOR COOPERATION BETWEEN CARTEL UNITS OF COMPETITION AUTHORITIES*, DAF/COMP/GF/WD(2012)34 (2012).

Odio-Rohrmoser, Edgar, 'Interview with the ex-Commissioner of the Costa Rican Competition Authority (COPROCOM)', (2017).

OECD, *Contribution by OECD to the Roundtable on: 'Modalities and Procedures for International Cooperation in Competition Cases Involving More than One Country'* (2013), available at http://unctad.org/meetings/en/Contribution/IGE2013_RT1_OECD_en.pdf (last visited 16 May 2017].

OECD, *Improving International Co-Operation in Cartel Investigations*, available at http://www.fne.gob.cl/wp-content/uploads/2014/03/OECD_-2012-Improving-international-cooperation-in-cartel-investigations1.pdf (last visited 26 January 2017).

OECD, *International Cooperation in Competition Law Enforcement*, C/MIN (2014) 17 (2014), available at https://www.oecd.org/mcm/C-MIN(2014)17-ENG.pdf (last visited 10 April 2017].

OECD, *Leniency Programmes in Latin America and the Caribbean: Recent Experiences and Lessons Learned* (2016], available at https://one.oecd.org/document/DAF/COMP/LACF(2016)5/en/pdf (last visited 21 February 2017).

OECD, *NATIONAL AND INTERNATIONAL PROVISIONS FOR THE EXCHANGE OF CONFIDENTIAL INFORMATION BETWEEN COMPETITION AGENCIES WITHOUT WAIVERS*, DAF/COMP/WP3(2013)4 (2013), available at http://www.oecd.org/officialdocuments/publicdisplaydocumentpdf/?cote=DAF/COMP/WP3(2013)4&doclanguage=en (last visited 17 February 2017].

OECD, *Procedural Fairness and Transparency. Key Points* (2012], available at http://www.oecd.org/competition/mergers/50235955.pdf (last visited 23 March 2017).

OECD, *Recommendation of the OECD Council Concerning International Co-Operation on Competition Investigations and Proceedings* (2014), available at http://www.oecd.org/daf/competition/2014-rec-internat-coop-competition.pdf (last visited 17 February 2017].

OECD & ICN, *Secretariat Report on the OECD/ICN Survey on International Enforcement Co-Operation*, International Enforcement Co-operation (2013], available at http://www.oecd.org/daf/competition/InternEnforcementCooperation2013.pdf (last visited 25 February 2017).

Oesterle, 'United Nations Conference on Restrictive Business Practices', 14 *Cornell International Law Journal* (1981) 1.

Official Journal of the European Communities, COUNCIL REGULATION (EC) No 1/2003 of 16 December 2002 on the Implementation of the Rules on Competition Laid down in Articles 81 and 82 of the Treaty, No. 1/2003, 4 January 2003.

País E.E., *Costa Rica ignora una orden de la Corte Centroamericana de Justicia*, 18 January 2012, EL PAÍS, available at http://internacional.elpais.com/internacional/2012/01/18/actualidad/1326926845_688633.html (last visited 4 April 2017].

Panama & Taiwan Governments, *Panama - Taiwan Free Trade Agreement*, 21 August 2003, available at http://www.sice.oas.org/Trade/PanRC/PANRC_e.ASP (last visited 18 May 2017).

Paul, 'Comity in International Law', 32 *Harvard International Law Journal* (1991) 1.

Philippine Government, Rules and Regulations to Implement the Provisions of Republic Act No. 10667 (Philippine Competition Act).

Ratshisusu, Mulalo Hardin, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with the Deputy Commissioner of the South African Competition Commission', (2017).

Reynaud, 'Forms of Trust and Conditions for Their Stability', 41 *Cambridge Journal of Economics* (2017) 127.

Rosenberg, 'National Implementation of Competition-Related Provisions in Bilateral and Regional Trade Agreements', in *Implementing Competition-Related Provisions in Regional Trade Agreements: Is It Possible to Obtain Development Gains?* (2007) 5.

Ryngaert C., *Jurisdiction over Antitrust Violations in International Law* (2008).

Shan H., *Protection of Trade Secrets in China* (2008).

Shapiro, Sheppard, and Cheraskin, 'Business on a Handshake', 8 *Negotiation Journal* (1992) 365.

Superintendencia de Industria y Comercio, SIC, *Colombia Autoparts Cartel - Closing the Investigation*, Resolution No. 37523 , 24 July 2015.

Slapper G. and Kelly D., *English Legal System* (4th ed, 1999).

Slaughter and May, 'EU Competition & Regulatory. Legal and Policy Developments at the EU Level', (2015) , available at https://www.slaughterandmay.com/media/2534641/eu-competition-and-regulatory-newsletter-16-oct-22-oct-2015.pdf (last visited 10 April 2017].

Snell, 'Controlling Restrictive Business Practices in Global Markets: Reflections on the Concepts of Sovereignty, Fairness, and Comity', 33 *Stan. J. Int'l L.* (1997] 215.

Sofia Competition Forum, *Comparative Overview of the Balkan Competition Regimes in the Field of INSPECTIONS ON SPOT* (2015], available at http://scf.cpc.bg/uploads/data/2015/report%20SCF%20inspections.pdf (last visited 5 April 2017).

Sokol, 'What Do We Really Know About Export Cartels and What Is the Appropriate Solution?', 4 *Journal of Competition Law and Economics* (2008) 967.

Sprigman, 'Fix Prices Globally, Get Sued Locally? U.S. Jurisdiction over International Cartels', 72 *The University of Chicago Law Review* (2005) 265.

Stephan, 'Against International Cooperation', in M. S. Greve and R. A. Epstein (eds.), *Competition Laws in Conflict: Antitrust Jurisdiction in the Global Economy* (2004) 66.

Stucke, 'Discovery in a Global Economy', in J. Basedow, S. Francq and L. Idot (eds.), *International Antitrust Litigation: Conflict of Laws and Coordination* (2012) 315.

Sweeney, 'Export Cartels: Is There a Need for Global Rules?', 10 *Journal of International Economic Law* (2007) 87.

Tassano, 'La Declaración de Lima: Una acción concreta para el fortalecimiento de la cooperación entre agencias en la fiscalización de actividades anticompetitivas transfronterizas', 2 *Revista de Defesa da Concorrência* (2014) 4.

Taylor M.D., *International Competition Law: A New Dimension for the WTO?* (2006).

TDLC, Chile- Tribunal de Defensa de La Libre Competencia - Auto Acordado Sobre Reservan O Confidencialidad de La Informacion En Los Procesos, vol. Auto Acordado No. 15/2012, 2012.

Terhechte, 'International Competition Enforcement Law Between Cooperation and Convergence - Mapping a New Field for Global Administrative Law', Working Paper CCLP (L) 26 *The University of Oxford Centre for Competition Law and Policy* , available at https://www.law.ox.ac.uk/sites/files/oxlaw/cclp_l._26.pdf (last visited 15 March 2017].

Thomas C. and De Stefano G., *Extradition & Antitrust: Cautionary Tales for Global Cartel Compliance* (2016], available at https://www.hoganlovells.com/~/media/hogan-lovells/pdf/publication/hogan_lovells_ab_extra_30_09_16.ashx (last visited 28 March 2017).

Timberg, 'Restrictive Business Practices as an Appropriate Subject for United Nations Action', 1 *Antitrust Bulletin* (1955) 409.

Tyhurst, 'The Adjudication of Competition Law Issues in Theory and Practice : An Assessment of the Reviewable Matters Jurisdiction of the Restrictive Trade Practices Commission', (1983) , available at http://digitool.library.mcgill.ca/R/?func=dbin-jump-full&object_id=64728&local_base=GEN01-MCG02 (last visited 28 February 2017].

UN, THE UNITED NATIONS SET OF PRINCIPLES AND RULES ON COMPETITION, TD/RBP/CONF/10/Rev.2.

UNCTAD, *Contribution from Costa Rica - COMPILATION OF THE CONTRIBUTIONS SUBMITTED FOR THE CONFERENCE* 32, available at http://unctad.org/en/Docs/tdrbpconf7contributions_en.pdf (last visited 17 February 2017).

UNCTAD, *Enhancing International Cooperation in the Investigation of Cross-Border Competition Cases: Tools and Procedures*, TD/B/C.I/CLP/44 (2017), available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd44_en.pdf (last visited 16 May 2017].

UNCTAD, *Informal Cooperation among Competition Agencies in Specific Cases*, TD/B/C.I/CLP/29 (2014].

UNCTAD, *List of Participants of the Intergovernmental Group of Experts on Competition Law and Policy Fifteenth Session Geneva, 19–21 October 2016*, TD/B/C.I/CLP/INF.6 (2016], available at http://unctad.org/meetings/en/SessionalDocuments/ciclpinf6_en.pdf (last visited 17 February 2017).

UNCTAD, *Model Law on Competition (2010) – Chapter IX*, TD/RBP/CONF.7/L.9 (2010), available at http://unctad.org/en/Docs/ciclpL2_en.pdf (last visited 15 March 2017].

UNCTAD, *Model Law on Competition (2015) – Revised Chapter I*, TD/RBP/CONF.8/L.1 (2015], available at http://unctad.org/meetings/en/SessionalDocuments/tdrbpconf8l1_en.pdf (last visited 15 March 2017).

UNCTAD, *Report of the Intergovernmental Group of Experts on Competition Law and Policy on Its Fifteenth Session*, TD/B/C.I/CLP/40 (2016), available at http://unctad.org/meetings/en/SessionalDocuments/ciclpd40_en.pdf (last visited 17 February 2017].

UNCTAD, *Report of the Sixth United Nations Conference to Review All Aspects of the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices*, TD/RBP/CONF.7/11 (2011], available at http://unctad.org/en/Docs/tdrbpconf7d11_en.pdf (last visited 17 February 2017).

UNCTAD, *The Use of Leniency Programmes as a Tool for the Enforcement of Competition Law against Hardcore Cartels in Developing Countries*, TD/RBP/CONF.7/4 (2010), available at http://unctad.org/en/Docs/tdrbpconf7d4_en.pdf (last visited 17 February 2017].

US Court of Appeals for the Ninth Circuit, US, *Hartford Fire Ins. Co. v. California 509 U.S. 764 (1993)*, 28 June 1993, available at https://supreme.justia.com/cases/federal/us/509/764/case.html (last visited 6 April 2017).

US District Court New York, US, *US Vitamin C Export Cartel*, Case 1:06-md-01738-BMC-JO Document 440 , 9 June 2011, available at http://www.lawnet.gr/assets/files/Vitamin%20Cartel%20.pdf (last visited 7 February 2017].

US & Autralian Governments, *AGREEMENT BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF AUSTRALIA ON MUTUAL ANTITRUST ENFORCEMENT ASSISTANCE*, 27 April 1999, available at https://www.justice.gov/sites/default/files/atr/legacy/2015/01/15/311076.pdf (last visited 11 April 2017).

US & Chinese Governments, *MoU on Antitrust and Antimonopoly Cooperation between US Department of Justice/US Federal Trade Commission; and the People's Republic of China National Development and Reform Commission (NDRC) , Ministry of Commerce (MOFCOM), and the State Administration for Industry and Commerce (SAIC)*, 27 July 2011, available at https://www.justice.gov/sites/default/files/atr/legacy/2011/08/03/273310a.pdf (last visited 18 February 2017].

US & EU Governments, *Agreement between US and EU on the Application of Their Competition Laws*, 23 September 1991, available at http://www.jstor.org/stable/20693634 (last visited 22 February 2017).

US & EU Governments Y., *Agreement between US and EU on the Application of Positive Comity Principles in the Enforcement of Their Competition Laws*, 4 June 1998, available at http://www.jstor.org/stable/20698829 (last visited 22 February 2017].

U.S. Department of Justice and Federal Trade Commission, Antitrust Guidelines for International Enforcement and Cooperation, 13 January 2017.

Van Brackel Barbosa, 'Interview at the ICN Annual Conference in Porto (10-12 May 2017) with a Staff Member of the Andean Community of Nations.', (2017].

Victor, 'Export Cartels: An Idea Whose Time Has Passed', 60 *Antitrust Law Journal* (1991] 571.

Williams M., *Third World Cooperation: The Group of 77 in UNCTAD* (1991].

Williams, 'The Double Criminality Rule and Extradition: A Comparative Analysis', 15 *Nova L. Rev.* (1991] 581.

Wils W.P.J., *Is Criminalization of EU Competition Law the Answer?*, SSRN Scholarly Paper, ID 684921 (2005], available at https://papers.ssrn.com/abstract=684921 (last visited 19 March 2017).

WTO official database, *WTO | Regional Trade Agreements*, December 2016, available at http://rtais.wto.org/UI/PublicAllRTAList.aspx (last visited 25 February 2017].

Yang and Maxwell, 'Information-Sharing in Public Organizations: A Literature Review of Interpersonal, Intra-Organizational and Inter-Organizational Success Factors', 28 *Government Information Quarterly* (2011] 164.

Yeh B.T., *Protection of Trade Secrets: Overview of Current Law and Legislation*, CRS Report prepared for Members and Committees of Congress (2016], available at https://fas.org/sgp/crs/secrecy/R43714.pdf (last visited 28 March 2017).

Young Council Latin American Regional Forum, *Leniency: The Future for Cartel Enforcement in Latin America* (2016).

Yu Y., 'The Impact of Private International Cartels on Developing Countries' (2003) (/available at https://pdfs.semanticscholar.org/6d71/34ef780b0574706a66437eba056fbb94a938.pdf).

Zanettin B., *Cooperation Between Antitrust Agencies at the International Level* (2002).

18 U.S. Code § 1905 - Disclosure of Confidential Information Generally, LII / Legal Information Institute, available at https://www.law.cornell.edu/uscode/text/18/1905 (last visited 24 March 2017].

Agreement between the Government of Australia and the Government of New Zealand on Trans Tasman Court Proceedings and Regulatory Enforcement (Christchurch 24 July 2008) - [2013] ATS 32, 11 October 2013, available at http://www.austlii.edu.au/au/other/dfat/treaties/ATS/2013/32.html (last visited 27 March 2017).

ECR, *Ahlstrom v Commission*, 27 September 1988 5233, available at http://eur-lex.europa.eu/resource.html?uri=cellar:5ed612ae-790c-4091-bf05-0a6d7cbd9142.0002.06/DOC_1&format=PDF (last visited 6 April 2017].

'China Vitamin C Price-Fixing Verdict Scrutinized by Court', *Bloomberg.com* (2015] , available at https://www.bloomberg.com/news/articles/2015-01-29/china-vitamin-c-dispute-sets-up-clash-over-u-s-antitrust-law (last visited 6 February 2017).

Contribution from the European Union - Discussion on How to Define Confidential Information, DAF/COMP/WP3/WD(2013)57 (2013), available at http://ec.europa.eu/competition/international/multilateral/2013_oct_confidential%20information_en.pdf (last visited 24 March 2017].

Costa Rica _ Ley 7472 1995.pdf.

European Commission - PRESS RELEASES - Press Release - Competition: The European Competition Network Launches a Model Leniency Programme – Frequently Asked Questions, available at http://europa.eu/rapid/press-release_MEMO-06-356_en.htm (last visited 28 March 2017).

Indecopi Inicia Procedimiento Contra Seis Líneas Navieras Por Presuntas Prácticas Colusorias En El Servicio de Transporte Marítimo Internacional de Carga Rodante - Inicio - Indecopi, available at https://www.indecopi.gob.pe/inicio/-/asset_publisher/ZxXrtRdgbv1r/content/indecopi-inicia-procedimiento-contra-seis-lineas-navieras-por-presuntas-practicas-colusorias-en-el-servicio-de-transporte-maritimo-internacional-de-ca?inheritRedirect=false (last visited 23 May 2017].

Patent Cooperation Treaty, 19 June 1970.

PCT FAQs, available at /pct/en/faqs/faqs.html (last visited 28 March 2017).

Unctad.org | International Bid-Rigging Workshop: The Cases of Liquid Oxygen in Latin America, available at http://unctad.org/es/Paginas/MeetingDetails.aspx?meetingid=272 (last visited 16 June 2017].

UNITED STATES DISTRICT COURT FOR the SOUTHERN DISTRICT OF IOWA, *US SOCIETE NATIONALE INDUSTRIELLE AEROSPATIALE and Societe de Construction d'Avions de Tourisme, Petitioners v. UNITED STATES DISTRICT COURT FOR the SOUTHERN DISTRICT OF IOWA, Etc.*, 15 June 1987, available at https://www.law.cornell.edu/supremecourt/text/482/522 (last visited 11 April 2017).

[USC07] 15 USC Ch. 88: INTERNATIONAL ANTITRUST ENFORCEMENT ASSISTANCE, available at http://uscode.house.gov/view.xhtml?req=granuleid%3AUSC-prelim-title15-chapter88&edition=prelim (last visited 28 March 2017].