

REALISM AND INTERNATIONAL COOPERATION IN COMPETITION LAW

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I. INTRODUCTION

Under economic globalization, anti-competitive activities transcend national borders and pose a challenge for international trade law as traditionally conceived. The annual average number of cross-border competition cases in an average year has increased substantially. According to the Organization for Economic Co-operation and Development, the annual average number of cross-border mergers has increased from 3,513 in the period from 1995 to 1999 to 7,523 in the period from

2007 to 2011.¹ Similarly, from 1990 to 1994, there was an average of about three cross-border cartels per year. From 2007 to 2011, the average number of revealed cartel cases per year was about 16.²

Countries have been dealing with cross-border competition problems by unilaterally extending national jurisdiction to acts conducted in foreign territory and/or cooperating in enforcing competition law especially by multilateral trade agreements. Although some countries exercise national jurisdiction extraterritorially to deal with cross-border competition cases, some other countries strongly oppose the unilateral enforcement of competition law because it harms international comity.³ Countries therefore need to strengthen cooperation to deal with transnational competition challenges.

International cooperation in competition law, however, is constrained by conflicting national interests. This paper examines different means of cooperation among countries in dealing with transnational anticompetitive conduct and indicates that countries have never achieved any globally binding mechanisms that can deal with cross-border anticompetitive conduct. The problems of multilateral cooperation in competition law reflect the typical tension in world politics after the Second World War (“WWII”) between the development of national economic welfare and the development of ideal international institutions.⁴ In negotiating international agreements on competition, while developed countries sought to achieve international competition regimes that facilitate trade

1. The Organisation for Economic Co-operation and Development, *Challenges and International Co-operation in Competition Law Enforcement*, 24 (2014).

2. *Id.* at 29.

3. See Thanh Phan, *The Legality of Extraterritorial Application of Competition Law a Need for a Unified Approach* 77 *LA. L. REV.* 2 425, 425–426 (2016) (noting that especially in the case of multinational corporations, issues of what country’s competition laws should be applied in a competition case can cause friction in the international community).

4. Robert G. Gilpin, *No One Loves a Political Realist*, in *REALISM: RESTATEMENTS AND RENEWAL* 3, 9 (Benjamin Frankel, ed., Psychology Press, 1996). See also DAVID ARMSTRONG, THEO FARRELL, & HÉLÈNE LAMBERT, *INTERNATIONAL LAW AND INTERNATIONAL RELATIONS* 72–73 (2007) (relating some of the major developments in realist political theory in the period after World War II and how scholars analyzed state action).

liberalization, developing countries emphasized the need to respect their diversity in terms of stages of development, socio-economic circumstances, legal frameworks, and cultural norms.⁵ Developing countries also raised concerns about the financial and administrative burdens they would have to incur in implementing an agreement that set developed-country standards.⁶

By discussing international cooperation in competition law, this paper also contributes to the discourse among international relations theories on cooperation among countries. The study questions the optimism of liberal and institutional theories concerning international institutions and endorses realism's assertion that states' concerns about cheating and relative gains constrain countries from cooperation.⁷ The failure of efforts to achieve international cooperation in competition law endorses the following assertions of realists: (i) that the international system is anarchic rather than hierarchic, (ii) that international law and international institutions are unlikely "to transcend or replace nationalism," (iii) that the actions of states are rational and they seek to maximize their national interests, (iv) that countries have little trust to each other, and (v) that states are concerned more about relative gains than absolute ones so international cooperation is hard to achieve and maintain. International cooperation in competition law, therefore, relies on national competition laws and enforcement mechanisms (competition regimes) as well as soft cooperation mechanisms. The efforts of international institutions such as the Organization for Economic Co-operation and Development ("OECD"), United Nations Conference on Trade and Development ("UNCTAD"), or International Competition Network ("ICN") to maintain soft law and soft cooperation in

5. Aditya Bhattacharjea, *The Case for a Multilateral Agreement on Competition Policy: A Developing Country Perspective* 9 J. INT'L ECON. L. 293, 296–97 (2006).

6. *Id.* at 297.

7. Joseph M. Grieco, *Anarchy and the Limits of Cooperation: a Realist Critique of the Newest Liberal Institutionalism* 42 INT'L ORG. 485, 499 (1988); see also Robert O. Keohane, *Institutional Theory and The Realist Challenge after the Cold War in NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE*, 269, 275 (David A. Baldwin, ed., 1993); John J. Mearsheimer, *The False Promise of International Institutions* 19 INT'L SECURITY 3, 12 (1994). See more subsection II.B.

competition law supports the neo-liberal institutionalist belief that states “can work together and can do so especially with the assistance of international institutions.”⁸

This paper consists of four sections. The first section discusses theoretical approaches to international cooperation, which explain the behavior of states in international relations. The second section provides an overview of international cooperation in competition law. This section analyzes the benefits as well as the difficulties of having an international agreement on competition. The third section discusses multilateral cooperation in competition law. The discussion indicates that countries are attempting to integrate competition rules into multilateral agreements of which the main objective is to promote market access but not to protect consumer welfare, competition, or efficiencies. A possible solution for multilateral cooperation in this area of law is having soft or non-binding transnational laws. The fourth section analyzes bilateral cooperation in competition law enforcement. This level of cooperation provides substantive methods for countries to deal with cross-border competition cases, but it works only for developed countries in which competition regimes are robust.

II. THEORETICAL APPROACHES TO INTERNATIONAL COOPERATION

After World War II, the international economy experienced a profound tension between the demands of states to enhance national economic welfare—which serves to promote national competitiveness—and the need for an ideal international institution that would govern state behavior.⁹ These conflicting demands have long been the focus of discussions among mainstream theories of international law and international relations.¹⁰ The theories “posit that states are the main ‘subjects’

8. Grieco, *supra* note 7, at 486. *See more* subsection II.C.

9. SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE 7–8 (2011) (stating that, at the close of World War II, the Allied Powers gathered together to try to form global institutions to preserve and grow the international economy; however, negotiations failed with the exception of a modest trade agreement).

10. A. Claire Cutler, *Law in the Global Polity in* TOWARDS A GLOBAL POLITY 58, 59 (Morten Ougaard & Richard A Higgott, eds., 2002) (detailing some of the main

and agents or voices of the global polity and that state consent is the prerequisite for a ‘source’ of legal regulation.”¹¹ These theories also assume that states seek to maximize their self-interest.¹² Realism and liberal and institutional theories, however, provoke a tension in international relations theory.¹³ Realists expect that the world is characterized by multipolar competition under anarchy while institutionalists expect the development of international institutions in quantity and complexity.¹⁴ Given that international relation theories help explain international-political outcomes and the economic interactions of states,¹⁵ this section briefly reviews these theories to provide theoretical frameworks for the analysis of international cooperation in the competition law area.

A. *Realism*

Realism is an important approach to international relations that focuses on power, interests, and rationality in state decision-making.¹⁶ Realists construct their theories on “fundamental insights about world politics and state action.”¹⁷ This theory rejects the role of international law in world politics.¹⁸ Realism consists of several assumptions suggesting “the main determinants of international conditions, and suggest a research agenda for further enquiry about [international relations].”¹⁹

The first assumption is that the international system is

arguments in mainstream international relations theory).

11. *Id.*

12. JACK DONNELLY, REALISM AND INTERNATIONAL RELATIONS 133 (Cambridge U. Press 2000).

13. *Id.* at 131.

14. Keohane, *supra* note 7, at 285.

15. KENNETH NEAL WALTZ, THEORY OF INTERNATIONAL POLITICS 38 (McGraw Hill 1979).

16. Robert O. Keohane, *Theory of World Politics: Structural Realism and Beyond in NEOREALISM AND ITS CRITICS* 158, 159 (1986).

17. *Id.*

18. ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 71.

19. BENJAMIN FRANKEL, REALISM: RESTATEMENTS AND RENEWAL xiii (Frank Cass & Co. 1996).

anarchic rather than hierarchic.²⁰ The world is characterized by interaction among formally equal countries.²¹ According to realists, while the national political system is certain, the international political system is more hypothetical.²² International society lacks an overarching legislature, judiciary, and police force.²³ This decentralization of international law derives from the nature of international society, which is also decentralized.²⁴ Countries, therefore, together “make international relations largely a realm of power and interest.”²⁵ The absence of an effective government at international level is supposed to result in unsettled conflicts among the interests of states.²⁶ Moreover, an anarchic system makes international law unable to regulate a number of problems including those in the economic sphere.²⁷

Anarchy, however, does not mean that global society is chaotic or is in disorder.²⁸ States maintain their sovereignty and national order within their territory.²⁹ In addition, realists still acknowledge that international law provides “rights and duties of states in relation to each other” at the international level.³⁰ Second, realists assume that states depend on each other. Modern national economies have never been autonomous or functioned independently from each other.³¹ Countries mutually enrich their national societies by employing a division of labor in

20. DONNELLY, *supra* note 12, at 10.

21. Keohane, *supra* note 16, at 166 (stating that one of the underlying assumptions of realist theory is that all states perform primarily similar functions).

22. WALTZ, *supra* note 15, at 43; *see also* HANS J. MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE*, 249 (2nd ed. 1954) (stating that some authors go so far as to assert that international law does not exist).

23. FRANK WHELON WAYMAN & PAUL FRANCIS DIEHL, *RECONSTRUCTING REALPOLITIK*, 5 (U. of Mich. Press 1994).

24. MORGENTHAU, *supra* note 22, at 251.

25. DONNELLY, *supra* note 12, at 9.

26. WALTZ, *supra* note 15, at 102.

27. MORGENTHAU, *supra* note 22, at 253.

28. Mearsheimer, *supra* note 7, at 10.

29. *Id.*

30. MORGENTHAU, *supra* note 22, at 250.

31. WALTZ, *supra* note 15, at 105 (discussing the economic relations between countries in terms of the similarities and differences between international economic relations and domestic economic relations).

international markets.³² Thus, despite the anarchy and certain conflicts among countries, interdependence makes states loosely connected.³³

The third assumption of realism is that states are the most important actors in world politics.³⁴ Realists assert that states are principal actors that have legitimate voices in the world scene.³⁵ States create and confer international organizations certain legal standing and voices.³⁶ International law, which is made by states, also creates a limited number of rules limiting national sovereignty, but such rules are not binding without the consent of states.³⁷

The fourth assumption of realism is that states act rationally and seek to maximize their national interests.³⁸ Realists contend that the actions of states are not norm-driven; they derive from their national interests such as those in economic, ethnic, or territorial spheres.³⁹ Realism views states “as unitary actors that rationally calculate their actions in order to improve their material welfare.”⁴⁰ State foreign policy, therefore, is determined by state self-interest.⁴¹ Realism proposes that a good foreign policy is a rational one because it helps a country to “minimi[ze] risks and maximi[ze] benefits and, hence, compl[y] both with the moral precept of prudence and the political requirement of success.”⁴²

32. *Id.*

33. *Id.*

34. Keohane, *supra* note 16, at 164.

35. FRANKEL, *supra* note 19, at xiv (noting that international institutions merely reflect the interests of their member states, but that it is the states themselves that are the primary actors.).

36. Cutler, *supra* note 10, at 66 (arguing that international institutions may only issue pronouncements on issues that member states have empowered it to speak on).

37. MORGENTHAU, *supra* note 22, at 253.

38. Cutler, *supra* note 10, at 63; *see also* MORGENTHAU, *supra* note 22, at 9; Mearsheimer, *supra* note 7, at 10.

39. WALTZ, *supra* note 15, at 106 (discussing the considerations of economic relations with other countries, and how those relations might benefit or hurt any given nation.).

40. DONNELLY, *supra* note 12, at 30; *see also* Mearsheimer, *supra* note 7, at 11; Keohane, *supra* note 16, at 165.

41. MORGENTHAU, *supra* note 22, at 8.

42. *Id.* at 7.

The fifth assumption is that countries have little trust in each other. Realists assert that, in addition to the maximization of national interests, states “look for opportunities to take advantage of each other.”⁴³ Moreover, states are uncertain about the intentions and strategies of other states.⁴⁴ Each country acknowledges that all the other countries maximize their self-interests as it does.⁴⁵ States, therefore, are not willing to cooperate because they “fear that the other side will cheat on the agreement and gain a relative advantage.”⁴⁶

Sixth, realists assert that states care more about relative gains than absolute ones.⁴⁷ Realists argue that, even when cooperation provides a state with large absolute gains, the state will not cooperate if it finds that its partners achieve greater gains.⁴⁸

Seventh, realists doubt the function of international law and international institutions “that attempt to transcend or replace nationalism.”⁴⁹ Realism proposes that “non-material factors such as norms, institutions and international law” are not of much importance.⁵⁰ International institutions stipulate “the ways in which states should cooperate and compete with each other.”⁵¹ These institutions, according to realists, have little influence on state behavior and they are unable to prevent states from maximizing national short-term interests.⁵²

According to realists, the formation of international institutions is constrained by the structure of international politics for four reasons.⁵³ First, states compete instead of seeking to promote self-interest through building mutual

43. Mearsheimer, *supra* note 7, at 9.

44. FRANKEL, *supra* note 19, at xvi.

45. WALTZ, *supra* note 15, at 107.

46. Mearsheimer, *supra* note 7, at 13.

47. Grieco, *supra* note 7, at 498.

48. *Id.* at 499; *see also* Keohane, *supra* note 7, at 275; *see* Mearsheimer, *supra* note 7, at 12.

49. WAYMAN & DIEHL, *supra* note 23, at 5.

50. ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 74.

51. Mearsheimer, *supra* note 7, at 8.

52. John J. Mearsheimer, *A Realist Reply* 20 INT’L SEC. 1, 82 (1995); *see also* DONNELLY, *supra* note 12, at 132.

53. WALTZ, *supra* note 15, at 106.

benefit.⁵⁴ Each state focuses on its interests and cares little about the pay-off to others in the deal.⁵⁵ Second, each state worries that gains achieved from cooperation would be unevenly distributed and thus make it worse off.⁵⁶ Third, states fear that cooperation may make one more dependent on others and therefore impair one's sovereignty.⁵⁷ Fourth, the need for consensus constrains the emergence of international institutions because countries may take different approaches to the same problem.⁵⁸

Realists, however, do not reject the importance of international institutions because institutions "facilitate negotiations and ease exchanges and interactions."⁵⁹ Since the end of the nineteenth century, countries have achieved many treaties in many areas, such as communications and humanitarian law.⁶⁰

B. Liberal and Institutional Theories

In contrast to realism, liberalism in international relations emphasizes the participation of multiple actors and the role of normative rules in world politics.⁶¹ Liberalism emerged with the rise of international policies spreading liberal rules, practices, and institutions.⁶² Liberals observe that international order after WWII has been characterized by "open markets, multilateral institutions, cooperative security, alliance partnership, [and] democratic solidarity."⁶³ The world order consists of large-scale institutions such as the U.N. and WTO. It

54. *Id.* at 107.

55. Mearsheimer, *supra* note 7, at 12.

56. WALTZ, *supra* note 15, at 106; *See also* Mearsheimer, *supra* note 7, at 12.

57. WALTZ, *supra* note 15, at 106.

58. MORGENTHAU, *supra* note 22, at 257.

59. FRANKEL, *supra* note 19, at xv.

60. MORGENTHAU, *supra* note 22, at 256.

61. ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 83.

62. Beate Jahn, *Liberalism – In Theory and History*, in *THE FUTURE OF LIBERALISM IN INTERNATIONAL RELATIONS* 16 (Friedman, Oskanian & Pardo eds. 2013).

63. John G. Ikenberry, *The Liberal International Order and Its Discontents*, in *THE FUTURE OF LIBERALISM IN INTERNATIONAL RELATIONS*, at 93.

is a liberal, hegemonic order under the leadership of the U.S.⁶⁴ Liberal rules and institutions thus are supposed to be the foundation of the modern world.⁶⁵

Liberalism in international relations has three core principles. First, actors in world politics include not only states but individuals, organizations, and groups.⁶⁶ Second, liberals contend that the decisions of states are strongly influenced by domestic constituencies.⁶⁷ Third, unlike realism, liberalism espouses the belief that states can “form interdependent ties, through trade and institutionalized co-operation, which in turn can shape state preferences and policy.”⁶⁸ Liberals believe that free trade and the international division of labor strengthen the interdependence among states and thus enhance domestic welfare as well as world peace.⁶⁹ Liberal theory, however, seems to ignore the costs of free trade and thus is too optimistic about international institutions.⁷⁰ Experience indicates that international cooperation and policy coordination in some areas of the international economy do not work as well as liberals expect.⁷¹

Institutionalism is a theory that shares with liberalism the importance of international institutions in world politics. Institutionalists also agree with realists on two points to some extent. First, institutionalists agree that “states are the principal actors in world politics” and that states are rational egoists.⁷² States only care about their own interests and ignore the interests of others.⁷³ Institutionalists, however, expect that international institutions can help states achieve their self-

64. *Id.*

65. *Id.* at 96 (arguing that all of the leading nation states today follow liberal philosophies and policies).

66. ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 87.

67. *Id.*

68. *Id.*

69. Keohane, *supra* note 7, at 271; *see also* ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 87.

70. Jahn, *supra* note 62, at 16 (noting that the benefits of liberal free trade policies and democracy building seemed to be limited to the Western hemisphere).

71. *Id.*

72. Keohane, *supra* note 7, at 271.

73. *Id.* at 274.

interests.⁷⁴ Institutionalism also believes that international institutions “have become significant in world politics.”⁷⁵

Second, institutionalism also shares with realism the idea that world politics lacks a common enforcement mechanism.⁷⁶ Institutionalists, however, assert that realists are “too pessimistic about the prospects for cooperation and the role of institutions.”⁷⁷ The lack of a supranational enforcement mechanism does not imply the insignificance of international cooperation and institutions.⁷⁸ Countries regularly enter into treaties by which they give up certain sovereignty and bear reciprocal obligations.⁷⁹ Some authors assert that international economic issues “are characterized far more often [than security issues] by elaborate networks of rules, norms, and institutions, grounded in reasonably stable, convergent expectations.”⁸⁰

Although institutionalists are optimistic about the significance of international institutions, they do not argue for an internationally overarching authority but for horizontal regimes created and operated by states to fulfill their interests.⁸¹ International institutions do not work as a supranational government.⁸² Institutions in this sense not only enforce rules, but also serve as mechanisms that facilitate information sharing and reduce transaction costs for countries.⁸³ In short, institutionalists argue that international institutions help states obtain objectives that are not achievable by unilateral or bilateral measures.⁸⁴ The emergence of institutions is not only states’ rational choice but also “an act of the construction of social reality that is grounded on normative and epistemic

74. *Id.* at 271.

75. *Id.* at 272.

76. *Id.* at 289.

77. Keohane, *supra* note 7, at 277.

78. *Id.* at 289.

79. DONNELLY, *supra* note 12, at 81.

80. Charles Lipson, *International Cooperation in Economic and Security Affairs* in *NEOREALISM AND NEOLIBERALISM: THE CONTEMPORARY DEBATE, NEW DIRECTION IN WORLD POLITICS* 70 (David A. Baldwin ed. 1993).

81. Keohane, *supra* note 7, at 273.

82. Cutler, *supra* note 10, at 64.

83. Keohane, *supra* note 7, at 274.

84. *Id.*

agreements.”⁸⁵

Liberal institutionalism, which has challenged the dominance of realism since 1950s, is an institutionalist theory with liberal perspectives.⁸⁶ Liberal institutionalism rejects the following four assumptions of realism. First, liberal institutionalists reject the centrality of states and emphasize the role of other actors such as individuals and organizations.⁸⁷ Second, like liberalism, liberal institutionalism asserts that states are not rational agents.⁸⁸ Third, while realism insists that states lack trust and are not willing to cooperate, liberal institutionalism contends that states consider each other “partners needed to secure greater comfort and well-being for their home publics.”⁸⁹ Liberal institutionalists, therefore, share with institutionalists the notion that international interdependence is a strong foundation for international cooperation.⁹⁰ Fourth and finally, liberal institutionalists believe in the importance of international institutions.⁹¹ They argue that institutions can prevent states from cheating and sustain cooperation.⁹² Thus, the functions of states in a liberal world are instituting and safeguarding the self-regulating market.⁹³

A new liberal institutionalism called neo-liberal institutionalism developed in the mid-1980s.⁹⁴ This theory shares three points with realism: (i) that the international system is anarchic, (ii) that states are the main actors of world politics, and (iii) that the decisions of states are rational.⁹⁵ Neo-

85. SECURITY COMMUNITIES 150 (Emanuel Adler & Michael N. Barnett, eds.1998).

86. ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 69.

87. Grieco, *supra* note 7, at 488; *see also* ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 69.

88. Grieco, *supra* note 7, at 489; *see also* ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 87.

89. Grieco, *supra* note 7, at 490.

90. DONNELLY, *supra* note 12, at 29.

91. Grieco, *supra* note 7, at 490.

92. DONNELLY, *supra* note 12, at 134.

93. John Gerard Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Postwar Economic Order*, 36 INT'L ORG. 379, 386 (1982).

94. ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 85.

95. Grieco, *supra* note 7, at 492; *See also* ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 85–86 (asserting that neo-liberal institutionalism relies on the assumptions of

liberal institutionalism is less optimistic than liberal institutionalism about the role of institutions.⁹⁶ Neo-liberal institutionalists observe that “anarchy impedes cooperation through its generation of uncertainty in states about the compliance of partners.”⁹⁷

Neo-liberal institutionalists, however, disagree with realists about international cooperation. Neo-liberal institutionalists believe that institutions help states cooperate.⁹⁸ They agree that “cheating and deception are endemic in international relations” but contend that international institutions can reduce such problems.⁹⁹ The complex interdependence among countries is an important factor that prevents states from cheating.¹⁰⁰

In addition, neo-liberal institutionalists and realists disagree about the objective of cooperation among states. Neo-liberal institutionalists underemphasize distributive issues and argue that countries will cooperate if they achieve positive gains.¹⁰¹ They propose that international institutions are more important to deal with distributional problems because international institutions help states balance gains from cooperation.¹⁰² Realists reject this idea and argue that even when cooperation provides a state with large absolute gains, the state will not cooperate if it finds that its partners achieve greater gains.¹⁰³ This realist argument is consistent with the lack of international cooperation in competition law that suggests countries are concerned more with the extent of their gains relative to other countries.¹⁰⁴

realist theory).

96. ARMSTRONG, FARRELL & LAMBERT, *supra* note 4, at 85 (noting that neoliberals accepted a more limited role of institutions).

97. Grieco, *supra* note 7, at 502.

98. *Id.* at 492–93.

99. *Id.* at 497 (quoting Robert Axelrod & Robert O. Keohane, *Achieving Cooperation Under Anarchy: Strategies and Institutions*, 38 *WORLD POLITICS* 226, 226 (1985)).

100. Grieco, *supra* note 7, at 505–06.

101. Keohane, *supra* note 7, at 292.

102. Cutler, *supra* note 10, at 63.

103. Grieco, *supra* note 7, at 499; *see also* Keohane, *supra* note 7, at 275; *see also* Mearsheimer, *supra* note 7, at 12; *see* subsection II.A.

104. *See infra* subsections III.B, IV.B.

C. Conclusion

In a world of anarchy, transnational problems and the interdependence of states give states an incentive to strengthen cooperation to achieve their interests. Liberalism, institutionalism, liberal institutionalism, and neo-liberal institutionalism believe that institutions can discourage states from cheating and sustain cooperation. Even neo-liberal institutionalists, whose assumptions are close to those of realists, also believe that states “can work together and can do so especially with the assistance of international institutions.”¹⁰⁵ This assertion is supported by soft laws and soft cooperation in competition law provided by institutions such as the OECD, UNCTAD, or ICN.¹⁰⁶ Moreover, neo-liberal institutionalism argues that developed countries prefer bilateral cooperation because “each state could then be more confident that the other would remain in the arrangement.”¹⁰⁷ This assertion is found in bilateral cooperation between developed countries in competition law.¹⁰⁸ Institutionalists, however, are optimistic about international cooperation in economic issues since they believe that “economic games often involve relatively simple coordination or mutually beneficial exchange.”¹⁰⁹ The discussion about global international cooperation in competition law in section IV indicates that this assertion is weak.

Realists, by contrast, insist that neo-liberal institutionalism misunderstands impact of anarchy on the decisions of states and therefore “fails to address a major constraint on the willingness of states to cooperate which is identified by realism.”¹¹⁰ Realists assert that states are egoistic and do not trust each other. They also believe that states’ concerns about relative gains impair international cooperation. Realists do not reject the importance of institutions but observe that international cooperation is

105. Grieco, *supra* note 7, at 486; *see also* Cutler, *supra* note 10, at 63.

106. *See infra* subsection IV.C.

107. Grieco, *supra* note 7, at 506.

108. *See infra* section V.

109. Lipson, *supra* note 80, at 71.

110. Grieco, *supra* note 7, at 487.

difficult to achieve and sustain.¹¹¹ The discussion of international cooperation in competition law in sections IV and V suggests that while states do not seek to cheat one another, the views of realists provide a better explanation of international cooperation—or lack thereof—in the area of competition law than the views of institutional theorists.

III. OVERVIEW OF INTERNATIONAL COOPERATION IN COMPETITION LAW

Global competition purports to benefit society from several perspectives. First, global competition promotes global economic welfare by allowing markets to allocate resources to their optimal uses.¹¹² Second, global competition creates larger, more efficient markets that “reduce waste, increase output from available resources, and lower costs to consumers.”¹¹³ Third, global competition stimulates economic growth and thereby “increases aggregate wealth, produces jobs, [and] funds other social and political activities.”¹¹⁴

On the other hand, global competition allows for transnational anticompetitive conduct.¹¹⁵ According to the OECD, the annual average number of cross-border mergers has increased from 3,513 in the period from 1995 to 1999 to 7,523 in the period from 2007 to 2011.¹¹⁶ Likewise, the number of cross-border cartels revealed in an average year has increased substantially. From 1990 to 1994 there was an average of about three cross-border cartels per year.¹¹⁷ From 2007 to 2011, the average number of revealed cartel cases per year was about 16.¹¹⁸

111. Mearsheimer, *supra* note 7, at 12.

112. DAVID J. GERBER, GLOBAL COMPETITION: LAW, MARKETS, AND GLOBALIZATION 278 (2010).

113. *Id.*

114. *Id.*

115. *See id.* (explaining, among other things, the disparity in benefits from country to country because of anticompetitive conduct).

116. The Organisation for Economic Co-operation and Development, *supra* note 1, at 24 (citing the results of the OECD’s own study).

117. *Id.* at 29.

118. *Id.*

Global competition governance, however, has not kept up with the rise of transnational anticompetitive business practices. Some countries are seeking international cooperation in competition law while others are unwilling to cooperate.¹¹⁹ In addition, the effectiveness and strength of competition authorities differ from country to country.¹²⁰ The OECD found that some “competition authorities where the law has been violated, have either not investigated in their own jurisdictions or did not have access to sufficient evidence to impose fines.”¹²¹

As business transactions become more transnational, competition authorities face greater difficulties in dealing with cross-border anticompetitive business practices. The lack of cooperation in this field of law may result in several problems, including high costs of enforcing laws and negative effects externalized by national competition laws.¹²² Countries, however, may incur costs to achieve international cooperation in this field of law.¹²³ This section discusses the problems of not having international cooperation in competition law and costs that countries may incur if they cooperate in this area.

A. *Problems of Not Having International Cooperation in Competition Law*

The divergence of national competition regimes and the lack of international cooperation give rise to four main problems. First, the absence of effective international cooperation gives rise to unilateral conduct that may deepen conflicts among countries. The competition laws of some countries, such as

119. See *infra*, subsection III.B and section IV.

120. Anu Bradford, *International Antitrust Negotiations and the False Hope of the WTO*, 48 HARV. INT'L L. J. 383, 401 (2007) (noting that one of the main barriers to international enforcement of competition laws are the varying and sometimes contradictory domestic competition regimes which already exist).

121. The Organisation for Economic Co-operation and Development, *supra* note 1, at 49.

122. Paul Stephan, *Global Governance, Antitrust, and the Limits of International Cooperation*, 38 CORNELL INT'L L. J. 173,182 (2005) (arguing that nations' alternative objectives for competition policy complicates cooperation between nations).

123. The Organisation for Economic Co-operation and Development, *supra* note 1, at 19.

Canada,¹²⁴ the U.S.,¹²⁵ and Vietnam,¹²⁶ explicitly provide exemptions for business transactions that enhance global competitiveness of domestic firms regardless of their adverse anti-competitive effects on foreign markets. These exemptions are controversial from a transnational competition law perspective.¹²⁷ Under the competition laws of countries affected by such mergers or cartels, those business transactions are illegal.¹²⁸ Affected countries, therefore, would protect their markets by enforcing competition law extraterritorially.¹²⁹ Consequently, the extraterritorial application of affected countries' competition laws creates conflicts in law enforcement.¹³⁰ Countries where the exempted cartels or mergers operate may take measures to resist the extraterritorial application of foreign competition laws.¹³¹ For example, Canada has several provincial and federal blocking and claw back laws.¹³² These laws allow Canadian companies and individuals to refuse any order made by a foreign competition authority or court to exercise its power unilaterally in Canada.¹³³ In addition, the *Canadian Foreign Extraterritorial Measures Act* (the "Act")¹³⁴ empowers the Canadian Attorney General to declare that a foreign judgment is not recognized and enforced in Canada.¹³⁵ The *Act* also provides measures for a Canadian

124. See generally Competition Act of Canada, S.C. 1985, c C-34, amended by R.S.C. 2015 (Can.).

125. See generally Webb-Pomerene Act, 15 U.S.C. §§ 61–66 (1918); see also Export Trading Company Act, 15 USC §§ 4001-4016 (1982).

126. See generally Competition Law of Vietnam, 3 December 2004, 27/2004/QH11 at art. 10 (Viet.).

127. Stephan, *supra* note 122, at 181–82.

128. Competition Act of Canada, *supra* note 124, at 45.1; see Webb-Pomerene Act, *supra* note 125, at § 64; see also Competition Law of Vietnam, at art. 1.

129. Phan, *supra* note 3, at 429.

130. *Id.* at 435.

131. *Id.* at 475.

132. Business Concerns Record Act, R.S.Q. 1977, c D-12 (Can.); Business Records Protection Act, R.S.O. 1990, c B-19 (Can.); Foreign Extraterritorial Measures Act of Canada, R.S.C. 1985, c F-29 (Can.).

133. *Business Records Protection Act*, *supra* note 132, § 1(d); Business Concerns Record Act, *supra* note 132, § 3(d).

134. Foreign Extraterritorial Measures Act of Canada, *supra* note 132, at § 8.

135. *Id.*

resident to recover the damages and expenses incurred due to such a foreign judgment.¹³⁶ These conflicts among countries, however, may be solved by cooperation. The OECD suggests that cooperation aims at minimizing risks of divergent outcomes by facilitating dialogue among the enforcers involved in the review of same cases.¹³⁷

Second, global society may incur negative effects externalized by national competition laws due to the lack of cooperation among countries.¹³⁸ A competition regime that strengthens the monopoly position of a local producer will inflict costs on producers and consumers of other countries.¹³⁹ International rules on competition, therefore, would prevent individual countries from producing global welfare losses.¹⁴⁰ Given that national protectionism is often demanded by certain industries or interest groups, international negotiations may help to reduce the power of the lobbying actors.¹⁴¹ When governments participate in a negotiation, powerful interest groups in one state may be offset by counterparts in another.¹⁴²

Third, the lack of cross-border cooperation may result in overlapping investigations launched by different countries against the same violations.¹⁴³ These overlapping procedures make the costs for remedying cross-border competition cases unnecessarily high.¹⁴⁴ Moreover, private actors also incur high costs due to overlapping law enforcements.¹⁴⁵ Multiple jurisdictions may punish a corporation or an executive for the

136. *Id.* at § 9(1).

137. The Organisation for Economic Co-operation and Development, *supra* note 1, at 19.

138. In this situation, negative externality is loss of consumer welfare in more than one country. *See* Stephan, *supra* note 122, at 183 (suggesting states will eschew international cooperation at the expense of potential short term gains); *see also* Andrew T. Guzman, *Is International Antitrust Possible*, 73 N.Y.U. L. REV. 1501, at 1517 (explaining why countries block activity that increases global welfare).

139. Stephan, *supra* note 122, at 183.

140. *Id.* at 182.

141. Andrew T. Guzman, *The Case for International Antitrust*, 22 BERKELEY J. INT'L LAW 355, 366 (2004).

142. *Id.*

143. *Id.* at 368.

144. GERBER, *supra* note 112, at 94.

145. *Id.*

same violations without considering sanctions served by the violators in other jurisdictions.¹⁴⁶ Overlapping merger reviews also increase transaction costs and result in unnecessary delays as well as legal uncertainty.¹⁴⁷

Fourth, by conducting overlapping investigations in a certain cross-border case without cooperation, each competition authority may have a portion of evidence, but none of them may have thorough facts about the violation.¹⁴⁸ An international cartel may operate in different countries. Each of these countries' competition authorities can obtain evidence only within their territory, while missing any piece of evidence may make it difficult for them to prove and remedy such a transnational violation.¹⁴⁹ According to the OECD, cooperation allows a competition authority to use material of the counterparts and therefore offers authorities the opportunity to have more effective investigations and to generate efficiencies.¹⁵⁰

B. Costs of International Cooperation in Competition Law

Countries may incur high costs to achieve cooperation in the competition law area even though international cooperation may help them solve the above-mentioned problems.¹⁵¹ The OECD observed that “providing co-operation in a specific matter can be time and resource intensive,” particularly for smaller agencies.¹⁵² Countries that pursue international cooperation in competition law may incur the following four types of costs.

The first type of costs refers to what countries may incur for dealing with distributional problems.¹⁵³ States have difficulties

146. The Organisation for Economic Co-operation and Development, *supra* note 1, at 47.

147. Bradford, *supra* note 120, at 398.

148. *Id.* at n.40.

149. *Id.*

150. The Organisation for Economic Co-operation and Development, *supra* note 1 at 19.

151. Guzman, *supra* note 141, at 363–364.

152. The Organisation for Economic Co-operation and Development, *supra* note 1, at 19.

153. Bradford, *supra* note 120, at 385 (“Distributional problem arises as states assume that the costs and the benefits of an international antitrust agreement would be unevenly distributed among them”).

“*ex-ante* identifying which country would fare better under an international agreement and, therefore, who should compensate whom and by how much.”¹⁵⁴ Agreements on competition law do not necessarily promote the welfare of all participating countries, and some of those countries may be worse off.¹⁵⁵ Potential losers may not participate in an international competition law agreement unless they are compensated in some other form.¹⁵⁶ This consideration of states weakens neo-liberalism’s belief that institutions can help states deal with distributional problems and balance gains from cooperation.¹⁵⁷ By contrast, distributional problems seems to strengthen realism’s assertion that states’ concerns about cheating and relative gains discourages countries from cooperating.¹⁵⁸

Second, an individual country that participates in making an international competition agreement also incurs costs in addressing domestic conflicts of interest that arise in the context of negotiating an international competition law agreement.¹⁵⁹ Some voters who will not derive any benefit from such an agreement or who may be worse off under such an agreement may oppose it.¹⁶⁰ For example, exporting companies may oppose the formation of an international agreement that aims to eliminate exemptions for export cartels or mergers.¹⁶¹ Negotiators might favor the interests of certain groups over those of others. Thus, each country must solve domestic conflicts

154. *Id.*

155. Guzman, *supra* note 138, at 1542.

156. *Id.*

157. Cutler, *supra* note 10, at 63; *see supra* subsection II.B.

158. *See* Grieco, *supra* note 7, at 499 (arguing that a state will decline to join a cooperative agreement if it believes its partners will have more relative gains); *see also* Keohane, *supra* note 7, at 275 (discussing Grieco’s claim that international cooperation is less significant than institutionalists believe); *see also* Mearsheimer, *supra* note 7, at 12 (explaining how relative gains theory and concern about cheating inhibits international cooperation); *see also supra*, subsection II.A.

159. Guzman, *supra* note 138, at 1544.

160. *See* Bradford, *supra* note 120, at 401 (comparing efficiency gains with adjustment costs, one of which is lack of support for new laws by domestic groups); *see also* Guzman, *supra* note 138, at 1544 (arguing that political realities, such as voter dissatisfaction, may influence negotiators).

161. *See* Bradford, *supra* note 120, at 401 (explaining the costs that would be incurred by corporations to adjust in adherence to new anti-trust regulations).

of interest before reaching an agreement with other negotiating partners.¹⁶²

Third, developing countries may incur higher costs than developed countries in adjusting their competition regimes to meet standards specified in an international agreement.¹⁶³ For example, amending domestic laws and building capacity for antitrust agencies to enforce an agreement are costly for negotiating countries.¹⁶⁴ Complying with an international agreement would probably not be much of a burden on developed countries that have competition law regimes generally consistent with international competition law standards.¹⁶⁵ Fourth and finally, countries participating in an international agreement may also incur “sovereignty costs,” which deprive a country of certain measures of independence in decision making or require a country to change domestic laws as concessions to other countries.¹⁶⁶

IV. GLOBAL COOPERATION IN COMPETITION LAW

The divergence of competition laws and the conflicting interests among countries in certain competition cases may result in negative effects externalized by national competition laws.¹⁶⁷ Unilateral efforts are no longer an appropriate measure to deal with problems within global competition law.¹⁶⁸ Countries, therefore, seek to cooperate in competition law to deal with transnational competition issues although a global

162. *See id.* (concluding that should the adjustment costs of a deal outweigh its efficiency gains, countries would be unlikely to reach international agreements).

163. *See id.* at 398 (explaining the trend of under-enforcement in developing countries).

164. *See id.* at 401 (describing the ways that a country incurs adjustment costs).

165. *See id.* at 412 (comparing compliance costs between developing and developed countries).

166. *See id.* at 401 (summarizing the concept of sovereignty costs).

167. *See* Stephan, *supra* note 122, at 183 (explaining how consumers’ interests may affect competition law); *see also* Guzman, *supra* note 130, at 1517 (reviewing scenarios when domestic interests of nations affect decision making internationally).

168. *See* Gerber, *supra* note 112, at 280 (noting the problems inherent in persuading each country to go beyond its individual efforts in the area of competition law).

policy is generally not optimal for every country.¹⁶⁹

Despite the importance of international cooperation in competition law, countries have never attempted to make a standalone global agreement on competition. They are instead seeking to integrate competition rules into multilateral trade agreements.¹⁷⁰ There are two different opinions that explain this integration. According to the first opinion, the main objective of competition rules in a trade agreement is trade liberalization; not the traditional economic objectives of competition law.¹⁷¹ Competition rules integrated in an international trade agreement are made to ensure market access, not consumer welfare.¹⁷² Under such an “antitrust market access” approach, international trade law would adopt a principle of prohibiting anticompetitive business practices that block market access.¹⁷³ Proponents of this view suggest that countries might agree to the general principle that “there should be no substantial unjustified market blockage by public or private action (as well as no transnational cartels)”¹⁷⁴ and that countries should take a liberal antitrust approach to support the worldview of liberal trade.¹⁷⁵

The second explanation for the integration of international competition rules in trade agreements argues that the success of international competition rules depends on the concessions among countries in other areas of the agreement.¹⁷⁶ Some countries may be better off while some others may be worse off due to the formation and enforcement of the competition rules of such a trade agreement.¹⁷⁷ An agreement in antitrust law could

169. Guzman, *supra* note 138, at 1544.

170. *See id.* at 25 (synthesizing policy on trade law, competition law, and national industrial policy).

171. *See* Rene Uruena, *The World Trade Organization and its Powers to Adopt a Competition Policy*, 91 INT'L ORG. L. REV. 55, 82 (1997).

172. *Id.* at 62–63. *See also* Eleanor M. Fox, *Toward World Antitrust and Market Access*, 91 AM. J. INT'L L. 1, 23 (1997).

173. Fox, *supra* note 172, at 23.

174. *Id.*

175. *Id.* at 2.

176. *See* Guzman, *supra* note 138, at 1505 (reasoning that the problem lies in the distribution of gained benefits).

177. *See* Bradford, *supra* note 120, at 385 (opining that states will assume that the

be reached if worse-off countries are able to obtain concessions in other areas of negotiation.¹⁷⁸ Countries would, therefore, consider other unrelated issues concurrently with international cooperation on competition law.¹⁷⁹ For example, developing countries may incur costs for reforming their competition law regimes, but they could exchange the required antitrust reforms for a commitment from developed countries to reduce agricultural subsidies or tariff barriers.¹⁸⁰

Although global cooperation in competition law is supposed to be an important instrument to deal with transnational competition issues, countries pursue such cooperation to maximize their self-interest rather than to achieve a substantive mechanism to deal with transnational competition issues.¹⁸¹ This section explores three possible ways to achieve global cooperation in competition law. The first way is to create a harmonized global competition regime that directly regulates undertakings within the territories of member countries.¹⁸² Such a regime would establish an international authority dealing with cross-border competition cases.¹⁸³ The second way is to forge an international agreement that relies on national competition laws and enforcement mechanisms of member countries to deal with cross-border cases.¹⁸⁴ The third way refers to soft laws and soft cooperation, which do not affect the

costs and benefits of an international antitrust agreement would be unevenly distributed among them); *see also* Guzman, *supra* note 138, at 1544 (explaining the optimal global policy may not be generally optimal for every country).

178. *See* Guzman, *supra* note 138, at 1505.

179. *Id.* at 1545.

180. *See* Bradford, *supra* note 120, at 413.

181. For example, promoting market access and exchange for the reduction of subsidies and trade barriers. *See, e.g.*, Uruena, *supra* note 171, at 62–63 (enhancing market access does not necessarily mean powers to seek allocative efficiencies through an international competition policy); Fox, *supra* note 172, at 13 (reasoning that self-interests include increasing the economic welfare for their citizens, providing an environment for the development of their business, and engaging in the world trading system); *see* Bradford, *supra* note 120, at 385 (arguing that cooperation has been obstructed by uncertainty regarding the magnitude and the division of payoffs among states); Guzman, *supra* note 130, at 1544.

182. *See infra* subsection IV.A.

183. *Id.*

184. *See infra* subsection IV.B.

sovereignty of participating countries. Soft laws and soft cooperation offer states low-cost means of addressing transnational competition problems. The analysis in this section supports realism's claim that the concerns of states about cooperation in the competition law area will make cooperation unlikely.

A. *Harmonized Global Competition Regime*

A harmonized global competition regime—consisting of a global competition code and an enforcement mechanism—is an ideal tool for dealing with cross-border competition issues. Unlike international agreements that regulate the behaviors of states, a global competition code would regulate and remedy illegal business practices directly.¹⁸⁵ Such a regime would also provide an institution to which member countries would transfer their sovereignty to deal with cross-border competition cases.¹⁸⁶ This level of cooperation would address concerns about conflicts of interest and the divergence of competition laws among member countries in competition cases.¹⁸⁷

Having a global competition code and a corresponding institution, however, may result in four problems for participating countries. First, the global code and institution would bring about inflexibility because fixed obligations would be applicable to countries of which the competition regimes are at different levels of development.¹⁸⁸ Second, the code and institution would impose high costs on participating countries—especially developing countries.¹⁸⁹ Third, international regimes may result in an institutional failure as national institutions do, but the former's problems are more complex than those of the latter.¹⁹⁰ For example, the international institution may apply a

185. See Fox, *supra* note 172, at 3 (recognizing a need for a doctrine where a cartel is purely private and harm to buyers is direct).

186. See *id.* at 8 (reasoning that the sovereignty/competition tension is central to the dialogue for dealing with the issue of federalism).

187. See *id.* at 18 (arguing that agency cooperation is fruitful only when nationals perceive their interests to be common and choose to cooperate).

188. GERBER, *supra* note 112, at 319.

189. *Id.* at 324.

190. Stephan, *supra* note 122, at 175.

controversial economic theory which serves the interests of certain countries, or pursues other objectives than those of competition law, such as trade liberalization.¹⁹¹ Fourth, a global competition regime that considers the wealth transfer from consumer to producer as an anti-competitive effect would overcome the resistance of the country where the producer is located and would have a sufficient cross-border enforcement mechanism, which is costly.¹⁹² Therefore, a global competition code and a corresponding institution are hard to create and even harder to reform.¹⁹³

Although a harmonized global competition regime would be the most effective way to deal with global anti-competitive conduct, such a regime has never materialized. The *Treaty of Rome*,¹⁹⁴ which established the European Economic Community, is the only regional agreement that provides a cross-border enforcement institution and transnational competition rules applying directly to undertakings.¹⁹⁵ The transnational competition regulations of the E.U. result from the efforts of member countries to build a community in which competition law is not the only rule of trade.¹⁹⁶ The prerequisite of the transnational competition code of the E.U. is a high degree of economic integration of member countries.¹⁹⁷ European integration provides a transnational power for competition law in the E.U.¹⁹⁸ In addition, free trade is the foundation of the competition policy of the E.U.¹⁹⁹ The *Treaty of Rome* also

191. *See id.* at 199 (reasoning that adding competition policy to the WTO's significant responsibilities may not have the desired effect).

192. *See id.* at 198 (reasoning that the risk of international conflict is deeply embedded in international redistribution).

193. *Id.* at 203.

194. *See generally* Treaty Establishing the European Economic Community, Mar. 25, 1957, 298 U.N.T.S. 11 [hereinafter *Treaty of Rome*].

195. *Id.* at arts. 85–86 (prohibiting anti-competitive agreements and abuse of a dominant position).

196. *See* Fox, *supra* note 172, at 4 (claiming the European Economic Community attempted to harmonize liberal trade law, competition law, and national industrial policy).

197. GERBER, *supra* note 112, at 321.

198. *Id.* (noting that the overall network of integration in the European Community lends itself well to the application of transnational competition laws).

199. Fox, *supra* note 172, at 7.

prohibits member countries from providing subsidies that “distort[] or threaten[] to distort competition.”²⁰⁰

B. International Agreements Relying on National Competition Regimes

The second form of global cooperation in competition law relies on national competition regimes and international comity.²⁰¹ This form of cooperation provides neither substantive rules governing business practices directly nor an adjudicating institution governing transnational competition cases.²⁰² This form of cooperation may establish a mechanism to deal with a competition case in which an anti-competitive practice takes place in the territory of a member country (“the home country”) having adverse effects in the territory of another member country (“the affected country”). The mechanism allows the affected country or an international institution to request that the home country deals with the anti-competitive practice by enforcing the home country’s competition law.²⁰³

Cooperation among independent competition regimes relies on countries reciprocally agreeing to consider important interests of the other country when conducting their law enforcement activities.²⁰⁴ This is referred to as “positive comity.”²⁰⁵ The OECD classifies two types of comity: negative and positive comity. Negative or traditional comity refers to “a country’s consideration of how to prevent its laws and law enforcement actions from harming another country’s important interests.”²⁰⁶ Positive comity involves “a request by one country that another country undertakes enforcement activities in order to remedy an allegedly anti-competitive conduct that is substantially and adversely affecting the interests of the

200. *Treaty of Rome*, *supra* note 194, at art. 92.

201. Organisation for Economic Co-operation & Development, *supra* note 1, at 11.

202. *See id.* (defining comity as a horizontal, sovereign to sovereign state concept, not abdication of jurisdiction).

203. *Id.*

204. *Id.* (defining this principle as comity, and arguing that it is an essential aspect of international cooperation).

205. *Id.*

206. *Id.* at 13.

referring country.”²⁰⁷ The following subsections (1. to 3.) discuss the failed efforts made by countries to achieve global cooperation among independent competition regimes.

1. The Collapse of the Havana Charter

After World War II, countries attempted to create the International Trade Organization (ITO) encompassing a wide range of rich and poor countries.²⁰⁸ In 1948, the United Nations Conference on Trade and Employment concluded a final act in Havana.²⁰⁹ The Havana Charter sought to provide a broader scope and more detail than any previous agreements on economic relations.²¹⁰

Chapter V of the Charter was designed to regulate restrictive business practices.²¹¹ It required each member to take appropriate measures and cooperate with the ITO to prevent business practices affecting international trade which restrain competition: for example, price fixing, market allocation, production restriction, or excluding competitors.²¹² Article 47 of the Charter provided consultation procedures to reach a mutually satisfactory conclusion regarding an antitrust case between a member country in which the anti-competitive business practice is conducted and a party which is affected by the practice.²¹³

In addition, the Charter also provided a mechanism that would have allowed the affected country to complain to the ITO. According to Article 48(4),

[I]f the Organization decides that an investigation is

207. *Id.*

208. See Richard Toye, *Developing Multilateralism: The Havana Charter and the Fight for the International Trade Organization, 1947-1948*, 25 INT'L HIST. REV. 282, 282 (2003) (noting that the WTO, the eventual successor of the failed ITO and the treaty which did result from those negotiations, the GATT, has long been criticized for its treatment of developing nations).

209. Havana Charter for an International Trade Organization, Apr. 1948, 3 U.S.T. 5355 [hereinafter Havana Charter].

210. Toye, *supra* note 208, at 303 (quoting Memo ‘Outcome of the United Nations Conference on Trade and Employment’, 18 March 1948, USNA, RG 43, ITF, box 154.).

211. Havana Charter, *supra*, note 209, at art. 46.

212. *Id.* at art. 46.

213. *Id.* at art. 47.

justified, it shall inform all Members of the complaint, request any Member to furnish such additional information relevant to the complaint as the Organization may deem necessary, and shall conduct or arrange for hearings on the complaint. Any Member, and any person, enterprise or organization on whose behalf the complaint has been made, as well as the commercial enterprises alleged to have engaged in the practice complained of, shall be afforded reasonable opportunity to be heard.²¹⁴

Article 48(5) allowed the ITO to review all information available and decide “whether the practice in question has had, has or is about to have” harmful effects on the expansion of production or trade, or if it would interfere with the achievement of any of the other objectives of the Charter.²¹⁵ Moreover, the ITO had the power to request that any concerned member report fully on the remedial action it had taken in any particular case.²¹⁶

However, the efforts to prevent cross-border restrictive business practices under the Charter relied on member states’ competition mechanism. According to article 50(1):

[E]ach Member shall take all possible measures by legislation or otherwise, in accordance with its constitution or system of law and economic organization, to ensure, within its jurisdiction, that private and public commercial enterprises do not engage in practices which are as specified in paragraphs 2 and 3 of Article 46 and have the effect indicated in paragraph 1 of that Article, and it shall assist the Organization in preventing these practices.²¹⁷

Article 52 also provided that “[n]o act or omission to act on the part of the Organization shall preclude any Member from enforcing any national statute or decree directed towards preventing monopoly or restraint of trade.”²¹⁸

Chapter V of the Havana Charter, however, collapsed with the whole Charter and the ITO for two main reasons. First, the

214. *Id.* at art. 48(4).

215. *Id.* at art. 48(5).

216. *Id.* at art. 48(8).

217. Havana Charter, *supra* note 209, at art. 50(1).

218. *Id.* at art. 52.

demands of developed and underdeveloped countries differed.²¹⁹ The demands of some of the underdeveloped countries for “unequal treatment” were extreme and were not always clearly reasoned while European countries, especially Britain, did not consider the difference among countries’ levels of development and pursued objectives on non-discrimination.²²⁰ Second, there was domestic political resistance in the U.S.—a country that played an important role in the international system at the time.²²¹ The U.S. Congress did not ratify the Charter due to organized opposition and because the Republican Party—a party that pursued protectionism and isolationism—took over control of the U.S. Congress in 1947.²²² The Havana Charter was opposed on the basis that it was strongly constructed on liberal trade principles.²²³ The collapse of the Havana Charter is consistent with the claim by realists that concerns states have about the relative distributional costs and benefits and relative gains of cooperation are significant factors impairing international cooperation in competition law.²²⁴

2. The Unborn Draft International Antitrust Code

In 1992 and 1993, a group of competition scholars proposed a Draft International Antitrust Code (“DIAC”) that was designed to be the “international law of competition, consisting of unfair trade and restraint of competition inhibitions.”²²⁵ According to Wolfgang Fikentscher, a co-author of the DIAC, “having the World Trade Organization (“WTO”) in place, it would be strange if this trade organization would not look into

219. See, e.g., Toye, *supra* note 208, at 291 (the delegate of El Salvador noted that the industrialized countries felt their demand for unequal treatment deserved sympathetic consideration, while the United States and other industrialized countries stood firm on their formal concept of equilibrium); Ivan D Trofimov, *The Failure of the International Trade Organization (ITO): A Policy Entrepreneurship Perspective*, 5 J. POL. L. 56, 57 (2012) (illustrating the failure of the ITO market access provisions to remedy the U.S. proposal retaining agricultural import restrictions).

220. Toye, *supra* note 208, at 291-92.

221. Trofimov, *supra* note 219, at 57.

222. *Id.*

223. Toye, *supra* note 208, at 283.

224. See *supra* subsections II.A and II.C.

225. Wolfgang Fikentscher, *The Draft International Antitrust Code (“DIAC”) in the Context of International Technological Integration* 72 CHI.-KENT L. REV. 533, 533 (1996).

the question of competition.”²²⁶ The drafters expected that the DIAC could be a candidate for Annex 4 of the WTO.²²⁷

The drafters set five principles in drafting the DIAC. The first principle was to not have a world law but, instead, to “let national antitrust laws do the job, and let national antitrust laws stay in their place and take care of the problems which are posed in the international arena.”²²⁸ The DIAC, therefore, did not aim to create substantive rules directly governing private actors or establish an international competition institution to take over the role of national competition authorities at the transnational level.²²⁹ The second principle was the national treatment principle that requires the competition regime of each country to treat home enterprises and foreign firms equally.²³⁰ The third principle was the principle of minimum standards that would regulate the “consensus wrong.”²³¹ The drafter expected to propose antitrust offenses that every country was likely to prohibit.²³² The fourth principle was the principle of self-execution that would authorize an international agency to safeguard the application of the national competition laws²³³ by allowing an international agency anti-trust official to enforce the competition laws of a country that did not enforce its own competition laws properly.²³⁴ The fifth principle was that the DIAC would only apply to cross-border cases.²³⁵

The DIAC was opposed by some countries for several reasons.²³⁶ Fikentscher observes that one objection was that the DIAC was too general while another objection was that the DIAC should have been more general to give it a wider scope.²³⁷

226. *Id.*

227. *Id.* at 535.

228. *Id.* at 536.

229. *Id.*

230. Fikentscher, *supra* note 225, at 537.

231. *Id.*

232. *Id.*

233. *Id.* at 538 (stating that they invented a new principle similar to self-executing treaty implementation).

234. *Id.*

235. Fikentscher, *supra* note 225, at 539.

236. *Id.* at 542.

237. *Id.* at 542–43.

Some authors, however, assert that many countries, including the U.S., did not accept the DIAC because, among other concerns, the prohibitions were overly broad, the wording was ambiguous, and the DIAC contained several procedural flaws.²³⁸ Despite its flaws and failure, the DIAC was an effort to achieve a widely perceived goal: “international recognition of an obligation upon all governments to prevent private business firms from closing or restricting access to markets.”²³⁹

3. The Failure of a WTO’s Agreement on Competition

The WTO is “the only global international organization dealing with the rules of trade among countries.”²⁴⁰ From an international trade perspective, a multinational competition agreement should perfectly supplement trade liberalization policy because a global competition agreement would aim to reduce trade restrictions.²⁴¹ The WTO, therefore, acknowledges the role of a multilateral competition framework in its trade topics.²⁴² The WTO’s first Ministerial Conference in 1996 in Singapore established the Working Group on the Interaction between Trade and Competition Policy (the Working Group).²⁴³ According to the Singapore Ministerial Declaration, this working group studies “issues raised by Members relating to the interaction between trade and competition policy, including anti-competitive practices, to identify any areas that may merit further consideration in the WTO framework.”²⁴⁴ In 1997 and 1998, the Working Group focused on three main issues:

- (i) The relationship between the objectives, principles,

238. Daniel J. Gifford, *The Draft International Antitrust Code Proposed at Munich: Good Intentions Gone Awry* 6 MINN. J. GLOBAL TRADE 1, 4–5 (1996); see also Fox, *supra* note 172, at 15–16.

239. Gifford, *supra* note 238, at 28.

240. WORLD TRADE ORGANIZATION: WHAT IS THE WTO?, https://www.wto.org/english/thewto_what_is_e/whatise.htm.

241. Uruena, *supra* note 171, at 55; see also Fox, *supra* note 172, at 19–22 (explaining that multi-national competition agreements and linking-principle systems would assure foreign nations and individuals access to litigation tools and appellate procedures, thereby reducing trade restrictions).

242. World Trade Organization, Ministerial Declaration of 13 December 1996, WTO Doc. WT/MIN(96)/DEC (2002) ¶ 1.

243. *Id.* at ¶ 20.

244. *Id.*

concepts, scope and instruments of trade and competition policy; and their relationship to development and economic growth, (ii) Stocktaking and analysis of existing instruments, standards, and activities regarding trade and competition policy, . . . (iii) The interaction between trade and competition policy.²⁴⁵

According to the Working Group's report in 1999, many members affirmed the need to enhance cooperation among members in addressing anti-competitive practices.²⁴⁶ However, their views differed towards the need for actions "at the level of the WTO to enhance the relevance of competition policy to the multilateral trading system."²⁴⁷ While several members supported a multilateral agreement on competition policy in the WTO, others favored bilateral and/or regional cooperation in competition.²⁴⁸

The fourth Ministerial meeting in Doha in 2001 recognized the demand of developing and least-developed countries for technical assistance and capacity building in competition law.²⁴⁹ The Ministerial meeting agreed that negotiations would "take place after the Fifth Session of the Ministerial Conference on the basis of a decision to be taken, by explicit consensus, at that session on modalities of negotiations."²⁵⁰ The Working Group planned to work on core principles, including "transparency, non-discrimination and procedural fairness, and provisions on hard-core cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building."²⁵¹ However, the fifth Ministerial Conference in Cancún in 2003 ended without consensus.²⁵² There was no discussion of competition

245. Trade and Competition Policy: Working Group Set Up by Singapore Ministerial, World Trade Organization (Seattle, U.S., 1999), https://wto.org/english/thewto_e/minist_e/min99_e/english/about_3/16comp/e.htm.

246. *Id.*

247. *Id.*

248. *Id.*

249. World Trade Organization, Ministerial Declaration of 14 November 2001, WTO Doc. WT/MIN(01)/DEC/1, (2001) ¶ 24.

250. *Id.* at ¶ 20.

251. *Id.* at 25.

252. World Trade Organization, Ministerial Declaration of 14 September 2003, WTO Doc. WT/MIN(03)/20 (2003).

law in subsequent conferences in Hong Kong in 2005,²⁵³ Geneva in 2009,²⁵⁴ Geneva in 2011,²⁵⁵ Bali in 2013,²⁵⁶ or Nairobi in 2015.²⁵⁷

The U.S.—which is an important member of the WTO—rejected the WTO proposals on competition law.²⁵⁸ Some American experts expressed fear that an international institution governing competition law might undermine national sovereignty, and that a global rule would be inconsistent with the objectives of some countries' competition laws.²⁵⁹ In addition, they feared that a WTO body would enforce international competition policy against American corporations.²⁶⁰ The U.S. experts, therefore, argued that “an international competition law framework is simply not necessary.”²⁶¹

The WTO's proposals on competition law were also opposed by developing countries.²⁶² These countries resisted a “one size fits all” agreement and feared the transplantation of competition law—a legal idea that has evolved in industrial countries—into developing economies.²⁶³ These countries emphasized the need to respect their “diversity in terms of stages of development, socio-economic circumstances, legal frameworks and cultural

253. See generally World Trade Organization, Ministerial Declaration of 18 December 2005, WTO Doc. WT/MIN(05)/DEC (2005); see also SARAH JOSEPH, BLAME IT ON THE WTO? A HUMAN RIGHTS CRITIQUE, 11 (2011) (pointing out that current rounds of negotiating a new WTO competition agreement have stalled, with no meaningful progress made recently).

254. See generally World Trade Organization, Record of Working Session I, WTO Doc. WT/MIN(09)/WS/R/1 (2009).

255. See generally World Trade Organization, Eighth Ministerial Conference, WTO Doc. WT/MIN(11)/11 (2011).

256. See generally World Trade Organization, Bali Ministerial Declaration, WTO Doc. WT/MIN(13)/DEC (2013).

257. See generally World Trade Organization, Nairobi Ministerial Declaration, WTO Doc. WT/MIN(15)/DEC (2015) .

258. GERBER, *supra* note 112, at 105–06.

259. *Id.* at 106.

260. *Id.*

261. *Id.*

262. Bhattacharjea, *supra* note 5, at 296–97 (discussing that developing countries opposed the sweeping terms of the proposal and emphasized the importance of recognizing each countries current socio-economic position).

263. *Id.* at 297.

norms.”²⁶⁴ A number of developing countries also considered financial and administrative burdens arising from the enforcement of a competition law agreement.²⁶⁵

In sum, the WTO member countries have been unable to reach an agreement on competition law due to five problems. First, since the WTO deals with rules of trade between nations, its proposed competition agreement tends to focus more on trade liberalization perspective than the core objectives of competition law such as protecting consumer welfare, protecting competition, or promoting efficiency.²⁶⁶ Second, concerns countries had about their self-interests and the unfair distribution of interests and costs of such an agreement were too strong for an agreement to succeed.²⁶⁷ Third, the principle of national treatment and the most-favored-nation principle of the WTO could constrain enforcement by a member country’s competition authority, especially in transnational merger cases.²⁶⁸ For example, country A may block a merger between a foreign firm and a domestic firm due to its anti-competitiveness but may allow a similar merger between two domestic firms because the latter’s efficiency outweighs its anti-competitiveness.²⁶⁹ Countries that have interests in the merger may argue that country A discriminates between its domestic firm and foreign companies.²⁷⁰ Country A and countries in

264. *Id.* at 296–97.

265. *Id.* at 297.

266. Uruena, *supra* note 171, at 55 (explaining that multilateral competition policies promote efficiency by eliminating private trade restrictions); *see also* Fox, *supra* note 172, at 19–22 (demonstrating that linking-principle systems introduce anticartel rules and encourage market access).

267. The U.S. and developing countries’ concern, for example, diverge on this point; *see also* Bhattacharjea, *supra* note 5, at 296–97 (discussing that developing countries opposed the sweeping terms of the proposal and emphasized the importance of recognizing each countries current socio-economic position).

268. WORLD TRADE ORGANIZATION, PRINCIPLES OF THE TRADING SYSTEM, https://www.wto.org/english/thewto_e/whatis_e/tif_e/fact2_e.htm (defining the rules of non-discrimination in trade, called the “Most Favored Nation” and “National Treatment” principles.”).

269. *See id.* (stating that in theory these principles stand for the presumption that foreign goods and services should receive the same treatment as domestic goods and services, but that some exceptions exist).

270. *See id.* (defining the national treatment principle, which states that a nation

question may not agree on the similarity between the two cases. The national treatment principle, therefore, may constrain the enforcement of country A's competition law. Fourth, the objectives of competition law differ from country to country.²⁷¹ A WTO agreement on competition law, therefore, could not be achieved until the gap between countries is closed.²⁷² Fifth and finally, setting up a dispute settlement mechanism for an agreement on competition law would be a difficult task for WTO member countries. The Government of Canada asserts that competition law enforcement is fact and data intensive, and requires detailed investigation.²⁷³ In addition, different countries are taking different economic theoretical approaches to competition law enforcement. A proposed dispute settlement body would, however, have to take one approach consistently.²⁷⁴

C. *Soft Laws and Soft Cooperation Governing Transnational Competition Problems*

As mentioned above, countries are reluctant to reach a binding multilateral agreement on competition because of the

may not treat similar foreign and domestic goods and services differently).

271. See The World Bank & The Organisation for Economic Co-operation and Development, *A Framework for the Design and Implementation of Competition Law and Policy* (1998), at 2 (arguing that while the United States and Canada see competition law as a means to maintain the competitive marketplace, France views competition laws as a means of securing economic freedom). See also The Organisation for Economic Co-operation and Development, *The Objectives of Competition Law And Policy*, CCNM/GF/COMP(2003) at 9.

272. Bhattacharjea, *supra* note 5, at 296–97.

273. COMPETITION BUREAU: GOVERNMENT OF CANADA, *OPTIONS FOR THE INTERNATIONALIZATION OF COMPETITION POLICY*, REPORTS at V. (1999), <http://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/01646.html#Sec6>.

274. Economic theoretical approaches to competition enforcement such as the consumer welfare approach or total welfare approach. See Bhattacharjea, *supra* note 5, at 296 (noting that the EU in particular argued for a dispute settlement body which would require member countries to enact and enforce laws based on the fundamental principles set out in the Doha Declaration); see also K. J. Cseres, *The Controversies of the Consumer Welfare Standard*, 3 COMPETITION L. REV. 121, 126 (2007) (arguing that dispute settlement bodies would be better off applying a total welfare standard that promotes efficiency and equity among the population); see also Herbert Hovenkamp, *Implementing Antitrust's Welfare Goals Symposium: The Goals of Antitrust*, 81 FORDHAM L. REV. 2471, 2478 (2012) (advocating for adopting the welfare tradeoff approach which would balance the dead-weight losses of production efficiency with producer gains).

gap between countries' capacities to implement the agreement²⁷⁵ as well as differing demands of countries.²⁷⁶ In addition, a binding multilateral agreement may require member countries to give up some degree of their sovereignty.²⁷⁷ Countries, therefore, seek soft laws and soft cooperation to fulfill their demand for low-cost means of addressing transnational competition problems.²⁷⁸ The efforts of countries and international institutions to maintain soft law and soft cooperation in competition law area endorse to some extent the belief of neo-liberal institutionalists that international institutions help states work together on dealing with certain international problems.²⁷⁹

In this paper, soft laws refer to non-binding rules providing countries with flexible solutions to deal with transnational competition problems.²⁸⁰ These laws allow adhering countries to adapt gradually to a new regime and to select only the provisions they prefer for implementation.²⁸¹ Soft laws rely on mutual understanding among countries and help competition laws across countries converge without weakening the enforcement of their national competition regime.²⁸² They also promote to some extent cooperation among competition agencies in dealing with transnational competition cases.²⁸³ Soft or informal cooperation is defined as unofficial, casual, daily, friendly and unconstrained collaboration between competition agencies.²⁸⁴ An advantage of soft cooperation is "states'

275. Bhattacharjea, *supra* note 5, at 296–97.

276. Trofimov, *supra* note 219, at 57–58 (relating the differing demands of countries and parties during the attempted formation of the failed ITO); *see also* Toye, *supra* note 208, 181 at 291.

277. Bradford, *supra* note 120, at 401.

278. *Id.* at 405 (arguing that certain countries, like the United States, may not pursue international agreements due to high negotiation and transaction costs).

279. Grieco, *supra* note 7, at 486; *see also* Cutler, *supra* note 10, at 63.

280. Guzman, *supra* note 141, at 370 (using the example of the information sharing, or "soft" cooperation used by the Organisation for Economic Co-operation and Development.).

281. *Id.*

282. Guzman, *supra* note 138, at 1543.

283. *Id.* (acknowledging that although soft law agreements are important, they are not as strong as many commentators have envisioned.).

284. The United Nations Conference on Trade and Development Secretariat

willingness to enter into deeper substantive commitments if those commitments are kept non-binding.”²⁸⁵ The following subsections analyze multilateral soft laws on competition provided by the International Competition Network, the Organization for Economic Co-operation and Development, and the United Nations Conference on Trade and Development.

1. The International Competition Network

The ICN, which was launched on October 25, 2001, consists of 104 competition agencies from 92 jurisdictions.²⁸⁶ The ICN provides a “dynamic dialogue that serves to build consensus and convergence towards sound competition policy principles across the global antitrust community.”²⁸⁷ The ICN serves to “advocate the adoption of superior standards and procedures in competition policy around the world, formulate proposals for procedural and substantive convergence, and seek to facilitate effective international cooperation to the benefit of member agencies, consumers and economies worldwide.”²⁸⁸

The ICN is not a rule-making body; it instead seeks “consensus on recommendations, or ‘best practices,’ arising from the projects, individual competition authorities decide whether and how to implement the recommendations, through unilateral, bilateral or multilateral arrangements, as appropriate.”²⁸⁹ A notable work of the ICN on international cooperation is the Practical Guide to International Enforcement Cooperation on Mergers.²⁹⁰ This guide is intended to serve as: “(i) a voluntary and flexible framework for inter-agency cooperation on merger investigations; (ii) practical guidance for

(UNCTAD), *Informal Cooperation among Competition Agencies in Specific Cases*, TD/B/C.I/CLP/29 (Apr. 28, 2014) at 3.

285. Bradford, *supra* note 120, at 439.

286. The International Competition Network, *ICN Factsheet and Key Messages* (ICN, 2009) at 1.

287. INTERNATIONAL COMPETITION NETWORK, *About the International Competition Network*, ¶ 1, <http://www.internationalcompetitionnetwork.org/about.aspx>.

288. *Id.*

289. *Id.*

290. *See generally* The International Competition Network, *Practical Guide to International Enforcement Cooperation in Mergers* (2012) (discussing recommended practices of merger review cooperation).

agencies seeking to engage in such cooperation; and (iii) practical guidance for merging parties and third parties seeking to facilitate cooperation.”²⁹¹ It provides agencies with cooperation guidance in specific cases but allows competition authorities to decide the form of their cooperation.²⁹²

Multilateral cooperation through the ICN is important and helps countries harmonize substantive law.²⁹³ The ICN’s soft cooperation framework allows competition agencies to deal with transnational competition cases when necessary without giving up their sovereignty.²⁹⁴

2. The Organization for Economic Co-operation and Development

The OECD, which consists of 34 member countries, has adopted a number of non-binding recommendations on competition law and policy and best practices such as the OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings,²⁹⁵ the Revised Recommendation Concerning Co-operation Between Members Countries on Anticompetitive Practices Affecting International Trade,²⁹⁶ and the Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations.²⁹⁷

291. *Id.* § II.3.

292. *Id.*

293. Guzman, *supra* note 141, at 370.

294. *Id.*

295. *See generally* The Organisation for Economic Co-operation and Development, OECD Recommendation concerning International Co-operation on Competition Investigations and Proceedings, (2014) (recommending participating countries commit to international cooperation and make efforts to create open channels of communication to exchange relevant information).

296. *See generally* The Organisation for Economic Co-operation and Development, Revised Recommendation Concerning Co-operation Between Members Countries on Anticompetitive Practices Affecting International Trade, (1995) (recommending member countries engage in mutually beneficial and practical practices to deal with anticompetitive actions in international trade).

297. *See generally* The Organisation for Economic Co-operation and Development, Best Practices for the Formal Exchange of Information between Competition Authorities in Hard Core Cartel Investigations, (2005) (advising steps to effectively and formally exchange information between competition authorities in cartel investigations).

The Recommendation concerning International Co-operation on Competition Investigations and Proceedings is a remarkable soft law of the OECD that calls for substantive cooperation between adherents.²⁹⁸ This recommendation, which was adopted on September 16, 2014, suggests adherence to promote international co-operation and “minimize direct or indirect obstacles or restrictions to effective enforcement co-operation between competition authorities.”²⁹⁹ Adhering countries pursue three basic commitments to effective international cooperation. First, they commit to minimize the legal framework that impairs international cooperation among competition authorities or legislations that prohibit domestic entities from cooperating with foreign competition authorities.³⁰⁰ Second, adherents commit to make competition law and enforcement mechanism transparent.³⁰¹ Third, adhering countries commit to “minimize inconsistencies between their leniency or amnesty programmes that adversely affect cooperation.”³⁰²

In addition, the Recommendation concerning International Co-operation on Competition Investigations and Proceedings calls for substantive cooperation between competition agencies in dealing with cross-border competition cases.³⁰³ First, it suggests the adoption of national 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.”³⁰⁴ This mechanism helps competition agencies share information related to cross-border cases in a more timely and efficient manner.³⁰⁵ Second, it recommends each adherent provide investigative assistance to another

298. “Adherents” refers to OECD members and non-members adhering to a recommendation. See Organisation for Co-operation and Economic Development, *supra* note 295, § 1.

299. *Id.* § II.

300. *Id.* § II.1.

301. *Id.*

302. *Id.* § VII.10.

303. *Id.*

304. Organisation for Co-operation and Economic Development, *supra* note 295, § VII.10.

305. *Id.* at § VI (recommending Adherents “provide notice of applicable time periods and schedules for decision-making.”).

competition authority including the possibility of executing inspections of premises, requests for information, and witness testimonies on behalf of another agency.³⁰⁶

Given that the recommendations and best practices of the OECD are not binding, its frameworks allow countries to cooperate substantively, especially on cross-border investigative assistance.³⁰⁷ Moreover, while the soft cooperation framework applies to OECD member countries, non-OECD member countries are encouraged to adhere to these recommendations and best practices.³⁰⁸

3. The United Nations Conference on Trade and Development

The UNCTAD also provides soft laws on transnational competition.³⁰⁹ The objective of UNCTAD's work on competition and consumer policies is to ensure that "partner countries enjoy the benefits of increased competition, open and contestable markets, private sector investment in key sectors and ultimately that consumers achieve improved welfare."³¹⁰ On December 5, 1980, the United Nations ("U.N.") General Assembly adopted the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices ("the Set") approved by the United Nations Conference on Restrictive Business Practices.³¹¹ These rules are not binding and the U.N. suggests all member states to implement the Set.³¹²

The Set has five objectives that emphasize the interest of developing countries and aim to limit restrictive business conduct of multinational corporations.³¹³ The first objective

306. *Id.* § VIII.1.

307. *Id.*

308. *Id.* § X.

309. *See generally* The United Nations Conference on Trade and Development (UNCTAD), *Competition Law and Consumer Protection Policy*, <http://unctad.org/en/Pages/DITC/CompetitionLaw/Competition-Law-and-Policy.aspx>.

310. *Id.* ¶ 1.

311. The United Nations Conference on Trade and Development (UNCTAD), *The United Nations Set of Principles and Rules on Competition*, TD/RBP/CONF/10/Rev.2 (Apr. 22, 1980), at 1 [hereinafter *Principles and Rules on Competition*].

312. *Id.*

313. *Id.* at art. IV.

focuses on the trade-liberalization perspective of transnational competition rules.³¹⁴ It seeks to ensure that “restrictive business practices do not impede or negate the realization of benefits that should arise from the liberalization of tariff and non-tariff barriers affecting world trade, particularly those affecting the trade and development of developing countries.”³¹⁵

The second and third objectives of the Set are in accordance with the economic objectives of competition law such as promoting efficiency, protecting competition, and promoting consumer welfare.³¹⁶ The second objective of the Set is to “attain greater efficiency in international trade and development, particularly that of developing countries.”³¹⁷ It seeks to (a) “create, encourage, and protect competition;” (b) control the capital and economic concentration; and (c) encourage innovation.³¹⁸ The third objective is “to protect and promote social welfare in general and, in particular, the interests of consumers in both developed and developing countries.”³¹⁹

The fourth objective aims at multinational corporations.³²⁰ It seeks “to eliminate the disadvantages to trade and development which may result from the restrictive business practices of transnational corporations or other enterprises, and thus help to maximize benefits to international trade and particularly the trade and development of developing countries.”³²¹ The fifth and final objective of the Set is to “facilitate the adoption and strengthening of laws and policies in this area at the national and regional levels.”³²²

In sum, the Set of Multilaterally Agreed Equitable Principles and Rules for the Control of Restrictive Business Practices is a work of the UNCTAD that calls countries to act in a mutually reinforcing manner at the national, regional, and

314. *Id.* at art. IV ¶ 1.

315. *Id.*

316. *Id.* at art. IV ¶¶ 2–3.

317. *Principles and Rules on Competition*, *supra* note 311, art. IV. ¶ 2.

318. *Id.*

319. *Id.* at art. IV. ¶ 3.

320. *Id.* at art. IV ¶ 4

321. *Id.*

322. *Id.* at art. IV. ¶ 5.

international levels to eliminate or effectively deal with restrictive business practices.³²³ The main objective of the Set does not serve the benefit of multinational corporations or trade liberalization like competition rules integrated in multilateral trade agreements.³²⁴ It instead seeks to protect and promote social welfare in general and the interests of consumers in both developed and developing countries from restrictive business practices, especially those conducted by multinational corporations.³²⁵

V. BILATERAL COOPERATION IN COMPETITION LAW

Since a multilateral agreement on competition law is costly and likely infeasible, several countries seek bilateral cooperation to deal with cross-border competition cases.³²⁶ Bilateral negotiations generally have a higher likelihood of success than multilateral negotiations, given that a smaller group of countries has a higher probability of finding common ground.³²⁷ With only a few participating countries, there is a greater chance to achieve a policy that will benefit all parties.³²⁸

Some countries sign a bilateral agreement that exclusively governs competition law while others integrate transnational competition rules in a bilateral trade agreement.³²⁹ Most bilateral agreements that exclusively govern competition law are between developed countries that have strong competition regimes.³³⁰ Developed countries may achieve substantive agreement on competition law because they similarly benefit

323. *Principles and Rules on Competition*, *supra* note 316, art. V.

324. *See id.* at art. IV ¶ 2 (protecting instead competition at a more individual level through the use of objectives like “encouragement of innovation”).

325. *Id.* at art. IV ¶¶ III–IV.

326. *See e.g.*, Agreement Between the Government of the United States of America and the Government of Canada Regarding the Application of Their Competition Laws and Deceptive Marketing Practices Laws, U.S.–Can., Aug. 3, 1995, 35 I.L.M. 309 [hereinafter Agreement 1995] (agreeing to coordinate efforts between competition agencies).

327. Guzman, *supra* note 138, at 1547.

328. *Id.*

329. *See e.g.*, Agreement 1995, *supra* note 326.

330. GERBER, *supra* note 112, at 108; *see also* neo-liberal institutionalism’s assertion in subsection II.C.

from such an agreement.³³¹ This rejects the pessimism of realists about international cooperation and supports the assertion of neo-liberal institutionalists that developed countries prefer bilateral cooperation because “each state could then be more confident that the other would remain in the arrangement.”³³² Gaps in interests between developing countries and between a developing country and a developed country make it much more difficult for them to achieve substantive bilateral agreements on competition law.³³³

This section analyzes bilateral agreements between a group of four countries: Canada, Japan, the U.S., and Vietnam. Canada and the U.S. are two common-law countries, while Japan and Vietnam are two civil law jurisdictions.³³⁴ In this group, Vietnam is a developing country and the others are developed countries.³³⁵ This section proceeds with two subsections: bilateral agreements between developed countries, and bilateral agreements between a developed country and a developing country.

A. *Bilateral Agreement between Developed Countries*

Three out of the four countries in the group are developed countries.³³⁶ These countries have robust competition regimes and they have signed bilateral agreements on competition

331. Guzman, *supra* note 138, at 1546 (asserting that similarities in net trade allow countries to benefit from competition law agreements); Charles Lipson argues that co-operation can be sustained among advanced capitalist states; see Lipson, *supra* note 80, at 76 (highlighting the fact that in a realist system where each country is guessing at the motivations of the other, it is easier for countries with similar demographics, like developed countries, to reach a deal, than it is for dissimilar nations, like a developed and a developing country).

332. Grieco, *supra* note 7, at 506.

333. See Guzman, *supra* note 138, at 1546 (noting the need for transfer payment to compensate for net trade imbalance).

334. See CENT. INTEL. AGENCY, *The World FactBook: Legal Systems*, <https://www.cia.gov/library/publications/the-world-factbook/fields/2100.html>.

335. *World Economic Situation and Prospects 2014: Country Classification*, 143–45, UN/DESA, http://www.un.org/en/development/desa/policy/wesp/wesp_current/2014wesp_country_classification.pdf.

336. *Id.*

enforcement.³³⁷ These agreements enhance bilateral cooperation between these competition agencies in enforcing competition law against cross-border anticompetitive business practices.³³⁸

1. Canada and the United States

On August 1, 1995, the Government of Canada and the Government of the United States of America signed an agreement on the application of their competition and deceptive marketing practices laws (“Agreement 1995”).³³⁹ The purposes of this agreement are to promote cooperation and coordination between the competition authorities of the Parties, to avoid conflicts arising from the application of the Parties’ competition laws, and to minimize the impact of differences on their respective important interests.³⁴⁰

The two countries achieved the following four issues of cooperation and coordination among others. The first issue is notifications of enforcement activities.³⁴¹ A country shall notify the other when the former’s competition law enforcement may affect important interests of the latter,³⁴² including extra-territorial enforcement of the notifying country’s competition law and enforcement activities regarding merger cases.³⁴³ A country shall also notify the other when the competition authority of the former requests “that a person provide information, documents or other records located in the territory of the other Party.”³⁴⁴ Agreement 1995 also allows officials of either country to visit the territory of the other country in the course of conducting investigations pursuant to their respective competition laws.³⁴⁵ Such visits are subject to notification

337. Global Competition Review, *Rating Enforcement 2015*, 1 (June 19, 2015), <http://globalcompetitionreview.com/surveys/article/38900/star-ratings>.

338. See e.g., Agreement 1995, *supra* note 326; see also Agreement 1999 *infra* note 362, Agreement 2005, *infra* note 380, Agreement on Trade Relations, *infra* note 397, Agreement for Economic Partnership, *infra* note 397.

339. See generally Agreement 1995, *supra* note 326.

340. *Id.* at art. I(1)

341. *Id.* at art. II.

342. *Id.* at art. II(1).

343. *Id.* at art. II(2).

344. *Id.* at art. II(5).

345. Agreement 1995, *supra* note 326, art. II(6).

pursuant to the agreement and the consent of the notified party.³⁴⁶

The second issue is enforcement assistance. The two countries acknowledge the importance of enforcement cooperation within their reasonably available resources.³⁴⁷ The cooperation includes information sharing, assistance that a country provides the other in “locating and securing evidence and witnesses” in the former’s territory, and significant information provided by a country about “anticompetitive activities that may be relevant to, or may warrant, enforcement activity” by the other’s competition authorities.³⁴⁸

The third issue is enforcement coordination. The two countries agree to consider coordination of their enforcement activities in addition to enforcement cooperation.³⁴⁹ Agreement 1995 provides that “[i]n any coordination arrangement, each party’s competition authorities shall seek to conduct their enforcement activities consistently with the enforcement objectives of the other country’s competition authorities.”³⁵⁰ This means that coordination may help the two countries to deal with possible conflicts of interest or differing objectives of competition laws between the two countries in certain cases.³⁵¹

The fourth issue is cooperation between the two countries regarding anticompetitive activities in the territory of one party that adversely affect the interests of the other party.³⁵² When a party finds that an anticompetitive activity taking place in the territory of the other party harms its important interests, the former country may request that the latter country’s “competition authorities initiate appropriate enforcement activities.”³⁵³ The requested party’s competition authorities shall “consider whether to initiate enforcement activities against anticompetitive activities identified in the request and inform

346. *Id.* at art. II(6).

347. *Id.* at art. III(1)(a).

348. *Id.* at art. III.

349. *Id.* at art. IV(1).

350. *Id.* at art IV(3).

351. Agreement 1995, *supra* note 326, art. IV.

352. *Id.* at art. V.

353. *Id.* at art. V(2).

the requesting party of its decision.”³⁵⁴ This agreement, however, does not limit “the discretion of [t]he requested [p]arty’s competition authorities under its competition laws and enforcement policies as to whether to undertake enforcement activities with respect to the anticompetitive activities identified in a request.”³⁵⁵ On the other hand, the agreement also does not “preclude[] the requesting Party’s competition authorities from undertaking enforcement activities with respect to such anticompetitive activities.”³⁵⁶

In sum, the agreement between Canada and the United States on competition law provides substantive cooperation between the two competition regimes in dealing with transnational competition cases. This agreement allows the countries to deal with cross-border anticompetitive activities by substantive methods such as information sharing and enforcement assistance.³⁵⁷ Moreover, the two countries agree that a country may allow officials of the other country to conduct investigations in the former’s territory pursuant to the latter’s competition law.³⁵⁸ This means that the two countries recognize the extraterritorial enforcement of competition law of the other country on an *ad hoc* basis.³⁵⁹ The agreement on competition between Canada and the U.S., however, strongly relies on the two countries’ respective national competition regimes.³⁶⁰ The enforcement of competition law of a country, including the extraterritorial enforcement of competition law, considers international comity and the other country’s interest but the enforcement is at such a country’s discretion.³⁶¹

2. Japan and the United States

Japan and the U.S. concluded an agreement concerning cooperation on anticompetitive activities in 1999 (“Agreement

354. *Id.* at art. V(3).

355. *Id.* at art. V(4).

356. Agreement 1995, *supra* note 326, art. V(4)

357. *Id.* at art. II-III.

358. *Id.* at art II(6).

359. *Id.* at art. II(3)(6), art. III(3)(a)(b).

360. *Id.* at art. I(2)(3).

361. *Id.* at art. V.

1999”).³⁶² The purpose of Agreement 1999 is to “contribute to the effective enforcement of the competition laws of each country through the development of cooperative relationships between the competition authorities of each Party.”³⁶³ Similar to Agreement 1995 between Canada and the U.S., this agreement includes, among others, four elements: (i) notification of enforcement activities, (ii) enforcement assistance, (iii) enforcement coordination, and (iv) cooperation when an activity carried out in the territory of a party adversely affects the important interests of the other party.³⁶⁴

First, where enforcement activities of a party may affect important interests of the other party, including those involving merger control, the party engaging in such enforcement activities must notify the other party.³⁶⁵ Second, a party is to provide the other with assistance in enforcing the latter’s competition law.³⁶⁶ Such assistance is, however, to be consistent with the laws, regulations and important interests of the assisting country.³⁶⁷ Unlike Agreement 1995 between Canada and the U.S., Agreement 1999 between Japan and the U.S. does not require that a country provide the other with assistance in locating and securing evidence and witnesses in the former’s territory.³⁶⁸ Enforcement assistance provided by Agreement 1999 between Japan and the U.S. is limited to information sharing.³⁶⁹

Third, Agreement 1999 provides that both parties “shall consider coordination of their enforcement activities” where they deal with cross-border issues.³⁷⁰ Parties should consider, among other matters, “the effect of such coordination on their ability to achieve the objectives of their enforcement activities.”³⁷¹

362. Agreement Concerning Cooperation on Anticompetitive Activities, U.S.–Japan, Oct. 7, 1999, 133 U.S.T 1999 [hereinafter Agreement 1999].

363. *Id.* at art. I(1).

364. *Id.* at art. II-V; *see also* Agreement 1995, *supra* note 326, art. II–V.

365. Agreement 1999, *supra* note 362, art. II.

366. *Id.* at art. III.

367. *Id.* at art. III(1).

368. Agreement 1995, *supra* note 326, art. III(3)(a).

369. Agreement 1999, *supra* note 362, art. III(2).

370. *Id.* at art. IV(1).

371. *Id.* at art. IV(2).

Fourth, when the competition authority of a party “believes that anticompetitive activities carried out in the territory of the other country adversely affect the important interests of the former party,” the competition authority of the country believing it is adversely affected may request that the competition authority of the other party initiate appropriate enforcement activities.³⁷² The requested competition authority shall consider whether to initiate enforcement activities against the anticompetitive activities identified in the request and inform the requesting counterpart of its decision.³⁷³

In general, Agreement 1999 between Japan and the U.S. relies heavily on national competition law regimes³⁷⁴ and international comity.³⁷⁵ Implementation of Agreement 1999 is to be in accordance with the laws and regulations in each country and subject to the availability of resources of the respective competition authorities.³⁷⁶ Moreover, the two countries agree that this agreement is to be construed to not “prejudice the policy or legal position of either party regarding any issue related to jurisdiction.”³⁷⁷ The degree of cross-border cooperation provided by this agreement is lower than that of Agreement 1995 between the U.S. and Canada because it neither provides assistance in locating and securing evidence and witnesses³⁷⁸ in the assisting country nor allows officials of a country to conduct investigations in the other’s territory pursuant to the former’s competition law.³⁷⁹

3. Canada and Japan

The government of Canada and the government of Japan signed an agreement concerning cooperation on anticompetitive

372. *Id.* at art. V(1).

373. *Id.* at art. V(2).

374. *See* Agreement 1999, *supra* note 362, art. V(2) (providing discretion for the requested regime to initiate enforcement after a request, and to inform the other party of its decision when practicable).

375. *Id.* at art. V(1).

376. *Id.* at art. XI(1).

377. *Id.* at art. XI(4).

378. *Id.* at art. III(2); *see also* Agreement 1995, *supra* note 326, art. III (3)(a) (illustrating missing provisions from agreement 1999).

379. Agreement 1995, *supra* note 326, art. II(6).

activities in 2005.³⁸⁰ The purposes of this agreement are (i) “to contribute to the effective enforcement of the competition law of each country through cooperation between the two countries,” and (ii) “to avoid or minimize the possible conflicts between the two countries arising from national competition law enforcement.”³⁸¹ Similar to Agreement 1995 and Agreement 1999, this agreement relies heavily on the national competition regimes of the two countries³⁸² and the “available resources of the respective competition authorities.”³⁸³ This agreement also includes, among other matters, the same four main elements: (i) notification of enforcement activities, (ii) mutual assistance in enforcing competition laws, (iii) coordination in enforcement activities, and (iv) positive comity.³⁸⁴

First, the competition authority of a party shall notify the competition authority of the other party about the enforcement activities of the former’s competition authority that may affect important interests of the latter, including activities related to cross-border merger cases.³⁸⁵ Second, the competition authority of a country shall assist the competition authority of the other party in the latter’s competition law enforcement.³⁸⁶ Such assistance is consistent with the assisting country’s laws and regulations, its important interests, and its reasonably available resources.³⁸⁷ Like Agreement 1999 between Japan and the U.S., this agreement does not state whether or not a country would provide the other with assistance in locating and securing evidence or witnesses in the former’s territory like that provided in Agreement 1995 between Canada and the U.S.³⁸⁸ The assistance focuses only on information sharing.³⁸⁹

380. Agreement Concerning Cooperation on Anticompetitive Activities, Can.–Japan, Sept. 6, 2005, [hereinafter Agreement 2005].

381. *Id.* at art. I(1).

382. *Id.* at art. X(5).

383. *Id.* at art. X(1).

384. *Id.* at art. II-V.

385. *Id.* at art. II(1-2).

386. Agreement 2005, *supra* note 380, art. III(1).

387. *Id.* at art. III(1).

388. *Id.*; *see also* Agreement 1995, *supra* note 326, Agreement 1999, *supra* note 362.

389. Agreement 2005, *supra* note 380, art. III.2.

Third, where the competition authorities of the two states deal with cross-border competition matters, they will seek coordination of their enforcement activities.³⁹⁰ In considering coordination the authorities consider, among other matters, “the effect of such coordination on their ability to achieve the objectives of their enforcement activities.”³⁹¹

Fourth, the agreement relies on positive comity to deal with cross-border competition cases.³⁹² By this mechanism, a party may request the other to initiate appropriate enforcement activities against anticompetitive activities carried out in the territory of the country receiving the request that have adverse effects on the requesting country.³⁹³ The competition authority receiving the request shall have discretion to decide whether to initiate enforcement activities.³⁹⁴

B. Bilateral Agreement between a Developed Country and a Developing Country

Vietnam is the only developing country among the four countries.³⁹⁵ Vietnam does not have any bilateral agreement with any country that exclusively governs competition law.³⁹⁶ Vietnam has signed bilateral trade agreements with both Japan and the U.S. that provide some rules on competition laws.³⁹⁷

390. *Id.* at art. IV.1.

391. *Id.* at art. IV.2.

392. *See id.* at art. V.1 (stating that if the competition authority of a Party believes that anticompetitive activities carried out in the territory of the other country will adversely affect the important interests of the former Party, such competition authority, taking into account the importance of avoiding conflicts regarding jurisdiction, may request that the competition authority of the other Party initiate appropriate enforcement activities).

393. *Id.*

394. *See id.* at art. V.2 (considering, carefully, whether to initiate enforcement activities or to expand ongoing enforcement activities with respect to the anticompetitive activities identified in the request.).

395. UN/DESA, *World Econ. Situation and Prospects 2014: Country Classification*, at 143–45, http://unctad.org/en/PublicationsLibrary/wesp2014_en.pdf.

396. U.S. Department of State, *2014 Investment Climate Statement* (June 2014), <https://www.state.gov/e/eb/rls/othr/ics/> (stating that Vietnam has 58 bilateral investment agreements).

397. Agreement Between The United States of America and the Socialist Republic of Vietnam on Trade Relations, U.S.–Viet., July 13, 2000, [hereinafter Agreement on

1. Vietnam and the U.S.

The U.S. and Vietnam entered an agreement on trade relations in 2000.³⁹⁸ The agreement seeks to “establish and develop mutually beneficial and equitable economic and trade relations on the basis of mutual respect for their respective independence and sovereignty.”³⁹⁹ The signing of the agreement was before the enactment of the *Competition Law* of Vietnam⁴⁰⁰ in 2004, so it does not have a chapter on cross-border competition.⁴⁰¹ Some articles, however, regulate competition to prevent the abuse of a monopoly position that restrains trade and investment.⁴⁰² Chapter III, which regulates trade in services, includes Article 5 on monopolies and exclusive service suppliers⁴⁰³ and Article 6 on market access.⁴⁰⁴

Article 5 provides that each party shall prevent any monopoly supplier of a service in the relevant market in its territory from conducting acts inconsistent with most-favored-nation treatment.⁴⁰⁵ Article 5 also sets out specific commitments on abuse of monopoly position and substantial prevention of competition among suppliers in its territory.⁴⁰⁶ Article 6 provides that a party shall not maintain or adopt limitations on the number of service suppliers whether in the form of numerical quotas, monopolies, or exclusive service suppliers.⁴⁰⁷

In general, these articles do not serve to achieve economic objectives of competition law such as promoting unfettered

Trade Relations]; Agreement Between Japan and the Socialist Republic of Viet Nam for an Economic Partnership, Japan–Viet., Dec. 25, 2008, [hereinafter Agreement for Economic Partnership].

398. See generally Agreement on Trade Relations, *supra* note 397.

399. *Id.* at preamble, ¶ 2.

400. *Id.*; see generally *Competition Law of Vietnam*, *supra* note 128.

401. Agreement on Trade Relations, *supra* note 397, ch. VII art. I (addressing issues like imports of foreign products, but conspicuously leaving out the issue of cross-border competition.)

402. *Id.* ch. III art. V.

403. *Id.*

404. *Id.* ch. III art. VI.

405. See *id.* ch. III art. V.1 (ensuring that any monopoly supplier of a service in its territory does not act in a manner inconsistent with their obligations and specific commitments).

406. *Id.* ch. III art. V.2, V.3.

407. *Id.* ch. III art. VI.2.

competition, protecting consumer welfare, or enhancing economic efficiency⁴⁰⁸ but to ensure market access.⁴⁰⁹ These articles do not constitute a chapter on competition but are integrated in the chapter on trade in services.⁴¹⁰ Moreover, given that Vietnam did not have a competition law at the time when this agreement entered into force, the agreement does not provide any cooperation mechanism for countries to deal with transnational competition cases.⁴¹¹

2. Vietnam and Japan

Vietnam and Japan concluded an Agreement for an Economic Partnership in 2008.⁴¹² Unlike the agreement on trade relations between Vietnam and the U.S., one of the objectives of the agreement between Vietnam and Japan is to “promote cooperation and coordination for the effective enforcement of competition laws in each party.”⁴¹³ It includes a chapter on competition.⁴¹⁴ The parties committed that each country “shall, in accordance with its laws and regulations, promote competition by addressing anti-competitive activities in order to facilitate the efficient functioning of its market.”⁴¹⁵

Cooperation between the parties on promoting competition has two objectives.⁴¹⁶ First, it contributes “to the effective enforcement of the competition law of each party.”⁴¹⁷ Second, it seeks to avoid possible conflicts between the two countries in the enforcement of the competition laws of each party.⁴¹⁸ The

408. See The World Bank & The Organisation for Economic Co-operation and Development, *supra* note 271, at 2 (citing the maintenance or protection of free and effective competition as the most common objective of enacted competition legislation).

409. See Uruena, *supra* note 171, at 62–63; see also Fox, *supra* note 172, at 19–22 (discussing the duty not to block market access by anticompetitive means).

410. Agreement on Trade Relations, *supra* note 397, ch III.

411. See *id.* ch. 3 (regulating only trade from the territory of one nation to another).

412. See generally Agreement for Economic Partnership, *supra*, note 397.

413. *Id.* at art. 1(c).

414. *Id.* ch. 10.

415. *Id.* at art. 99.

416. *Id.*

417. *Id.* at art. 101.

418. Agreement for Economic Partnership, *supra* note 397, art. 101.

agreement also calls for some forms of cooperation such as exchange of information, notification and coordination of enforcement activities, and consultation.⁴¹⁹ The agreement allows the parties to seek assistance from or provide “assistance to one another pursuant to other bilateral or multilateral agreements or arrangements.”⁴²⁰

In sum, the Agreement for an Economic Partnership between Japan and Vietnam provides a soft cooperation between the two competition authorities of the two countries.⁴²¹ Such cooperation is enforced in accordance with the parties’ respective laws and regulations and subject to their respective available resources.⁴²² Moreover, chapter 10 on competition is not subject to the agreement’s dispute settlement mechanism.⁴²³

C. A Comparative Analysis

Bilateral agreements on competition law providing substantive cooperation between the parties are more likely to be made between developed countries with reasonably well-developed competition law regimes.⁴²⁴ There are three significant attributes to bilateral competition law agreements between developed countries.⁴²⁵ First, since these agreements deal exclusively with competition law they seek to deal with cross-border competition cases.⁴²⁶ Second, cooperation between these countries strongly relies on national competition law regimes and international comity.⁴²⁷ Third, cooperation generally focuses on four elements: (i) notification of enforcement activities, (ii) enforcement assistance, (iii) enforcement coordination, and (iv) cooperation when an activity

419. *Id.*

420. *Id.* at art. 104.2.

421. *See id.* at art. 101 (focusing on cooperation on promoting competition by addressing anti-competitive activities).

422. *Id.*

423. *Id.* at art. 103.

424. The Organisation for Economic Co-operation and Development, *supra* note 1, at 5–6.

⁴²⁵ *Id.* at 5.

426. *Id.*

427. *Id.* at 7, 10.

carried out in the territory of a party adversely affects the important interests of the other party.⁴²⁸ Among the bilateral agreements analyzed above, the level of cooperation is highest in the agreement between the U.S. and Canada.⁴²⁹ In addition to four general elements, the U.S. and Canada agree to provide assistance in locating and securing evidence and witnesses⁴³⁰ in the assisting country and allow officials of a country to conduct investigations in the other's territory pursuant to the former's competition law.⁴³¹

In contrast to a bilateral agreement on competition law between developed countries, a developed country and a developing country normally integrate an agreement on competition law in a trade agreement.⁴³² The agreement between the U.S. and Vietnam does not serve to achieve economic objectives of competition but to ensure market access.⁴³³ The agreement between Vietnam and Japan that contains a chapter promoting cooperation and coordination in the enforcement of competition law⁴³⁴ provides for soft cooperation between the two countries.⁴³⁵ Such cooperation relies on the countries' national competition regimes.⁴³⁶

VI. CONCLUSION

Countries are making efforts to strengthen cooperation in competition law in response to the rise of cross-border anticompetitive conduct.⁴³⁷ There are four fundamental benefits to international cooperation in competition law. First, it helps to

428. *Id.* at 16–17; *see also* Agreement 1999, *supra* note 362.

429. *See generally* Agreement 2005, *supra* note 380.

430. *Id.* at art. III.3(a).

431. *Id.* at art. II.6.

432. Agreement on Trade Relations, *supra* note 397, art. 13.

433. *Id.* at art. 3.1.

434. Agreement for Economic Partnership, *supra* note 397, art. 1(c).

435. *See id.* at art. 101 (focusing on cooperation on promoting competition by addressing anti-competitive activities subject to each party's respective available resources and laws).

436. *Id.* at art. 100, 102.

437. Stephan, *supra* note 122, at 197 (recognizing that a universal right of freedom from competitive injury implies a commitment by states to international wealth redistribution).

reduce the divergence of competition law across countries in certain cross-border cases.⁴³⁸ Second, cooperation among countries on enforcing competition law may protect global society from suffering losses made by transnational anticompetitive business practices.⁴³⁹ Third, it may save overlapping costs for countries that get involved in the same cross-border cases.⁴⁴⁰ Fourth and finally, cooperation in enforcing competition law helps competition authorities gather more thorough facts and information regarding violations that take place in different territories.⁴⁴¹

Countries may, however, incur several costs in pursuing cooperation in competition law.⁴⁴² First, there is the issue of the distribution of costs and benefits arising from an international agreement on competition law.⁴⁴³ Second, an individual country that participates in making an international competition agreement also incurs costs in addressing domestic conflicts of interest arising from the negotiations.⁴⁴⁴ Third, developing countries may incur higher costs than developed countries in adjusting their competition law regimes to meet standards specified in an international agreement.⁴⁴⁵ Fourth and finally, countries participating in an international agreement may also incur “sovereignty costs” if they are required to give up some degree of independence in government decision making.⁴⁴⁶

438. *Id.* at 18 (predicting that absent an effective international regime to constrain their choices, national regulation of competition will generate global welfare losses).

439. In this situation, negative externality is loss of consumer welfare in more than one country. *See id.* at 183; Guzman, *supra* note 138, at 1517.

440. Hugh M. Hollman, William E. Kovacic & Andrew S. Robertson, *Building Global Antitrust Standards: the ICN's Practical Approach*, in RESEARCH HANDBOOK ON INTERNATIONAL COMPETITION LAW 89, 91 (Ariel Ezrachi ed., 2012)

441. The Organisation for Economic Co-operation and Development, *supra* note 1, at 46.

442. *Id.* at 21.

443. Bradford, *supra* note 120, at 385.

444. Guzman, *supra* note 138, at 1544 (recognizing that transaction costs arise due to a variety of factors).

445. Bradford, *supra* note 120, at 401 (stating that governments could experience sovereignty costs when required to give up some degree of their independence in decision making).

446. *Id.*

International cooperation in competition law highlights aspects of theories of international relations. There are two points in support of neo-liberal observations.⁴⁴⁷ First, the neo-liberal claim about the feasibility of bilateral competition law agreements between developed countries seems to be borne out by the existence of the Canada–U.S., Canada–Japan and Japan–U.S. bilateral competition law agreements.⁴⁴⁸ These agreements help developed countries avoid or mitigate conflicts between the parties arising from the application of the competition law of each country and to seek cooperation in accordance with their available resources and respective enforcement objectives.⁴⁴⁹ In particular, the agreement between Canada and the U.S. provides for mutual assistance in locating and securing evidence and witnesses in the assisting country⁴⁵⁰ and allows officials of one country to conduct investigations in the other country’s territory pursuant to the former’s competition law.⁴⁵¹

Second, the efforts of international institutions such as OECD, ICN, and UNCTAD to maintain soft law and soft cooperation in the area of competition law support the neo-liberal institutionalist belief that states “can work together and can do so especially with the assistance of international institutions.”⁴⁵² Soft laws rely on international comity and do not require countries to sacrifice their sovereignty.⁴⁵³ Soft laws do not impose obligations on states but seek voluntary cooperation.⁴⁵⁴ Although soft laws are easy to achieve, they cannot deal with situations in which countries have different

447. Grieco, *supra* note 7, at 486.

448. See *generally* Agreement 1999, *supra* note 362; Agreement 1995, *supra* note 326.; Agreement 2005, *supra* note 380.

449. See *e.g.* Agreement 1999, *supra* note 362, art. 1.1; see also Agreement 1995, *supra* note 326, art. I.1; see also Agreement 2005, *supra* note 380, at article I.1.

450. Agreement 2005, *supra* note 380, art. 3.3(a).

451. *Id.* at art. 2.6.

452. Grieco, *supra* note 7, at 486.

453. Guzman, *supra* note 138, at 1543 (arguing that allowing cooperation between regulatory authorities will most likely be mutually beneficial).

454. Bradford, *supra* note 120, at 439 (stating that non-binding commitments are likely to result in difficulty reaching agreements between States, who might have been more willing to enter into deeper substantive commitments before the non-binding commitment was established).

objectives or conflicting interests since they are not binding.⁴⁵⁵

The analysis does not support the optimism of liberal and institutional theories about international institutions. It does, however, support realism's concern about cheating and the realist claim that differences in gains that countries can obtain from cooperation discourage countries from cooperating.⁴⁵⁶ The collapse of the Havana Charter indicates that the concern about relative distributional costs and benefits of cooperation and relative gains is a significant factor impairing international cooperation in competition law.⁴⁵⁷ Similarly, the failure of the Draft International Antitrust Code and a WTO's agreement on competition law supports realism's assertion that the self-interest of countries, the unfair distribution of interests, and the costs imposed by such agreements were too significant for the agreements to succeed.

In sum, countries have yet to achieve a reliable and binding international mechanism for dealing with transnational competition cases. International cooperation in competition law relies on voluntary participation by countries that may be constrained by the conflicting interests of countries in cross-border cases.

455. Grieco, *supra* note 7, at 487.

456. *Id.* at 499 (illustrating how states, fearing that their partners will achieve relatively greater gains, cause the partners to surge ahead, and cannot fully treat allies as friends, which results in their partners becoming their foes); *see also* Keohane, *supra* note 7, at 275 (arguing that "[t]he contention that international anarchy dictates concern for relative rather than absolute gains is not sustainable."); *and see* Mearsheimer, *supra* note 7, at 12 (stating that there are two factors inhibiting cooperation among states: (1) relative-gains considerations and (2) concerns about cheating.); *see also* subsection II.A.

457. Toye, *supra* note 208; *see* subsections II.A and II.C.

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