International Lawyer

Volume 45 | Number 4 Article 4

2011

Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Politics in South Africa, Brazil, and India - A Comparative Overview

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Cartel Regulation in Three Emerging BRICS Economies: Cartel and Competition Policies in South Africa, Brazil, and India— A Comparative Overview

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> Antitrust laws in general, and the Sherman Act in particular, are the Magna Charta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster.[1]

Abstract

This article argues that only increased cross-border cooperation through bilateral agreements between domestic competition authorities in the developed world can regulate anti-competitive cartel activities effectively. To discuss this argument, the competition policies and laws of three emerging economies, namely South Africa, India, and Brazil are compared with the competition law of the European Union. The benefits of bilateral agreements concerning international cartels appear to be clear: only a synchronized and international approach will help developing nations in protecting their markets from unfair competition practices. This article will discuss the state of anti-cartel policies and legislation in the selected jurisdictions, the present state of coordination of competition policies through promotion and cooperation at the bi-national and international level, and highlight some examples of more publicized anti-competition cases. The article also provides an insight into cartel activities in these three emerging economies and poses the question about which of the existing methods of cooperation is the most effective one for addressing cartel activities. It provides a short overview of the existing international institutions and enforcement bodies that promote and

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1. United States v. Topco Assocs. Inc., 405 U.S. 596, 610 (1972).

coordinate international competition policies and anti-cartel initiatives. The cooperation methods identified and utilized by the International Competition Network will be briefly analyzed in order to support the authors' view on the relevance and importance of bilateral cooperation agreements for the conclusion of successful cartel investigations. The article concludes with the observation that more could be done by the developing "Newly Industrialized Nations" (NIC) to increase the collaborative ties of their anti-competition policies and organizations as well as ensure that they fall under the wider umbrella of regional competition regimes such as in the case of South Africa and the European Union. Time will tell whether the emerging economies will be able to balance competition policy and consumer welfare in an effective and progressive way without affecting their trade and investment policies.

I. Introduction

This 1972 *dictum* of the U.S. Supreme Court, read in conjunction with sections 1 and 2 of the U.S. Sherman Act,[2] stresses the importance[3] of balancing the demands of a free market economy with the necessity to promote consumer welfare by limiting anti-competitive corporate market distortion. In the developing world, many states, including South Africa, have made some measurable progress in enacting competition legislation, or antitrust laws as they are known in the United States. South Africa is a developing country with a very recently established competition regime. The majority of the population is plagued by poverty and lack of services.[4] Consequently, anti-competitive business activities by corporations severely affect the poor of society: it is the poor who bear the heaviest burden of anti-competitive behavior such as price fixing, price discrimination, and market distortion leading to a market without sufficient competition. Cartel activity prevents consumers and other market stakeholders from enjoying the benefits of a free and fair market. Thus, the existence of cartels in an economy such as South Africa can have an overall negative impact on the formation of a competitive and prosperous market economy. South Africa depends on direct foreign investment and thus has an interest in demonstrating to a prospective investor that it takes a proactive stand on fair competition and the "preservation of economic freedom."[5] In general, cartels, the "supreme evil of antitrust,"[6] whose activities constitute one of the "most egregious offence(s) under competition law,"[7] particularly those involving Multinational Corporations (MNCs), often have a

2. Section 1 of the Sherman Act states "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (2004). Section 2 extends this prohibition on monopolies. *See* § 2.

3. The mission statement of the European Commission stresses the need to align these two interests. *See, e.g., Mission of Directorate General for Competition*, EUROPEAN COMMISSION, http://ec.europa.eu/dgs/competition/mission/ (last visited Jan. 15, 2012). Part One, Article 2 of the Consolidated Version of the Treaty Establishing the European Community stresses the need for such a balance based on balanced economic growth and price stability, a highly competitive social market economy, aiming at full employment and social progress, and "a high level of protection and improvement of the quality of the environment."

4. *See South Africa Country Profile*, U.N. DEVELOPMENT PROGRAMME, http://hdrstats.undp.org/en/countries/profiles/ZAF.html (last visited Jan. 15, 2012), which ranks South Africa's Human Development Index at 123, compared with the U.K.'s rank of twenty-eight.

5. *Topco Assocs. Inc.*, 405 U.S. at 610.

6. Verizon Commc'n, Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 408 (2004), *cited in* KIRSTY MIDDLETON ET AL., CASES AND MATERIALS ON UK AND EC COMPETITION LAW 325, n.1 (2009).

7. *Mondi Ltd. and Kohler Cores and Tubes* [2002] ZACT (LM) at 27 ¶ 87 (S. Afr.).

particularly negative impact on developing market economies: market dominance, its distortion, and an absence of consumer welfare are just some possible consequences.

This article argues that increased cross-border cooperation through bilateral agreements between domestic competition authorities in the developed world can regulate anti-competitive cartel activities effectively. To discuss this argument, the competition policies and laws of three emerging economies, namely South Africa, India, and Brazil, are compared with the competition law of the European Union. This country selection was made based on their shared category as emerging and developing, as well as Newly Industrialized Countries (NICs)[8] reflecting on their similarities in terms of market nature, economic impact, and potential market challenges. Brazil and India are members of the so-called BRICS group.[9] South Africa is the youngest member of the (former) BRIC group and the strongest single emerging economy on the African continent.[10] Another similarity is the fact that all three states are member parties to the International Competition Network (ICN)[11] but not to the Organization for Economic Cooperation and Development (OECD), whose members are mostly developed nations.[12] These organizations, together with organizations such as the European Union and other regional anti-competition bodies, play an important role to ensure that cartels are identified, investigated, and subsequently regulated in terms of international and domestic competition legislation and policies of the countries affected. Subsequently, the role and functions of these two organizations regarding limiting anti-competitive activities, especially cartels, are scrutinized within the scope of the chosen domestic jurisdictions.

The article also provides an insight into cartel activities in these three emerging economies and poses the question as to which of the existing methods of cooperation is the most effective one for addressing cartel activities. It provides a short overview of the existing international institutions and enforcement bodies, which promote and coordinate international competition policies and anti-cartel initiatives. The cooperation methods identified and utilized by the ICN[13] will be briefly analyzed in order to support the authors' view on

8. *See* PAWEL BOZYK, GLOBALIZATION AND THE TRANSFORMATION OF FOREIGN ECONOMIC POLICY 164 (2006), for an overview of these newly industrialized countries. Go to *World Economic Outlook FAQ*, INTERNATIONAL MONETARY FUND, http://www.imf.org/external/pubs/ft/weo/faq.htm#q4b (last visited Jan. 15, 2012) for an overview of criteria used by the IMF to distinguish different categories of market economies.

9. BRICS, named after its members Brazil, Russia, India, China and since April 2011, South Africa, resemble a group of "countries considered economically significant . . . who view themselves as an emerging centre of gravity in the global economy." Mzukisi Qobo, *The BRIC Pitfalls and South Africa's Place in the World*, SUNDAY INDEPENDENT (Apr. 17, 2010), *available at* http://www.saiia.org.za/great-powers-africa-opinion/the-bric-pitfalls-and-south-africa-s-place-in-the-world.html. *See also BRIC Invite: Sign of China's African Ambitions*, AFRICA MONITOR: SOUTHERN AFRICA (BUSINESS MONITOR INTERNATIONAL), Mar. 1, 2011 [hereinafter BRIC Invite], in which the BRIC group was described as "a group of leading emerging markets that will become increasingly important in the global economy over the long term. The nations are broadly characterized by fast economic growth, rapid reforms, and business-friendly environments."

10. South Africa joined the BRIC group in April 2011, *see BRIC Becomes BRICS—South Africa as a Gateway to the Continent*, MONEY WATCH AFRICA, May 12, 2011, http://www.moneywatchafrica.com/2011/05/bric-becomes-brics-south-africa-as.html; *see also* BRIC Invite, *supra* note 9.

11. For more information on the ICN, go to http://www.internationalcompetitionnetwork.org/.

12. *See List of OECD Member Countries*, OECD, http://www.oecd.org/document/58/0,3746,en_2649_201185_1889402_1_1_1_1,00.html (last visited Jan. 15, 2012), for a list of the OECD member states.

13. *See* INT'L COMPETITION NETWORK, CO-OPERATION BETWEEN COMPETITION AGENCIES IN CARTEL INVESTIGATIONS (2006), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf, submitted at the ICN annual conference held in Moscow in May 2007.

the relevance and importance of bilateral cooperation agreements for the conclusion of successful cartel investigations.

II. Competition Law and the Concentration of Market Power in Cartels and Multinational Corporations: A Legislative Overview

A. Cartels and Anti-Cartel Legislation

The following four legislative examples stress the common aim of regulating competition law, maximizing consumer welfare, and preventing market distortion by means of anti-trust applications.

Cartels constitute an association of manufacturers or suppliers that aims to maintain high prices and restrict competition: the European Union's competition commission defines cartels as "a group of similar, independent companies which join together to fix prices, to limit production or to share markets or customers between them . . . As a consequence, their clients (consumers or other businesses) end up paying more for less quality."[14]

The OECD regards anti-trust measures as a way of ensuring consumer welfare, the "individual benefit derived from the consumption of goods and services," by maximizing consumer surplus of such consumption while also ensuring the well-being of the producers of such services.[15] The organization explicitly warns of the negative impact that so called "hard core cartels" can have and warns of their negative impact on market equity: "They injure consumers in many countries by raising prices and restricting supply, thus making goods and services completely unavailable to some purchasers and unnecessarily expensive for others."[16]

Under South African competition legislation, cartel activities are prohibited under section 4 of the Competition Act 89 of 1998, as amended[17] (the Act): any involvement in such cartel activities may lead to administrative[18] as well as possible criminal sanctions against the companies and the directors involved.[19] South African competition legislation does not provide a concise definition of the term cartel. Instead, the Act lists examples of corporate activities that could qualify as cartel activity. Section 4(1) stipulates that:

> An *agreement* between, or concerted *practice* by, *firms*, or a decision by an association of *firms*, is prohibited if—(a) it is between parties in a horizontal relationship and if it

14. European Commission's competition overview at *Overview: Cartels*, European Comm'n, http://ec.europa.eu/competition/cartels/overview/index_en.html (last visited Jan. 15, 2012).

15. *See* OECD, Glossary of Industrial Organization Economics and Competition Law 29, 53, *available at* http://www.oecd.org/dataoecd/8/61/2376087.pdf.

16. OECD, Recommendation of the Council Concerning Effective Action Against Hard Core Cartels 1 (1988), *available at* http://www.oecd.org/dataoecd/39/4/2350130.pdf.

17. *See* Competition Act No. 89 of 1998, § 3(1-2) (S. Afr.), *available at* http://www.saflii.org/za/legis/num_act/ca1998149.pdf, where the South African legislative framework is discussed in more detail.

18. *See id.* §§ 59-61.

19. Criminal prosecution against directors or management who cause a firm to engage in a prohibited practice will soon be possible in South Africa after this Act comes into effect. Competition Amendment Act No. 1 of 2009, § 12 (S. Afr.), *available at* http://www.compcom.co.za/assets/Files/Competition-Amendment-Act.pdf.

has the effect of substantially preventing or lessening competition in a market [. . .] or (b) it involves any of the following *restrictive* horizontal practices.[20]

This definition of collusive anti-competition activity is reiterated in India's anti-cartel legislation, with section 1 of the Indian Competition Act[21] defining a cartel as: "an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services."[22]

The Brazilian Act[23] (hereinafter Federal Law), like the South African statute, lacks a clear definition of a cartel. Section 20 of the Federal Law only contains a rather wide definition of collusive actions qualifying as anti-competitive in order to include any anti-competitive practices between competitors: "any act in any way intended or otherwise able to produce the effects listed below, even if any such effects are not achieved, shall be deemed an infringement of the economic order."

Section 20 then provides a catalogue of generally infringing "prohibited" activities such as distortion of competition or free enterprise, control of the relevant product market, and profiteering and abusing a company's market dominance.[24] Section 21 of the Federal Law lists certain acts that generally constitute a violation of the "economic order," including price fixing,[25] concerted practices,[26] and the practice of "apportion[ing] markets for finished or semi-finished products or services, or for supply sources of raw materials or intermediary products,"[27] which is of a particular relevance for a state of the developing world due to its economic ramifications.[28]

These three legal definitions and regulations of cartel activities in South Africa, Brazil, and India follow the overall rationale and formula of prohibited cartel activities of the European Union. Article 101 of the Treaty on the Functioning on the European Union (TFEU) (former Article 81 of the EC Treaty) defines anti-competitive cartel activities as, "all agreements between undertakings, decisions by associations of undertakings and concerted practices which may affect trade between Member States and which have as their object or effect the prevention, restriction or distortion of competition within the internal market."[29]

Anti-competitive cartel agreements, decisions, and concerted practices deemed incompatible with the internal market resemble "prohibited" practices listed in Article

20. Competition Act No. 89 of 1998, § 4(1)(a-b). Section 4(1)(b) concerns anticompetitive practices such as price fixing, market sharing/division, or collusive tendering.

21. Competition Act of 2002, 2003, No. 12, Acts of Parliament, 2002 (India), *available at* http://www.unctad.org/sections/ditc_ccpb/docs/ditc_ccpb_ncl_India_en.pdf.

22. *Id.* § 2.

23. *See* Brazilian Antitrust Law, Decreto No. 8884/94, de 11 de junho de 1994, DIÁRIO OFICIAL DA UNIÃO [D.O.U.] de 13.6.1994 (Braz.).

24. *Id.* § 20.

25. *Id.* § 21(I).

26. *Id.* § 21(II).

27. *Id.* § 21(III).

28. For more violations of the Federal Law, *see id.* § 21

29. *See* Consolidated Version of the Treaty on the Functioning of the European Union, art. 101(1) Mar. 20, 2010, 2010 O.J. (C 83/47) [hereinafter TFEU].

101(1)(a)–(e) TFEU, including "price fixing," exclusive distribution and purchasing agreements, and selective distribution and franchise agreements.[30]

B. Multinational Corporations, Market Dominance and Anti Cartel Cooperation

Globalization has seen the rise of so-called multi-national corporations (MNCs) or multi-national enterprises (MNEs). The OECD defines MNCs as "companies or other entities established in more than one country and so linked that they may co-ordinate their operations in various ways".[31] The International Labor Organization's (ILO) Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy defines MNCs as "Multinational enterprises include enterprises, whether they are of public, mixed or private ownership, which own or control production, distribution, services or other facilities outside the country in which they are based."[32]

The economic impact of MNCs is quite significant and increasing: U.S. scholar Blumberg describes the impact of such MNC/MNEs on global trade and business:

> In the modern global economy, the largest corporations conduct worldwide operations. They operate in the form of multinational corporate groups organized in "incredibly complex" multi-tiered corporate structures consisting of a dominant parent corporation, sub holding companies, and scores or hundreds of subservient subsidiaries scattered around the world. The 1999 World Investment Report estimated that there are almost 60,000 multinational corporate groups with more than 500,000 foreign subsidiaries and affiliates.[33]

Business activities of MNCs with their headquarters registered in the developed world are often subject to strict competition or antitrust laws. The spatial dimension of such limitations (which limits such governance to the boundaries of the nations of the developed world) does seldom extend to the many group subsidiaries that carry out the business in the developing world where they are registered for the actual business operation. MNCs operate in different states, including emerging economies through subsidiaries, branches, and alliances. These subsidiaries, branches, or alliances might get involved in cartel activities in the developing host country where standards of competition or antitrust legislation and regulations are often underdeveloped or even absent. The U.S. Department of Justice addresses this absence of corporate accountability: "We observe that firms in some cartels compete in the U.S. while conspiring elsewhere."[34]

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30. *Id.* art. 101(1)(a-e).

31. OECD, OECD Guidelines for Multinational Enterprises ¶ 3, at 14 (2008), *available at* http://www.oecd.org/dataoecd/56/36/1922428.pdf.

32. Int'l Labour Org., Tripartite Declaration of Principles Concerning Multinational Enterprises and Social Policy 6 (2006), *available at* http://www.ilo.org/wcmsp5/groups/public/---ed_emp/---emp_ent/---multi/documents/publication/wcms_094386.pdf.

33. Phillip I. Blumberg, *Asserting Human Rights Against Multinational Corporations Under United States Law: Conceptual and Procedural Problems*, 50 Am. J. Comp. L. 493, 493 (2002).

34. J. Bruce McDonald, Deputy Assistant Att'y Gen., What Do You Know?, Remarks to the British Inst. of Int'l Comparative Law Sixth Annual Trans-Atlantic Antitrust Dialogue (July 6, 2006), *available at* 2006 WL 4422979.

The International Commission of Jurists reflects on such shortcomings of corporate accountability and governance in a 2008 report, when it states that:

> Throughout different jurisdictions the basic principle is that the conduct of a subsidiary will not be identified with its parent for the purposes of assigning legal responsibility. This means that a parent company will not generally be held vicariously liable for its subsidiary's conduct, even in situations where it holds 100% of its subsidiary's shares.[35]

Consequently, effective international multi-lateral anti-cartel competition policy is needed to close this "accountability" gap. Such a step, however, requires close cooperation between the competition authorities of the state where the holding company is registered and the state where the subsidiary is operating. Parisi emphasizes the need for more cooperation regarding competition matters:

> As business concerns have increasingly pursued foreign trade and investment opportunities, antitrust compliance issues have arisen which transcend national borders and, thus, have led antitrust authorities in the affected jurisdictions to communicate, cooperate, and coordinate their efforts to achieve compatible enforcement results.[36]

Greater international cooperation can lead to a speedy and effective investigation of such cartel activities. As a consequence, corporate accountability in general will be achieved and with it future corporate perpetrators deterred. An overall facilitation of the enforcement of competition law and policies will eventually benefit the MNC affected, which can concentrate on its core business instead of facing a dragged out competition investigation by multiple completion organizations.

C. Promotion and Coordination of International Competition Policies

1. *The Promotion of International Competition Policies*

Multilateral cooperation in competition matters takes place by international organizations that aim at promoting cooperation between competition authorities and harmonization of existing competition frameworks. This article looks at the role of the International Competition Network, the Organization for Economic Cooperation and Development, the United Nations Conference on Trade and Development, and the World Trade Organization. These bodies exist alongside other regional arrangements and mechanisms responsible for creating and enforcing competition policies such as the European Commission of the European Union.[37]

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35. Int'l Comm'n of Jurists, Corporate Complicity & Legal Accountability 47 (2008), *available at* http://www.icj.org/dwn/database/Volume3-ElecDist.pdf.

36. John J. Parisi, *Enforcement Co-operation Among Antitrust Authorities*, 20(3) Eur. Competition L. Rev. 133, 133 (1999).

37. The European Commission oversees competition policy within the European Union. *See About the European Commission*, http://ec.europa.eu/about/index_en.htm (last visited Jan. 15, 2012).

a. The International Competition Network

The International Competition Network (ICN) was launched on October 25, 2001 by fourteen states including the United States, European Union, Australia, and South Africa.[38] Budzinski describes the ICN as "a network of competition agencies from around the world, with close interaction of other public and private players who are concerned with international competition issues."[39] Ugarte identifies a general lack of international collaboration as a key reason for the establishment of the ICN: "[t]he ICN was born out of the recognition by many jurisdictions that multilateral efforts are necessary to ensure convergence and coordination within and between the growing numbers of *competition* enforcement systems around the world."[40] The ICN provides domestic competition authorities throughout the world with a specialized but informal platform to maintain contact and address competition concerns.[41] It assists domestic competition authorities in the enforcement of competition laws and other competition policies. The ICN operates through specialized working groups and one of these is the working group for cartels. It helps in addressing and governing cartel activities inside and outside the jurisdiction of the member states. The cartel working group is responsible for addressing particular challenges faced by competition authorities when acting against so called "hardcore" cartels. Aims and objectives of the ICN are summarized by Budzinski, who sees the main goal of the ICN as "the promotion of convergence in competition policies, primarily concerning procedural issues but, in the long run, also concerning substantive issues."[42]

b. The Organization for Economic Cooperation and Development

The Organization for Economic Cooperation and Development (OECD) has been in existence since 1961.[43] Its predecessor, the Organization for European Economic Cooperation (OEEC) was established in 1947 with the aim to administer economic and development aid in Europe received from the United States and Canada under the Marshall Plan for the reconstruction of post war Europe.[44] The OECD, in its current form, provides a discussion forum for states which are "committed to democracy and market economy" in order to "support sustainable economic growth, boost employment, raise living standards, maintain financial stability, assists other countries' economic development and contribute to growth in the world trade."[45] At present it has thirty-four member states with most of the industrialized nations as members of the organization.[46] The OECD's

38. *Cf.* Oliver Budzinski, *The International Competition Network: Prospects and Limits on the Road Towards International Competition Governance*, 8(3) COMPETITION & CHANGE 223, 227 (2004).

39. *Id.*

40. Fernando S. Ugarte, *The Int'l Competition Network: Achievements So Far*, 22(10) INT'L FIN. L. REV. 1, 5 (2003).

41. *About the ICN*, http://www.internationalcompetitionnetwork.org/about.aspx (last visited Jan. 15, 2012).

42. Budzinski, *supra* note 38, at 223-42.

43. *See About the ICN*, *supra* note 41.

44. *See History of the OECD*, http://www.oecd.org/pages/0,3417,en_36734052_36761863_1_1_1_1_1,00.html (last visited Jan. 15, 2012); *see also* OECD COLUMBIA ELEC. ENCYCLOPEDIA (6th ed. 2011).

45. *About OECD*, CORP. SUSTAINABILITY REPORTING, http://www.reportingcsr.org/oecd-p-41.html (last visited Jan. 15, 2012).

46. Chile, Slovenia, Israel, and Estonia joined as its latest members in 2010. *See OECD Members & Partners*, http://www.oecd.org/pages/0,3417,en_36734052_36761800_1_1_1_1_1,00.html (last visited Jan. 15, 2012).

Competition Committee is responsible for competition or antitrust matters.[47] One of the Committee's recent reports highlighted the high priority the organization places on competition law.[48] It publishes annual peer-reviewed reports of states and their competition policy structure. These reports provide other competition agencies with a detailed overview on the progress of the competition policies and laws of countries that were reviewed. These reports are then released to the states that were subject to these reports and a further summary of the report is made available to the wider public by the Secretary General of the OECD.[49]

c. The United Nations Conference on Trade and Development

The first United Nations Conference on Trade and Development (UNCTAD) took place in 1964.[50] It "provided a new forum, for the comprehensive review of trade, aid, and financial question related to development."[51] "It undertakes research, policy analysis, and [economic] data collection."[52] It further "provides technical assistance . . . [to] developing countries" that intend to develop and implement competition law and policy.[53] The so-called Intergovernmental Group of Experts on Competition Law and Policy meets on an annual basis to consult on matters of interest regarding competition laws and policy.[54] It offers a voluntary peer-review mechanism for competition law and policy to developing countries that is undertaken by UNCTAD competition policy experts.[55]

d. World Trade Organization

The World Trade Organization (WTO), which regulates global trade, provides the forum for countries for the initiation of trade negotiations.[56] A Working Group on the Interaction between Trade and Competition Policy (WGTCP) was established in 1996 after a Ministerial Conference in Singapore.[57] Under the more recent Doha Declaration of 2001, the WGTCP "focus[es] on the clarification of core principles, including transparency, non-discrimination and procedural fairness; provisions on hardcore cartels; modalities for voluntary cooperation; and support for progressive reinforcement of competition institutions in developing countries through capacity building."[58]

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47. *Id.*

48. *See* OECD COMPETITION COMM., BEST PRACTICES FOR THE FORMAL EXCHANGE OF INFORMATION BETWEEN COMPETITION AUTHORITIES IN HARD CORE CARTEL INVESTIGATIONS 2 (2005), *available at* http://www.oecd.org/dataoecd/1/33/35590548.pdf.

49. OECD, COMPETITION POLICY IN OECD COUNTRIES 1993-1994, at 3 (1997).

50. Isaiah Frank, *Aid, Trade and Economic Development: Issues Before the U.N. Conference*, 42 (2) FOREIGN AFF. 210 (1964).

51. Richard N. Gardner, *United Nations Conference on Trade & Development*, 22 (1) INT'L ORG. 120 (1968).

52. *About UNCTAD*, http://www.unctad.org/Templates/Page.asp?intItemID=1530&lang=1 (last visited Jan. 15, 2012).

53. *Id.*

54. *See UNCTAD Competition Law & Policy*, http://www.unctad.org/Templates/StartPage.asp?intItemID=2239&lang=1 (last visited Jan. 15, 2012).

55. *Id.*

56. *See generally* Ed Brown, Jonathan Cloke & Mansoor Ali, *How We Got Here: The Road to GATS*, 8(1) PROGRESS IN DEV. STUDIES 7-22 (2008).

57. *See* World Trade Organization, *Interaction Between Trade & Competition Policy*, http://www.wto.org/english/tratop_e/comp_e/comp_e.htm (last visited Jan. 15, 2012).

58. *Id.* At present the WGTCP is dormant due to the present limitations during the Doha round.

e. European Union

Competition policy in the European Union (EU) is supervised and enforced by the European Commission, Directorate General for Competition, as the chief EU organ for competition policies and law:

> The mission of the Directorate-General for Competition [of the European Commission] is to enforce the competition rules of the Community [Union] Treaties, in order to ensure that competition in the EU market is not distorted and that markets operate as efficiently as possible[, thereby] contribut[ing] to the welfare of consumers and to the competitiveness of the European economy.[59]

Other competition institutions within the EU are the European Courts, the General Court, and the European Court of Justice under Article 19(1) Treaty of the European Union (TEU), which serve as judiciary instance in cases of appeal under Article 263 of the Consolidated Version of the Treaty on the Functioning of the European Union (TFEU) (ex. Article 230 EC Treaty pre Lisbon) and referral by the courts of individual member states under Article 267 TFEU (ex. Article 234).[60] Under Article 3 of Regulation 1/2003,[61] implementation and enforcement of EU competition law takes place in a decentralized form by means of cooperation between the European Commission and the national competition authorities established under domestic competition laws.[62]

Additionally, there exist bilateral antitrust agreements between the EU and selected other states with the explicit goal of harmonizing enforcement actions and avoiding enforcement clashes between the EU and other jurisdictions. Currently, the EU has such bilateral agreements with Canada, Japan, and the United States, as well as further country-specific agreements.[63]

Such bilateral agreements are necessary for overall compliance with EU competition law and its extraterritorial application: "One of the reasons why Europe and the USA entered [into] these agreements was the importance of addressing anti-competitive activities that occur beyond the effective reach of a jurisdiction, but affect it nonetheless because of the internationalisation of today's markets."[64]

2. *Coordinating Cooperation Between Competition Agencies*

"One aspect of cooperation in the field of competition is related to law enforcement issues but there is also a fair amount of cooperation on broader issues such as competition

59. *See DG Competition Mission Statement*, http://ec.europa.eu/dgs/competition/mission (last visited Jan. 15, 2012).

60. *See* SYLVIA HARGREAVES, EU LAW CONCENTRATE 62-63 (2d ed. 2011).

61. Council Regulation (EC) No. 1/2003 of 16 December 2002 is a regulation on the implementation of the rules on competition laid down in (former) Articles 81 and 82 of the Treaty (now Articles 101 and 102 TFEU). *See Antitrust Regulations*, http://ec.europa.eu/competition/antitrust/legislation/regulations.html (last visited Jan. 15, 2012).

62. *See* KJ Cseres, *The Impact of Regulation 1/2003 in the New Member States*, 6(2) COMPETITION L. REV. 145, 147 (2010).

63. *See Bilateral Relations on Competition Issues*, http://ec.europa.eu/competition/international/bilateral (last visited Jan. 15, 2012). The 1991 bilateral agreement with the United States is the most developed one.

64. Markus Muller, *The European Commission's Decision Against Microsoft: A Violation of the Antitrust Agreements Between the United States and the European Union?*, 26(6) EUR. COMPETITION L. REV. 309 (2005).

advocacy or the proper design of competition laws and competition law enforcement institutions."[65] The impact of such collaboration on competition issues increases when coupled with additional efforts to achieve harmonization of commercial practice:

The review of commercial practices involves considerable work and costs, both for competition authorities and for the businesses whose conduct is subject to review. If the same commercial practice falls within several jurisdictions the costs increase accordingly. Greater cooperation and the elimination of unnecessary duplication of effort, can reduce costs to competition authorities and business alike.[66]

Newly Industrialized Countries (NICs) like South Africa have experienced an increase of—mostly foreign—MNC and MNE business activities. Consequently, they identified international trans-border competition cooperation as a way of completing investigations into cartel and anti-competitive activities in a time-efficient and effective way.[67] Successful trans-border competition cooperation may deter companies from committing cartel offences. Noting the absence of an established and operational system of cooperation in cartel cases, the Cartel Working Group of the ICN investigated possibilities of closer cooperation between the competition authorities of multiple jurisdictions in a report submitted to the ICN's annual conference in Moscow in 2007.[68] The report analyzed different methods that might ensure greater cooperation, including those discussed below.

a. Informal Cooperation[69]

This method is based on the 1995 OECD Recommendation on Cooperation. The OECD recommendations provide a broad outline on how member states should deal with "exchanges of information, co-operation in investigations and proceedings, consultations and conciliation of anticompetitive practices affecting international trade."[70] The ICN points out that there is an overall lack of precedence where this method of cooperation was used during cartel investigations.[71]

65. Frederic Jenny, *International Cooperation on Competition: Myth, Reality and Perspective*, 48 ANTITRUST BULL. 973, 974 (2003).

66. Leon Brittan & Karel van Miert, *Towards an International Framework of Competition Rules*, 24 INT'L BUS. LAW. 454, 455 (1996).

67. *See generally* SALLY VAN SICLEN, SOUTH AFRICA—PEER REVIEW OF COMPETITION LAW AND POLICY 47 (2003), *available at* http://www.oecd.org/dataoecd/43/58/34823812.pdf (The peer reviewed OECD report stated that "South Africa has no formal co-operation agreements with other competition agencies. But even without formal arrangements, the Commission has worked with the European Commission, Canada, Australia, and the US in merger matters."). Such trans-border cooperation takes place in connection to merger as well as cartel activities.

68. *See* ICN CENTRAL WORKING GROUP, CO-OPERATION BETWEEN COMPETITION AGENCIES IN CARTEL INVESTIGATIONS (hereinafter ICN CARTEL WORKING GROUP REPORT) 5 (May 2007), *available at* http://www.internationalcompetitionnetwork.org/uploads/library/doc348.pdf; *see also* Jenny, *supra* note 65, at 974, 978 (discusses the importance of international cooperation in competition matters and the various "tools of cooperation"); Claus-Dieter Ehlermann, *The International Dimension of Competition Policy*, 17 FORDHAM INT'L L.J. 833, 835-37 (1993) (the successful use of bilateral agreements in situations where uncompetitive practices have extraterritorial effects).

69. *See* ICN CARTEL WORKING GROUP REPORT, *supra* note 68, at 9; Jenny, *supra* note 65, at 978.

70. *See* OECD, REVISED RECOMMENDATION OF THE COUNCIL CONCERNING CO-OPERATION BETWEEN MEMBER COUNTRIES ON ANTICOMPETITIVE PRACTICES AFFECTING INTERNATIONAL TRADE 6 (1995), *available at* http://www.oecd.org/dataoecd/60/42/21570317.pdf.

71. ICN CARTEL WORKING GROUP REPORT, *supra* note 68, at 9.

The authors submit that voluntary cooperation by competition authorities needs overall willingness and commitment by each participant—something that might often not be the case.

b. Cooperation Based on Waiver[72]

This method applies in cases where a transnational company involved in a cartel applies for immunity or leniency[73] in more than one competition jurisdiction. The company effectively authorizes the respective domestic competition authorities to exchange sensitive information on a particular competition case. This method can only be successful if the competition legislation or policies of the competition jurisdictions involved contain immunity or leniency provisions that are comparable.[74] South Africa, Brazil,[75] and India[76] have similar leniency programs under which a corporation under investigation for alleged cartel activities may apply for immunity from prosecution.[77] Consequently, any competition cooperation between these states should not be problematic in such an instance. In South Africa, the Corporate Leniency Policy was "developed . . . to facilitate the process through which firms participating in a cartel are encouraged to disclose information on the cartel conduct in return for immunity from prosecution."[78]

The authors submit if one of the jurisdictions in which the cartel operates lacks such a leniency program, this model of cooperative leniency might fail.

c. Cooperation Based on National Laws

Domestic competition legislation and policies may contain provisions that authorize competition agencies to establish collaborative arrangements with agencies from other jurisdictions.[79] Germany, the United States of America, the United Kingdom, and Australia are among the countries with legislation containing provisions of such bilateral effect.[80] As an example, section 82(4) of the South African Competition Act 89 of 1998 provides for such cooperation agreements with other competition agencies: "The President may assign to the Competition Commission any duty of the Republic, in terms of an

72. *Id.* at 11.

73. *Id.* This ensures that the company will not be prosecuted if it provides the investigative competition authorities with all the necessary information it will need to prosecute participants of the cartel. *Id.*

74. *Id.*

75. SDE, FIGHTING CARTELS: BRAZIL'S LENIENCY PROGRAM 17, 20 (2009), *available at* http://www.oecd.org/dataoecd/52/22/43619651.pdf. The publication states that "the SDE is the antitrust agency with power to negotiate the leniency agreement" and further states the requirements that an applicant has to comply with before the SDE will consider to enter into a leniency agreement. *Id.*

76. Section 46 of the Competition Act provides that "[t]he [Competition] Commission [of India] may, if it is satisfied that any producer, seller, distributor, trader or service provider included in any cartel, which is alleged to have violated section 3, has made a full and true disclosure in respect of the alleged violations and such disclosure is vital, impose upon such producer, seller, distributor, trader or service provider a lesser penalty as it may deem fit, than leviable under this Act or the rules or the regulations." The Competition (Amendment) Act, 2007, No. 12, Acts of Parliament, 2007, § 46 (India). However, this possibility is subjected to certain provisos. *Id.*

77. *See id.*; SDE, *supra* note 75, at 17; Corporate Leniency Policy §§ 3.1, 3.5 (S. Afr.).

78. Corporate Leniency Policy § 2.5 (S. Afr.).

79. ICN CARTEL WORKING GROUP REPORT, *supra* note 68, at 11.

80. *Id.* at 13.

international agreement relating to the purpose of *this* Act, to exchange information with a similar foreign agency."[81]

Considering the fact that such cooperation is only limited to a few states, is voluntary, and takes place on an ad hoc basis, it might still lack the necessary impact.

d. Cooperation Based on Non-Competition Specific Agreements Between Jurisdictions[82]

So-called Mutual Assistance Agreements can be invoked if states need mutual assistance in regard to combating cartel activities.[83] Mutual Legal Assistance Treaties (MLATs) are mostly entered into by countries to cooperate in criminal cartel matters.[84] However, the ICN states that there is no automatic need for a "dual criminality" element when cooperation is sought: the criminality of cartels in one jurisdiction does not necessarily prevent cooperation on cartels by a Mutual Assistance Agreement if no such criminal status is given to cartels in the other jurisdiction. It may, however, lead to limited or no cooperation at all if one jurisdiction gives criminal status to cartels and the other one does not.[85] The South African Competition Amendment Act 1 of 2009 grants criminal status to cartels in South Africa[86] and therefore it is possible for South Africa to enter into such MLATs with other countries that have the same criminal approach to cartels.

e. Regional Cooperation Instrument: The European Union Cooperation Network

All member states of the European Union belong to the European Competition Network (ECN).[87] Its key guardian is the European Commission, which is responsible for ensuring the compliance of all EU member states with its competition policies. Regulation (EC) 1/2003[88] of December 16, 2002, introduced a system of decentralized enforcement executed by domestic enforcement bodies—the so-called national competition authorities (NCAs). The ICN regards the EU enforcement network as an example for a successful regional cooperation regime.[89] When the Lisbon Treaty came into force in December 2009, it gave legal personality to the European Union under Article 46A Treaty on the Functioning of the European Union; but we have yet to see whether this new capacity to enter into international treaties will further strengthen the EU competition network.

81. *Id.* at 13-14.

82. *Id.* at 15.

83. *Id.* (the ICN describes Mutual Assistance Agreements as "treaties on co-operation in criminal matters which create hard law obligations on signatories.").

84. *Id.*

85. *Id.*

86. Competition Amendment Act 1 of 2009 § 12 (S. Afr.).

87. P.S.R.F. MATHIJSEN, A GUIDE TO EUROPEAN UNION LAW 228 (2004).

88. Regulation 1/2003 introduced a system of decentralized enforcement executed by domestic enforcement bodies, the so called national competition authorities (NCAs).

89. ICN CARTEL WORKING GROUP REPORT, *supra* note 68, at 19; OECD REPORT, *supra* note 70.

f. Cooperation Based on Competition-Specific Agreements Between Jurisdictions or Bilateral Agreements on Competition Matters

The common purpose of these agreements is to promote cooperation between competition authorities.[90] The ICN reports that the first bilateral agreement was concluded between Germany and the United States of America in 1976.[91] Since then, many such bilateral agreements followed: the United States of America and Brazil,[92] Canada and Brazil,[93] Chile and Brazil,[94] and Russia and Brazil[95] have all entered into such bilateral agreements.

Considering the above methods of coordinating cooperation between competition authorities, cooperation based on competition-specific agreements between jurisdictions or bilateral agreements on competition matters seems to be by far the most promising method. Not only do the participating parties retain a high amount of flexibility in terms of identifying anti-competitive practices on which they want to cooperate, but they also have the guarantee that if a competition matter arose they would be able to rely on the cooperation of the country with which the bilateral agreement was concluded. This observation reiterates the earlier ascertainment of the U.S. Federal Trade Commission, whereas *"[c]o-operation among antitrust authorities facilitates the effective and efficient enforcement of antitrust laws and thus the maintenance of competition in markets. That is not an expression of economic theory, but rather a fact of life."*[96]

D. A Comparative Overview of Competition Law and Policy of the European Union, South Africa, Brazil, and India

1. *Overview*

The following overview introduces and compares the competition policy and laws in South Africa, Brazil, and India with those of the European Union. It highlights the authors' view that only binding bilateral agreements that synchronize domestic cartel laws and policies—and not only informal cooperation agreements—are necessary to protect

90. ICN Cartel Working Group Report, *supra* note 68, at 17.

91. *See id.*

92. Agreement Between the Government of the United States of America and the Government of the Federative Republic of Brazil Regarding Cooperation Between their Competition Authorities in the Enforcement of their Competition Laws, U.S.-Braz., Oct. 26, 1999, T.I.A.S. No. 13,068.

93. Cooperation Arrangement Between the Commissioner of Competition, Competition Bureau of the Government of Canada, and the Council for Economic Defense, the Secretariat of Economic Law of the Ministry of Justice, and the Secretariat for Economic Monitoring of the Ministry of Finance of the Government of the Federative Republic of Brazil Regarding the Application of their Competition Laws, Can.-Braz., Apr. 25, 2008, competitionbureau.gc.ca.

94. Cooperation Arrangement Between the Fiscalía Nacional Económica of Chile and the Council for Economic Defense, the Secretariat of Economic Monitoring of the Ministry of Finance of the Government of the Federative Republic of Brazil Regarding the Application of Their Competition Laws, Chile-Braz., Oct. 2008, *available at* http://www.cade.gov.br/upload/AB%20Inglés.pdf.

95. Agreement on Cooperation in the Sphere of Competition Policy Between the Government of the Federative Republic of Brazil and the Government of the Russian Federation, Russ.-Braz., Dec. 12, 2001, www.oecd.org.

96. John J. Parisi, *Enforcement Co-operation Among Antitrust Authorities*, 20(3) Eur. Competition L. Rev. 133, 133 (1999).

emerging economies from the threat of market distortion posed by cartels. Cross-border cooperation established by bilateral agreements might speed up any investigation into cartel activities by MNCs. The outcomes of an investigation of an alleged transnational cartel activity undertaken by the anti-competition authorities of one jurisdiction can be utilized by the competition authorities of other jurisdictions affected by such cartel activities, instead of having to conduct time-consuming investigations on their own.

2. *European Union*

As the main supervisory organ, the European Commission, together with its domestic counterparts at the Member State level,[97] functions as the 'gatekeeper' for fair competition and is responsible for the regulation and prevention of anti-competitive cartel activities under Article 101 TFEU (ex. Article 81 EC Treaty),[98] the abuse of dominant positions by dominating undertakings under Article 102 TFEU (ex. Article 82),[99] and the regulation of mergers under the Merger Regulation 139/2004.[100] In addition, it oversees the fair use of state aid by its Member States under Articles 107—109 TFEU (ex. Articles 87–89).[101] The Commission has the power to adopt a decision, to conduct investigations, and to impose penalties when following a complaint or on its own initiative if it finds in a given case that there has been a violation of Articles 101 or 102 of the Treaty.[102] The latter is the measure that has the potential of deterring potential corporate offenders. Under Regulation 1/2003, the Commission has the power to impose fines on undertakings and associations of undertakings not exceeding ten percent of the total turnover realized in the preceding business year by each of the undertakings that participated in the infringement under Article 23 Regulation 1/2003[103] and under Article 24 1/2003 periodic penalty payments not exceeding five percent of their average daily turnover in the preceding business year per day in order to compel undertakings to put an end to an infringement or to comply with a decision ordering interim measures.[104]

Penalties can be in the billions of euros—as two fines of 2009 exemplify. Two gas providers, E.ON and GDF Suez, were fined €553,000,000 each for their collusion in dominating the Franco-German gas market and the computer chip giant, Intel, was fined an impressive €1,060,000,000 for its exclusion of other competitors from the computer chip market.[105]

A major competition matter that made evident the positive effects of international cooperation between competition authorities occurred in 1994, when Microsoft Corporation made a declaration to the U.S. Department of Justice and the European Competition

97. Council Regulation 1/2003, Preamble ¶¶ 3, 4, 2002 O.J. (L 1) 1 (EC).

98. Consolidated Version of the Treaty on the Functioning of the European Union art. 101, Sept. 5, 2008, 2008 O.J. (C 115) 88-89 [hereinafter TFEU].

99. *See id.* art. 102.

100. Council Regulation 139/2004, 2004 O.J. (L 24) (EC).

101. *See* TFEU, *supra* note 98, arts. 107-09.

102. *See id.* art. 105.

103. Reg 1/2003, art. 23.

104. *Id.* art. 24.

105. Press Release, European Commission, Antitrust: Commission Action Against Cartels (July 8, 2009), *available at* http://ec.europa.eu/competition/cartels/overview/faqs_en.html.

Commission (ECC) to change their licensing practices.[106] This undertaking was made after negotiations with these authorities, following an allegation by Novell against Microsoft that the latter had kept competitors out of the market for PC-operating browser system software by illegally tying Windows and Internet Explorer[107] and bundling Windows Media Player with the Microsoft operating system.[108] The ECC allegedly started its investigations in 2000 independently from the U.S. competition proceedings that had already started in the early 1990s.[109] While investigations were ongoing, Microsoft gave its consent for the exchange of information between the U.S. Department of Justice and the ECC. It waived its right to secrecy regarding both the U.S. Department of Justice and the ECC.[110] This cooperation was greeted as a success for international cooperation:

> [T]he negotiation of the undertaking was a historic and unprecedented piece of co-operation between the EC Commission and the United States Department of Justice. It serves as an important model for the future, as it shows how the two authorities can combine their efforts to deal effectively with giant multinational companies. The success of this joint approach sends a strong signal to all multinational companies, including those in other sectors.[111]

III. Republic of South Africa

A. Legislative Overview

At present, the only available action against cartel activity in South Africa is the administrative penalty as provided by the Competition Act 89 of 1998 (the Act).[112] It promotes and protects fair competition in South Africa and came into force October 20, 1998.[113] The Preamble of the Act states that competition law and structures to enforce those laws will "provide for markets in which consumers have access to, and can freely select, the quality and variety of goods and services they desire" and it is also intended to "restrain trade practices which undermine a competitive economy."[114] It repealed the Maintenance and Promotion of Competition Act of 1979 (the old Act), which regulated competition among corporations.[115] Chapter 2 of the Act prohibits uncompetitive practices that, inter alia, include price fixing and price discrimination.[116] Under section 61 of the Act, corporations involved in cartel activities may be penalized by an administrative fine of up to ten percent of the annual turnover in South Africa or their exports from South Africa during

106. Press Release, European Commission, Following an Undertaking by Microsoft to Change its Licensing Practices, the European Commission Suspends its Action for Breach of the Competition Rules (Sept. 17, 2004), *available at* http://europa.eu/rapid/pressReleasesAction.do?reference=IP/94/653.
107. United States v. Microsoft Corp., 253 F.3d 34, 45 (D.C. Cir. 2001).
108. Commission Decision Case COMP/C-3/37.792 Microsoft (EC).
109. *See id.* ¶ 4.
110. *Id.*
111. *Id.*
112. Competition Act No. 89 of 1998 (S. Afr.)
113. *See id.* Preamble.
114. *See id.*
115. *See id.* Schedule 2.
116. *See id.* ch. 2.

the firm's preceding financial year.[117] When determining the penalty, the Competition Tribunal shall look upon various factors, which include "the nature, duration, gravity, and extent of the contravention, any loss or damage suffered as a result of the contravention, and the behavior of the respondent."[118]

The scope of available sanctions will change when the Competition Amendment Act 1 of 2009 (the Amendment Act) comes into force. Corporate and company directors, such as CEOs and CFOs, who are responsible for their undertakings' involvement in cartel activities can now face personal criminal responsibility.[119] South African legislators made a bold move when drafting the Amendment Act. The then president of the Republic of South Africa, Kgalema Mothathle, refused to sign the Competition Amendment Bill of 2008 (the Bill), as the Amendment Act then was called, questioning the constitutionality of certain provisions.[120] Firstly, there was the question of whether evidence obtained during the hearing in front of the competition authorities could be used in a subsequent criminal court case against directors.[121] Secondly, the amendment takes away the burden of proof from the South African prosecuting authorities under which they have to prove beyond reasonable doubt that an offense was committed, in terms of the competition laws, by stating that a person may be prosecuted for an offense if there is proof of or acknowledgement by a firm that it engaged in a prohibited practice.[122] Despite these concerns,[123] Jacob Zuma, the present South African president, signed and assented to the Bill, which became the Competition Amendment Act (Act No 1 of 2009), on August 26, 2009.[124] Section 73A will be inserted into the Act, allowing the prosecution of a "[company] director of a *firm* or while engaged or purporting to be engaged by a *firm* in a position having management authority within the *firm*"[125] causing "the firm to engage in a prohibited practice"[126] or having "knowingly acquiesced"[127]to such activity.

It has yet to been seen whether the new Competition Amendment Act will create enough deterrence to stop such anti-competitive activities.

B. Enforcement Agencies

In South Africa, the Competition Commission, the Competition Tribunal, and the Competition Appeal Court were established by the Competition Act 89 of 1998 (the Act)

117. *See id.* § 61(2).

118. *See id.* § 61(3).

119. *See* Segoane L. Monnye & Sasha-Lee Afrika, *Prison Beckons Directors Involved in Cartels*, 16 Juta's Bus. L. 13, 13 (2008).

120. Luke Kelly, *The Introduction of a Cartel Offence into South African Law*, 21 Stellenbosch L. Rev. 321 (2010).

121. The issue was also discussed at a joint meeting of the Law Society of South Africa's Competition Law Committee and the Constitutional and Human Rights Committee, 8 *De Rebus—SA Attorneys' Journal* (2008).

122. Competition Amendment Bill, § 12 (2008); *see also* Kelly, *supra* note 120, at 331.

123. These concerns were not addressed as the Bill was assented to with exactly the same content. It is therefore possible to expect future litigation after the commencement of the Amendment Act.

124. Competition Amendment Act (Act No. 1, 2009). It was assented to on August 26, 2009 while the date of its entry into force has still not been proclaimed.

125. *Id.* § 12.

126. *Id.*

127. *Id.*

and are responsible for enforcing competition legislation, policies, and domestic compliance.

The Commission consists of a Commissioner and at least one Deputy Commissioner who is appointed by the Minister of Trade and Industry.[128] The Commission has jurisdiction throughout the Republic of South Africa, is independent, and is only subject to the South African Constitution and the law of South Africa.[129] It functions independently from any interference by any executive organ of state and "each organ of state must assist the Commission to maintain its independence and impartiality, and to effectively carry out its powers and duties."[130] The Commission has a wide range of implementation and enforcement powers[131] designed to protect the individual consumer's right to a fair market:

> [T]he Commission is representing the public interest and acts as 'claimant cum prosecutor'. The public interest is that interest that all South Africans have in open and unfettered competition in our economy. The Commission is assigned to this task because of the difficulties facing ordinary citizens in pursuing anti-competitive conduct through normal court channels.[132]

The Tribunal has jurisdiction throughout the Republic, and consists of a chairman who is appointed by the President and at least three, but no more than ten, other members. Under section 27(1), the Tribunal has the responsibility to adjudicate any matter that is prohibited under the Act, which may be considered by it, and review any decision of the Commission that gets referred to in terms of the Act.

Section 36 of the Act establishes the Competition Appeal Court, which has a similar status as a High Court in South Africa. It consists of three judges, of whom one is designated to be the Judge President. The court is responsible for reviewing any decisions of the Competition Tribunal referred to it in terms of the Act and for considering any appeal arising from a decision of the Tribunal.

Overall, the three enforcement bodies have been successful in safeguarding corporate compliance with South Africa's competition legislation as the case overview below shows.

C. A Short Overview of Selected Cartel Cases in South Africa

In recent times, many corporations were under investigation for alleged cartel activities by the Competition Commission. Such cartel activities include collaborations between international MNCs and domestic South African companies, which affect the domestic market; one good example was the well-publicized milk cartel case, involving corporations such as Parmalat SA (Pty) Ltd., Clover SA (Pty) Ltd., and Nestle SA (Pty) Ltd.[133] These and other cartel activities, many which have not yet been discovered, prompt questions.

128. *Id.* § 19(2).
129. *Id.* § 20(1)(a).
130. *Id.* § 20(3).
131. *Id.* § 21.
132. Competition Comm'n v. Pioneer Foods (Pty) Ltd. 2010 (91/CAC/Feb10) ZACAC 2 (S. Afr.).
133. *See* Amanda Visser, *Appeal Lodged in Milk Cartel Case*, FIN24 (Sept. 19, 2008, 07:32), http://www.fin24.com/BusBusin/Appeal-lodged-in-milk-cartel-case-20080919; *see also S Africa: Regulator Upbeat on "Milk Cartel" Case*, JUST-FOOD (Jan. 19, 2009), http://www.just-food.com/news/regulator-upbeat-on-milk-cartel-case_id105093.aspx.

Are MNCs that operate in developing nations more likely to commit prohibited practices? Do the respective national competition authorities, unlike their counterparts in developed member states of the OECD, suffer from a general lack of formal cooperation in their fight against cartels?

Cartel cases that the Commission has investigated include, inter alia, an alleged cartel in the bread industry, a cartel operating in the pipe products and construction industry[134] in which two subsidiaries of Murray and Roberts and Aveng were involved,[135]and an alleged milk cartel.[136]

1. *The Bread Cartel: Competition Commission v. Pioneer Foods (Pty) Ltd.*[137]

In the so-called "bread cartel" case, the Competition Commission of South Africa referred to the Competition Tribunal for a decision on two complaints against Pioneer Foods (Pty) Ltd.; the Western Cape complaint and the National complaint concerned alleged bread cartel activities at the regional and national level. In the Western Cape complaint, the Commission received information about an alleged cartel between the bread producers Premier Foods, Tiger Brands, Foodcorp (Pty) Ltd., and Pioneer Food. These prohibited horizontal agreements[138] between the cartel members aimed at dividing the market by allocating certain areas for business operations to each participant and fixing bread prices, thus contravening §§ 4(1)(b)(i) and (ii)[139] of the Competition Act. During the investigation, Premier Foods decided to cooperate fully with the Commission in order to qualify for immunity under the leniency policy of the Commission. During the early stages of the investigation, Tiger Brands successfully entered into a consent order agreement with the Commission after it provided evidence against the bread cartel. Tiger Brands received an administrative fine of ZAR98.784.869.90. Foodcorp was fined an administrative fine of ZAR45.406.359.82. Only the case of Pioneer Food—with the company denying involvement in any cartel—was referred to the Tribunal. The Tribunal found that Pioneer Foods had indeed contravened § 4 (1) (b) (i) and (ii) of the Act[140] and was punished with a rather robust penalty of ZAR195.718.614 for its involvement in both the Western Cape and national bread cartel.

134. Competition Comm'n v. S. Pipeline Contractors Conrite Walls (Pty) Ltd. [2010] (23/CFR/Feb09) (S. Afr.); *see also* Media Release, Competition Commission, Competition Commission Busts Pipe Products Cartel (Jan. 30, 2009), http://www.compcom.co.zz/assets/Uploads/AttacheAttach/MyDocuments/30-Jan-09-Competition-Commission-busts-pipe-products-cartel.pdf.

135. Amanda Visser, *Cartel Firms Get Off Scot-Free*, FIN24 (Mar. 2, 2009), http://www.fin24.com/Business/Cartel-firms-get-off-scot-free-20090302.

136. Competition Comm'n v. Clover Indus. Ltd. [2008] (103/CR/Dec06) (S. Afr.).

137. Competition Comm'n v. Pioneer Foods (Pty) Ltd. 2010 (15/CR/Feb07) (S. Afr.) [hereinafter Bread Case].

138. Section 1 of the Competition Act defines a horizontal relationship as a relationship between competitors and an agreement, when used in the context of prohibited practices, includes a contract, arrangement or understanding, whether or not it is legally enforceable. Competition Act No. 89 of 1998 § 1(xi) (S. Afr.).

139. *Id.* § 4(1)(b)(i)-(ii) (S. Afr.).

140. Bread Case, supra note 137, at ¶ 131, namely "direct and indirect fixing of a selling price and other trading conditions in contravention of section 4(1)(b)(i)and(ii) of the Act."

2. *Pipes and Construction Cartel: Competition Commission v. Cape Concrete Works (Pty) Ltd.*[141]

In this 2009 case, the Commission found that corporations that operated in the pipe products industry had formed a cartel and were responsible for bid rigging, price fixing, and allocating markets or customers. In December, Rocla (Pty) Ltd. (Rocla) applied for leniency to the Commission in terms of its Corporate Leniency Policy.[142] It was involved in a cartel with other corporations in the precast industry.[143] Rocla informed the Commission that, together with the other corporations, they "[fixed] the selling price of pipes, culverts and manholes[;] [divided] the markets of the production and distribution of pipes, culverts and manholes; and [collusively tendered] in respect of the supply of precast concrete products and precast concrete sleepers to certain suppliers."[144] The Commission subsequently started an investigation into the cartel. Cape Concrete Works (Pty) Ltd. admitted its involvement in the cartel and agreed, in a plea bargain with the Commission, to pay a fine of ZAR 4.371.386.

3. *The Milk Cartel: Competition Commission v. Clover Industries Limited, Clover SA (Pty) Ltd., Parmalat (Pty) Ltd, Ladismith Cheese (Pty) Ltd., Woodlands Dairy (Pty) Ltd., Nestle SA (Pty) Ltd., and Milkwood Dairy (Pty) Ltd.*[145]

In the milk cartel case, the companies Clover Industries Ltd., Clover SA (Pty) Ltd., Parmalat (Pty) Ltd., Ladismith Cheese (Pty) Ltd, Woodlands Dairy (Pty) Ltd., Nestle SA (Pty) Ltd., and Milkwood Dairy (Pty) Ltd. were accused of fixing the prices of raw and processed milk and manipulating the market to restrict competition.[146] It was alleged that price information was exchanged between the management of the corporations via telephone and email.[147] It was further alleged that price data were circulated and synchronized by making use of a combination of fictitious and actual scenarios where each participant would then provide the price it would charge for the provided scenario.[148] During January 2009, the Commission issued a media statement in which it confirmed a settlement with one of the participants in the milk cartel.[149] Lancewood (Pty) Ltd. admit-

141. Competition Comm'n v. Cobro Concrete 2009 (23) CR 1 (CT) ¶ 2.1 (S. Afr.).
142. *Id.*
143. *Id.*
144. *Id.*
145. *See* Competition Comm'n v. Clover Indus. Ltd. et. al. 2006 (103) CR 1 (CT) ¶ 3-4 (S. Afr.); Clover Indus. Ltd. v. Competition Comm'n et. al. 2008 (78) ZACAC 1 (CAC) (S. Afr.); *and* Ladismith Cheese Ltd. v. Competition Comm'n 2008 (81) ZACAC 1 (CAC) (S. Afr.) for the Competition Appeal Court's decision after some of the dairy companies, including Clover Industries Limited, Clover SA (Pty) Ltd., and Ladismith Cheese (Pty) Ltd. appealed against three *in limine* points. The first point was whether the letter that was submitted to the Commission, informing the Commission of the possibility of a cartel amongst dairy companies, qualified as an official complaint or only as providing the Commission with information. The second and third *in limine* points were based on a corporate leniency agreement concluded between the Commission and Clover Industries Limited and Clover (SA) Pty Ltd. on Feb. 3, 2006. The appeal, however, failed on all three points *in limine*.
146. Media Statement, S. Afr. Competition Comm'n, Competition Commission Settles with Milk Cartel Participant (Jan. 16, 2009), *available at* http//www.compcom.co.za.
147. *Id.*
148. *Id.*
149. *Id.*

ted to the Commission that it was involved in the activities as alleged by the Commission and agreed to pay an administrative penalty of ZAR100,000.00.[150]

But the Commission recently withdrew its case against Clover Industries Limited and Clover SA (Pty) Ltd., Nestle SA (Pty) Ltd., Parmalat (Pty) Ltd., and Ladismith Cheese (Pty) Ltd.—the remaining respondents in its long running case.[151] The withdrawal is due to a decision by the Supreme Court of Appeal of South Africa in which it sets aside the complaints initiated by the Competition Commission against the applicants during 2006 and refers the December 7, 2006 Competition Commission complaints to the Competition Tribunal of South Africa.[152]

These cases highlight the important role South Africa's competition authority plays in their quest to ensure fair and healthy competition in order to preserve economic freedom.[153]

D. Sanctions and Penalties

At the moment the Act provides for administrative penalties against corporations, which can amount to a total of ten percent of the annual turnover made during the business year in which the corporation was involved in the cartel activity.[154] The amended Act will establish personal accountability of directors and other officers of the company by criminalizing certain acts amounting to prohibited practices of their corporations.[155] With this latter legislation in place, the South African competition penalty system will finally become more in line with the examples of the United States,[156] Canada,[157] and the United Kingdom[158] that all make provisions for custodial sentences for directors who allow the corporation to get involved in cartels.

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150. *Id.*

151. *See* Media Release, S. Afr. Competition Comm'n, Commission Withdraws Case against Clover, Ladismith, Nestle, and Parmalat (Apr. 20, 2011), *available at* http://www.compcom.co.za/assets/Uploads/AttachedFiles/MyDocuments/final-media-release-on-the-milk-case.pdf.

152. Woodlands Dairy v. Milkwood Dairy 2010 (105) SA 1 (ZASCA) (S. Afr.); *see also* Ann Crotty, *Milk Cartel Ruling 'Terrible'*, SA Time (Sept. 15, 2010), www.iol.co.za/business/business-news/milk-cartel-ruling-terrible-1.692687.

153. There are more examples of cartel cases. In Competition Comm'n. v. New Reclamation Group 2008 (37) CR 1 (CT) (S. Afr.), the New Reclamation Group confessed to the Commission of its involvement in fixing the price of scrap metal. It was punished with an administration fine of R145.972.065. In Competition Comm'n. v. Adcock Ingram Critical Care & Tiger Brands Ltd. 2008 (20) CR 1 (CT) (S. Afr.), the Commission alleged "that the respondents allocated customers and specific types of goods and services during 2001 and 2002 and engaged in collusive tendering for the supply of large volume parenterals (intravenous medical products) to State Hospitals during 1999 to 2007." Adcock Ingram admitted liability to the Commission during the investigation and agreed to pay an administrative penalty of R53 502 800. This amount represented eight percent of Adcock Ingram's turnover for the financial year ending in 2007. *See also* Monnye & Afrika, *supra* note 119.

154. Competition Act 89 of 1998 § 61(2) (S. Afr.).

155. *See* Monnye & Afrika, *supra* note 119.

156. Sherman Antitrust Act of 1890, 15 U.S.C. § 1 (2004).

157. Competition Act, R.S.C. 1985, c. C-34 § 45(2) (Can.).

158. Enterprise Act, (2002) § 188, 1 Current Law.

E. Concluding Remarks

South Africa has an Agreement on Trade, Development, and Cooperation with the European Union,[159] which extends to competition-related matters.[160] Article 35 of the Agreement lists corporate agreements and concerted practices that are incompatible with the validity of the Agreement and that could affect trade between the European Union and South Africa, and where pro-competitive effects do not outweigh such anti-competitive behavior.[161]

An infringement of the anti-competitive provisions of this agreement might lead to direct assistance by the European Union in cases where the South African competition authorities discover a cartel that might affect trade with the European Union or a cartel that has operation in both South Africa and the European Union, thus having effect in the European Union.

IV. Brazil

As a dynamic emerging market economy, Brazil has become the host country to many MNCs. In the past, the Brazilian economy was largely centralized and the state took responsibility for regulating and fixing prices.[162] When this system was abolished in the 1990s, corporations enjoyed more economic operative freedom.[163] Consequently, the need for more stringent competition regulation arose to ensure that corporations did not abuse their new position of economic freedom.[164] Changes to the competition legislation formed part of many responses by the Brazilian government to high inflation.[165] In 1994 a new competition law was enacted.[166] Brazil has many cooperation agreements with other countries' competition agencies. These include, inter alia, agreements with Canada, the United States, Chile, the European Union, and Russia.[167]

159. Agreement on Trade Development and Cooperation, E.C.-S. Afr., Jul. 29, 1999, 142 O.L.J. 311.

160. *Id.*

161. *Id.* art. 35, ¶ 1(a) includes "agreements and concerted practices between firms in horizontal relationships . . . which have the effect of substantially preventing or lessening competition in the territory of the Community or of South Africa, unless the firms can demonstrate that the anti-competitive effects are outweighed by pro-competitive ones . . . . "

162. *See* Global Competition Review, The Antitrust Review of the Americas (2009), *available at* http//www.globalcompetitionreview.com); *see also* John W. Clark, Competition Policy and Regulatory Reform in Brazil: A Progress Report, 2 OECD J. Competition L. & Pol'y 1 (2000) for a comprehensive summary on the competition law developments in Brazil.

163. *Id.*

164. *Id.*

165. *See* Org. for Econ. Co-operation and Dev., Competition Law and Policy in Braz. 10 (2010), *available at* http://www.oecd.org/dataoecd/4/42/45154362.pdf.

166. Decreto No. 8884, de Junho de 1994, Diario Oficial Da Uniao [D.O.U.] de 11.6.1994 (Braz.).

167. All these agreements are retrievable from http://www.mj.gov.br/sde.

A. The Legal Framework and Prohibited Practices

Brazil has various statutes that are intended to prevent anti-competitive activities such as cartels.[168] Law No. 8,884/94, the Federal Competition Act (hereafter Federal Law), Law No. 8,137/90; the Brazilian Economic Crimes Law, which criminalizes certain cartel conduct;[169] Law No. 10.446/02, which allows for investigations into cartels with interstate or international impact; and the Presidential Decree of October 7, 2008, which designated October 8 of each year as the annual Anti-Cartel Enforcement Day in Brazil.[170] It is no coincidence that the first leniency agreement,[171] in terms of the Brazilian Leniency Program, came into effect on October 8, 2008. The subsequent proclamation of this day as the official Anti-Cartel Day serves as a further indication of the Brazilian authority's commitment to curb hardcore cartels.[172]

The Federal Law promotes free competition and consumer protection.[173] It has jurisdiction over "individuals, private or public companies, as well as any individual or corporate associations, established *de facto* and *de jure* [on the territory of Brazil][174]—even on a provisional basis —"irrespective of a separate legal nature, and notwithstanding the exercise of activities" considered legal monopolies.[175] It further provides that the "company and each of its managers of officers shall be jointly liable to the various forms of infringement of the economic order."[176] Articles 20 and 21 of the Federal Law define which corporate behaviors qualify as a violation of the economic order.[177]

168. Int'l Competition Network, Anti-Cartel Enforcement Template, Subgroup 2: Enforcement Techniques 2 (2009), http://www.cade.gov.br/upload/Brazil_ICN%20Cartel%20Template_April%202009.pdf.

169. Brazilian Economic Crimes Law, No. 8,137/90, § 4.

170. Secretariat of Economic Law, Ministry of Justice, Brazil's Anti-Cartel Program, *available at* http//www.internationalcompetitionnetwork.org.

171. In terms of the Brazilian Leniency Program, which was launched in 2000, an agreement might be negotiated by the SDE and an applicant for leniency if (i) the applicant is the first to come forward and confesses his participation in the unlawful practice; (ii) the applicant ceases its involvement in the anticompetitive practice; (iii) the applicant was not the leader of the activity being reported; (iv) the applicant agrees to fully cooperate with the investigation; (v) the cooperation results in the identification of other members of the conspiracy, and in the obtaining of documents that evidence the anticompetitive practice; (vi) at the time the company comes forward, the SDE has not received sufficient information about the illegal activity to ensure the condemnation of the applicant. Secretariat of Economic Law et al., *Fighting Cartels: Brazil's Leniency Program*, Brasília-DF, CEP 70064-900, 17, 20 (3rd ed. 2009)

172. *See* Anti-Cartel Enforcement Template, *supra* note 168.

173. Federal Law, Decreto No. 8884: 1, de Junho de 1994, Diario Oficial Da Uniao [D.O.U.] de 11.6.1994 (Braz.).

174. *Id.* art. 15 ("[A] foreign company is deemed resident in the Brazilian territory if it operates or has a branch, affiliate, subsidiary, office or place of business, agent or representative in Brazil."); *id.* art. 2.

175. *Id.* art. 15.

176. *Id.* art. 16.

177. *Id.* art. 20. This includes any act that in any way intended or otherwise is able to limit, restrain or in any way injure open competition or free enterprise; to control a relevant market of a certain product or service; to increase profits on a discretionary basis; and to abuse one's market control.

B. ENFORCEMENT BODIES

The Brazilian Competition Policy System has three bodies[178] for the enforcement of the antitrust legislation:[179] the Secretariat of Economic Monitoring (Secretaria de Acompanhamento Econômico), which is part of the Finance Ministry; the Administrative Council for Economic Defense (Conselho Administrativo de Defesa Econômica); and the Secretariat of Economic Law Enforcement (Secretaria de Direito Econômico), which is part of the Justice Ministry.

The Secretariat of Economic Monitoring (SEAE) is a governmental investigative agency. Its main responsibilities include certain investigative and advisory duties under the competition laws of Brazil, providing economic analysis for economic regulator programs and monitoring market conditions in Brazil.[180] The SEAE may issue non-binding economic opinions in merger reviews and anti-competitive activities.[181]

The Administrative Council for Economic Defense (CADE) was created under Law No. 4137 of September 1962.[182] In terms of the Federal Law, CADE became a federal independent agency with the responsibility to ensure compliance with the Federal Law and its regulations.[183] CADE's board consists of a president and six other board members.[184] Its duties include, inter alia, the task of resolving "purported violations of the economic order" and applying the penalties provided by law, resolving "proceedings instituted by the Secretariat of Economic Law Enforcement," and ordering action to counter possible violations of the economic order.[185]

The Secretariat of Economic Law Enforcement (SDE) seems to be the Brazilian equivalent to the South African Competition Commission and thus the chief investigative body regarding anticompetitive activities[186] It is headed by a secretary who is appointed by the Minister of Justice.[187] SDE's duties include, among others, the enforcement of market compliance with Brazil's Federal Law by monitoring and following up on market practices.[188]

178. CADE, THE BRAZILIAN SYSTEM OF COMPETITION POLICY, *available at* http://www.cade.gov.br/upload/WTOgenevaSBDCtradepolicy2.pdf.

179. OECD, COMPETITION LAW AND POLICY IN BRAZIL: A PEER REVIEW 11 (2010), *available at* http://www.oecd.org/dataoecd/4/42/45154362.pdf.

180. *See generally id.* (discussing the various roles of the SEAE).

181. *Id.* at 29.

182. Federal Law, art. 3; PEER REVIEW, *supra* note 179, at 10.

183. Federal Law, art. 7.

184. *Id.* art. 4. These members are chosen from among citizens older than thirty years of age reputed for their legal or economic knowledge and unblemished reputation, duly appointed by the President of the Republic of Brazil after their approval by the Senate.

185. *Id.* art. 7.

186. *See Defensa da Concorrencia*, http://www.mj.gov.br/sde (last visited Jan. 15, 2012).

187. Federal Law, art. 13.

188. *Id.* art. 14(1) ("to ensure compliance with the Federal Law by monitoring and following up on market practices") and art. 14(2) (to "provide for ongoing follow-up on business activities").

C. A Brief Overview of Cartel Cases in Recent Years

1. *The Rio de Janeiro – São Paulo Airline Case*[189]

In this case, newspapers started the investigation into an affair, which became known as the São Paulo Airline Case. It was alleged that presidents of certain domestic airlines colluded in price fixing ticket prices for the Rio de Janeiro-São Paulo route, because all the ticket prices were going up by ten percent. CADE found the airlines guilty of collusion to increase prices and each airline was fined an amount equivalent to one percent of their revenue on that route.[190]

2. *The Rio de Janeiro Newspaper Case*[191]

In this case, four newspapers in Rio de Janeiro increased their prices by the same price and percentage rates. CADE investigated the matter and found the newspapers guilty of anti-competitive behavior. Each paper was fined one percent of its annual revenue.[192]

3. *The Flat Steel Cartel Case*[193]

This case concerned an agreement between competitors in the steel industry in which the parties planned to increase the prices of flat-rolled steel products. SEAE discovered that certain companies, which were members of the Brazilian Steel Institute, planned to increase the price of flat steel simultaneously. SEAE informed the companies that their plans could lead to a possible disturbance of the economic order; nonetheless, the companies proceeded with the increase. Reasons for the price adjustment, as provided by the relevant companies, were considered unconvincing and the companies were found guilty of price fixing. CADE fined each company one percent of their annual revenue before the proceedings against them were filed.[194]

D. Penalties

Article 23 of the Federal Law determines the applicable penalties for anticompetitive behavior that violates the economic order. Companies shall be fined one to thirty percent of the gross, pre-tax revenue of the company in its latest financial year. The fine shall not be lower than the actual competition advantage gained from the infringement. Managers or other officers shall be fined ten to fifty percent of the fine imposed on the company, and the manager will be personally liable for paying this fine. For other individuals and public or private entities, as well as any de facto or de jure associations of entities or persons, even temporary ones, with or without legal identity, the fine can total anywhere

189. *See* OECD, Global Forum on Competition's Roundtable on Prosecuting Cartels Without Direct Evidence of Agreement: A Contribution by Brazil 3-5 (2006), *available at* http://www.oecd.org/dataoecd/61/28/36063750.pdf.

190. Inter-American Development Bank, Competition Law and Policy in Latin America: Peer Reviews of Argentina, Brazil, Chili, Mexico and Peru 76 (2006).

191. *See* A Contribution by Brazil, *supra* note 189, at 82.

192. *Id.*

193. *See* Clark, *supra* note 162, at 193, for a summary of the case.

194. *See* A Contribution by Brazil, *supra* note 189, at 82.

between six thousand and six million Brazilian real. In case of a repetition of such an infringement, such fines can be doubled.[195]

V. India

A. Legal Framework

The Supreme Court of India stated the primary purpose of competition law is "to remedy some of those situations where the activities of one firm or two lead to the breakdown of the free market system, or, to prevent such a breakdown by laying down rules by which rival businesses can compete with each other."[196] The first competition legislation in India was the Monopolies and Restrictive Trade Practices Act of 1969 (MRTP Act), which came into force in June 1970.[197] The aim of the MRTP Act was to "provide that the operation of the economic system did not result in the concentration of economic power to the common detriment, for the control of monopolies, for the control of monopolistic and restrictive trade practices and for matter connected therewith or incidental thereto."[198] Indian authorities felt the need to keep competition policies in line with international economic developments.[199] In 1999, the Indian government appointed the Raghavan Committee, a committee on Competition Policy and Law.[200] In light of India's growing role as a global economic player, the task of the Raghavan Committee was to oversee Indian competition policies in order to ensure compliance with international competition law developments.[201] Upon submitting the committee's report, the new Competition Act of 2002 (Competition Act) was enacted. The Competition Act came into effect on September 1, 2009.[202] The overall aim of the act is to "prevent practices that would have an adverse effect on the development of fair competition, to promote and sustain competition in the markets, to protect the interest of consumers and to ensure freedom of trade carried on by other participants in markets in India."[203] Section 3 of the Competition Act prohibits cartel activity in India "in respect of production, supply, distribution, storage, acquisition or control or goods or provision of services which causes or is likely to cause an appreciable adverse effect on competition."[204] The Competition Act makes provisions for the Competition Committee of India (CCI) to enter into any memorandum or arrangement with any agency of any foreign country "for the purpose of discharging its duties or performing its functions under this Act."[205] This may be done with the prior

195. *See* Federal Law, art. 23.
196. Competition Comm'n of India v. Steel Authority of India, (2010) 10 S.C.C. 744, 744-45 (India).
197. Anurag K. Agarwal, Competition Law in India: Need to go Slow and Steady 3 (2005) *available at* http://www.iimahd.ernet.in/publications/data/2005-10-05anurag.pdf.
198. The Monopolies and Restrictive Trade Practices Act, No. 54 of 1969, India Code (1969).
199. *See* Argarwal, *supra* note 197.
200. Debashree Dutta, *New Competition Regime in India*, LegalServiceIndia, http://www.legalserviceindia.com/articles/neew.htm (last visited Jan. 15, 2011).
201. *Id.*
202. Global Competition Review, The Asia-Pacific Antitrust Review (2010), *available at* http//www.globalcompetitionreview.com.
203. The Competition Act, 2002, No. 12, Acts of Parliament, 2003 (India).
204. *Id.* § 3(1).
205. *Id.* § 18.

approval of the Central Government of India.[206] Consequently if the Indian competition authorities feel that cartels will be addressed more efficiently through cooperation, it has the possibility to cooperate with other countries. This intention of Indian authorities was already noticeable during a BRIC international competition conference held in Kazan, Russia.[207] The CCI issued a statement saying that "the (BRIC nations) resolved to take effective measures to tackle cartels and anti-competitive agreements . . . they also stressed upon the need of co-operation and exchange of views and experiences on the matters relating to competition policy development."[208]

B. ENFORCEMENT

The CCI was established under the Competition Act[209] and became operational on October 14, 2003.[210] It "consist[s] of a Chairperson and not less than two and not more than ten other Members [who are all] appointed by the Central Government [of India]."[211] The CCI has "the duty . . . to eliminate practices that have an adverse effect on competition, promote and sustain competition, protect the interest of consumers and ensure freedom of trade carried on by other participants, in markets in India."[212] It has the power to start inquiries into any alleged contravention of the Competition Act.[213] The Commission can make any order it deems fit should there be a contravention of the Act.[214] The Competition Amendment Act of 2007 amended the Competition Act. The amendment makes provisions for the establishment of a Competition Appellate Tribunal (CAT). The CAT may "hear and dispose of appeals against any direction issued or decision made or order passed by the [CCI]."[215] The CAT "shall consist of a Chairperson and not more than two other Members who will be appointed by the Central Government [of India]."[216] Any decision or order of the CAT may be challenged in the Supreme Court of India.[217]

The revamp of the Indian competition regime also had implications for old cases, investigations, and proceedings started under the auspices of previous competition authorities. The Monopolies and Restrictive Trade Practices Commission (MTRPC) was allowed two years to complete open pending matters after the commencement of the Competition Act in September 2009.[218] From September 2011 on, open cases will be transferred to the Appellate Tribunal for further adjudication.[219] Therefore, because the MTRPC was go-

206. *Id.*
207. *BRIC Nations to Tackle Cartels Together*, INDIANEXPRESS (Sept. 4, 2009, 1:23 AM), http://www.indianexpress.com/news/bric-nations-to-tackle-cartels-together/512603.
208. *Id.*
209. The Competition Act, 2002, No. 12 § 7(1), Acts of Parliament, 2003 (India).
210. Dep't of Co. Affairs, *The Establishment of the Competition Commission of India*, F. No. 1/10/2003-CL. V (Oct. 14, 2003).
211. The 2002 Competition Act, § 8(1).
212. *Id.* § 18.
213. *Id.* § 19(1).
214. *Id.* § 27.
215. The Competition (Amendment) Act, 2007, No. 70 § 53A(1)(a), Acts of Parliament, 2007 (India).
216. *Id.* § 53C.
217. *Id.* § 53T.
218. *Id.* cl. 50.
219. The 2002 Competition Act, § 66(3).

ing to dissolve as current matters were taken care of, no new cases were taken by the commission. All of the cases dealing with unfair trade practices, with a few exceptions,[220] were transferred to the National Commission, which was established in terms of the Consumer Protection Act 68 of 1986 (Consumer Act). These cases will be adjudicated as if the cases were filed under the Consumer Act.[221]

C. A Short Overview of Cartel Inquiries Before the CCI in Recent Years

1. *The Glass Bottles Manufacturers' Inquiry*[222]

In this case, a complaint was filed with the Monopolies and Restrictive Trade Practices Commission (MTRPC)[223] and the complaint was transferred to the Competition Commission after it started operating as India's competition enforcement body . The complainant, *All Indian Distillers' Association*, alleged that four of India's major glass bottle manufacturers had formed a cartel and were increasing the sale price of the glass bottles arbitrarily on the pretext of the increase in raw material such as soda ash. The Competition Commission dismissed the case as being based on unsubstantiated rumors, thus not confirming the existence of a cartel between the four glass bottles manufacturers because

> as far as the allegation of cartelization by the respondent glass manufacturers is concerned, no reliable material has been placed on record which can lend support to such assertion. Definitely something more than bare allegations is needed to show concerted action on the part of the respondents to fix the prices of glass bottles.[224]

2. *The Hard Disk Drive Industry Inquiry*[225]

Here, a complaint was lodged against a multinational company that had its head office in the Cayman Islands. The complaint alleged that the company, besides other competition law transgressions such as abusing its dominance, was involved in cartel activities with other manufacturers of hard disk drives to increase the prices of hard disk drives as a whole in India. However, the CCI in this case also found that the existence of the alleged cartel was not sufficiently proven by the complainant after scrutiny of the complainant's documentation.

While it is too soon to make a judgment on whether the CCI will ensure the fair enforcement of the competition legislation of India and apply sanctions provided under the Competition Act, the just mentioned cases give rise to some optimism.

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220. Those cases on unfair practices referred to in clause (x) of sub-section(1) of 36A of the MRTP Act which will be transferred to the CAT.

221. The 2002 Competition Act, § 66(4).

222. All India Distillers' Ass'n, New Delhi v. Haldyn Glass Gujarat Ltd. Baroda & Ors., UTPE Case No. 30(146)/ 2008, (Competition Comm'n of India 2010).

223. The MRTPC is a quasi-judicial organ which is tasked to prevent unfair trade practice from happening and works closely with the Central Government of India. *Monopolies and Restrictive Trade Practices Commission (MRTPC)*, Ministry of Corporate Affairs Government of India, http://www.mca.gov.in/Ministry/mrtpc.html (last visited Jan. 15, 2011).

224. *Id.* at 4.

225. Suresh Goel v. Seagate Singapore International Headquarter Pvt. Ltd., File No. C- 35/2008/DGIR (Competition Comm'n of India 2010).

D. Conclusion

The benefits of bilateral agreements regarding international cartels are clear—only a synchronized and international approach will help the developing nations in protecting their markets from unfair competition practices. This article has shown the state of anti-cartel policies and legislation in selected jurisdictions, the present state of the coordination of competition policies through cooperation at the bi-national and international level, and highlighted some examples of more publicized anti-competition cases. One observation is that more could be done by the developing NIC nations to increase the collaborative ties of their anti-competition policies and organs as well as ensure that they fall under the wider umbrella of regional competition regimes, such as in the case of South Africa and the European Union. The necessity of safeguarding consumer welfare through effective domestic anti-competition frameworks was highlighted in the discussed cartel cases. Time will tell whether the emerging economies will be able to balance competition policy and consumer welfare in an effective and progressive way without affecting their trade and investment policies.